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VOLUME 28 Fall 1993 NUMBER 1

CONTENTS

Articles

"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports
Stanley Z. Fisher 1

A Synopsis of the Laws Protecting Our Cultural Heritage
Marilyn Phelan 63

Comments

A Case Frozen in Time: Does Title VII's 1991 Amendment Strip *United States v. Burke* of Its Precedential Value?
Jody R. King 109

United States v. Goodner Brothers Aircraft, Inc.: Environmental Justice or Disaster?
Richard M. Filosa 133

Notes

The Evolution of Horizontal Mergers and the 1992 Merger Guidelines
Brian Golden 159

The Evolution of Accord and Satisfaction: Common Law; U.C.C. Section 1-207; U.C.C. Section 3-311
Jay Winston 189

Natural Law v. Positive Law: Interpreting Morality
Rosina L. Hunt 231

NEW ENGLAND LAW REVIEW

VOLUME 28 | 1992-1993 | NUMBER 1

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NEW ENGLAND LAW REVIEW

VOLUME 28 Winter 1993 NUMBER 2

CONTENTS

SYMPOSIUM ON DOMESTIC VIOLENCE

Introduction

Panel Discussion i

Articles

Overview of MASS. GEN. L. ch. 209A, the Abuse Prevention Statute, and the Prosecutorial Role of the District Attorney's Office
John P. Zanini 261

Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts
Sandra E. Lundy 273

REPORT ON DOMESTIC VIOLENCE: A COMMITMENT TO ACTION
State Attorney General's Office 313

A Survey of Domestic Violence Programs in Legal Education
Mithra Merryman 383

Comments

From Self-Defense to Coercion: *McMaugh v. State*—Use of Battered Woman's Syndrome to Defend Wife's Involvement in Third-Party Murder
Monique M. Gousie 453

In re Valerie D.: Prenatal Conduct an Insufficient Basis for Termination of Parental Rights
Hinda K. Kimmel 483

Adoption of Carlos: Blood Thicker Than Law in Massachusetts
Lisa M. Connelly 515

Abortion and the Freedom to Travel in the European Economic Community: A Perspective on *Attorney General v. X*
Seth S. Stoffregen 543

Domestic Relations Exception to Diversity Jurisdiction: *Ankenbrandt v. Richards*
Maryellen Murphy 577

NEW ENGLAND LAW REVIEW

VOLUME 28 | Spring 1994 | NUMBER 3

CONTENTS

Articles

Battered Women Who Act Under Duress
Beth I.Z. Boland 603

A Clash of Titans: The First Amendment Right to Petition vs. The Antitrust Laws
James S. Wrona 637

Ideology, Prejudgment, and Process Values
John R. Allison 657

Comments

Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources: Solid Waste Management and the Dormant Commerce Clause
Shaun Anderson 745

Modernizing Public Welfare Offenses in Massachusetts (Go to Jail—Go Directly to Jail)
David M. Turchetta 783

Simon & Schuster v. New York State Crime Victims Board: Should the Supreme Court Have Invalidated New York's *Son of Sam* Statute?
Robert Mazow 813

Jacobson v. United States—Entrapment Redefined?
Amy Perkins 847

Note

Criminal Defendant Perjury: A Lawyer's Choice Between Ethics, the Constitution, and the Truth
Donald Liskov 881

Book Review

Reviewed by George Dargo 909

NEW ENGLAND LAW REVIEW

VOLUME 28 Summer 1994 NUMBER 4

CONTENTS

Essay

Spare Parts, Family Values, Old Children, Cheap
Patricia J. Williams 913

Articles

Must We Stop Arresting Batterers?:
Analysis and Policy Implications of
New Police Domestic Violence Studies
Joan Zorza 929

Kinship and Marriage in Massachusetts Public
Employee Retirement Law: An Analysis of the
Beneficiary Provisions, and Proposals for Change
Jennifer Wriggins 991

Director and Shareholder Liability for Massachusetts
Corporations' Distributions to Shareholders: A Suggestion
for Change in Standards of Director Liability
James E. Tucker 1025

Comments

Just Say No . . . Driving: *Rushworth v. Registrar of Motor Vehicles* and the Massachusetts License Suspension Law
John Shaffer 1071

Are Parents Who Fail to Protect Their Children From Sexual Assault Criminals?: A Comment on *Commonwealth v. Raposo*
Raymond Mello 1103

Notes

Regulation of Zoning Nonconformities in Massachusetts: The "Difficult and Infelicitous" Language of Section 6, Chapter 40A, Massachusetts Zoning Act
Teresa Rohwedder 1123

SJC Steers Off Course: DUI Breath Test Refusals Inadmissible
Joseph F. Stanton 1169



TIMOTHY J. CRONIN, JR.
New England School of Law
Professor of Law, 1968-1993
Dean, 1981-1986

In Memoriam: Timothy J. Cronin, Jr.

Elizabeth K. Spahn*

Timothy J. Cronin, Jr., Professor of Law (1968-1993) and Dean Emeritus (1981-1986),[1] played a central role in building the New England School of Law. His vision was of the New England School of Law as an institution that could proudly and comfortably combine our origins as the first law school established for the education of women[2] with our more recent populist and ethnic traditions. Tim's method was highly personal, maintaining close relations with New England School of Law's and Boston's Irish communities, while at the same time reaching out to

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* Professor of Law, New England School of Law.

1. Tim joined the faculty at the New England School of Law in 1968 as an Assistant Professor. He was promoted to Associate Professor in 1971, and to Professor in 1973. Tim served as Assistant Dean under Dean Robert E. O'Toole from 1972 to 1974, and as Associate Dean under Dean Thomas C. Fischer from 1979 to 1981, before the Board of Trustees unanimously voted to name him Dean in 1981. As Professor of Law, Tim taught such courses as Administrative Law, Agency & Partnership, Contracts, Equity, Federal Income Taxation, Modern Remedies, and U.C.C. Sales.

Tim received his B.A. from Harvard College in 1952 and his J.D. from Boston College Law School in 1959, where he was a staff member on the *Annual Survey of Massachusetts Law.* He served in the Army Reserves from 1951 to 1953, and saw active duty in Japan from 1953 to 1955. He was honorably discharged in 1956, with decorations that included the Congressional Unit Citation, the United Nations Medal, and the Korean Service and National Defense Medals.

Following graduation from law school, Tim served in the Kennedy administration as a trial attorney with the Federal Trade Commission. He then practiced law with the John Hancock Mutual Insurance Company prior to joining the New England School of Law faculty.

Tim served two terms as the Massachusetts Commissioner for the National Conference of Commissioners on Uniform State Laws, from 1980 through 1988. He served on the drafting committee on Health Records (Uniform Information Practices Code) and the Committee on Liaison with the Uniform Law Conference of Canada and International Organizations. Tim was especially proud of the fact that he was appointed to the two terms by two Massachusetts governors with quite different political orientations. Governor Edward King appointed Tim to his first term and Governor Michael Dukakis appointed Tim's second term.

Tim visited Beijing, China several years ago and was in the process of developing contacts with law schools in the Far East when he died. His sabbatical was to have begun January 1, 1994, and he planned to spend it in the Far East.

2. The New England School of Law was founded in 1908 as the Portia Law School, the first law school in the nation devoted exclusively to the legal education of women. The school became coeducational in 1938 and changed its name to from Portia to New England School of Law in 1968. *See* RONALD CHESTER, UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA (1985) (describing the legal education provided by Portia Law School); Seventy-Fifth Anniversary of New England School of Law Commemorative Edition, 18 NEW ENG. L. REV. i-ii, 521-625 (1983) (Foreword by Justice Sandra Day O'Connor and articles describing the history of women in the law and modern legal education).

include men and women of all races and sexual orientations as welcome members of our law school community. His commitment was to raise the academic and intellectual standards of the school without turning away from our original mission to provide affordable legal education to those otherwise excluded because of gender, social, or class background. Moving beyond the local practicing bar, Tim expanded our faculty hiring to include experienced law teachers from across the nation who possessed wide-ranging intellectual interests.

Tim's twenty-five year tenure as professor and dean spanned a critical period in the history of the New England School of Law, moving from our earliest reputation as a bar review type school taught by local practitioners in a tiny building on Beacon Hill to our present position as an intellectually exciting, nationally known, academically rigorous law school. Tim's accomplishments included presiding as Dean over the tenuring of the first *three*[3] female faculty members[4] in the history of this law school. He also hired the first African-American[5] and Hispanic[6] law professors in our history. Tim's deanship integrated our previously all-white[7] teaching faculty in a law school which trains lawyers who provide leadership to such racially troubled communities as South Boston, Dorchester, Charlestown, and Chelsea.[8] He hired the first openly lesbian law professor,[9] not only in the New England School of Law's history, but I believe in any of the Massachusetts law schools. He promoted female secretaries into management positions, and he hired the (female) legal methods director onto the faculty tenure track.[10]

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3. Tenuring three women in a five year deanship was extraordinary, particularly in an era when many law schools were unable to find even one "acceptable" woman, and most law school deans congratulated themselves as egalitarian if they managed to tenure one token woman. *See* Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988).

4. The three faculty members are Elizabeth Spahn, tenured in 1984; Judith Greenberg, tenured in 1986; and Mary Joe Frug, tenured in 1987.

5. Professor Robert Ward, hired in 1983 and promoted to Associate Professor under Dean Cronin in 1985. Professor Ward was tenured in 1987, just months after Tim's deanship ended.

6. Professor Isaac Borenstein was hired in 1983 and promoted to Associate Professor in 1985. Professor Borenstein was well on his way to tenure when he accepted an appointment as a Massachusetts District Court Justice in 1985.

7. Prior to these additions to our faculty, the only non-Caucasian faculty member was Professor Frank Bae, our Librarian, whose ancestry is Chinese.

8. Boston's difficulties with racial integration during the 1970s and 1980s is the subject of a vast legal and political literature. *See, e.g.*, J. ANTHONY LUKAS, COMMON GROUND (1985) (the Pulitzer Prize winning account of the lives of three families during Boston's turbulent and often violent desegregation process).

New England School of Law drew many of its students from the ethnic neighborhoods of Boston during the 1980s. Under Tim's deanship we were also able to racially integrate the teaching faculty.

9. Professor Sarah Salter was hired in 1983 as an Associate Professor, and tenured in 1989.

10. Professor Barbara Plumeri became the first legal methods director appointed to the faculty tenure track. She was tenured in 1988.

As Dean, Tim nurtured us all, encouraging us to read widely, teach boldly, and believe that we could make a difference in our worlds. Under his deanship, our intellectual horizons expanded. Instead of viewing academic excellence and preparation for law practice as a mutually exclusive either/or choice, Tim focused on developing both aspects of our identity, with each aspect enhancing and informing the other. New England School of Law became a leader in both feminism and critical legal studies,[11] especially the intersections between the two sometimes conflicting approaches. He also hired our first law and economics professor.[12] During his deanship, our clinical legal education program was revived and grew into a fundamental part of our curriculum, drawing on our traditional commitment to practical preparation for law practice while expanding our notions of academic and strategic excellence in the practice of law. Our basic first year curriculum design was hammered out,[13] and the infrastructure of regularized, written faculty and student rules of procedure were developed.[14] The administrative structure of the law school was shifted from a centralized administrative design to strengthen faculty committees and the faculty's role in governance of the institution. We settled into our new building on Stuart Street, and began seriously recruiting out-of-state students.

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11. During Tim's deanship, the *New England Law Review* published a number of influential articles by well known scholars working within either critical legal studies or feminist intellectual traditions. *See, e.g.*, David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209 (1986); John W. Van Doren & Patrick T. Bergin, *Critical Legal Studies: A Dialogue*, 21 NEW ENG. L. REV. 291 (1986); Howard Zinn & Laura Stewart, *Ideology in the Courtroom*, 21 NEW ENG. L. REV. 711 (1986).

Major pieces in feminist scholarship (which sometimes take stances adverse to critical scholarship) included: Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521 (1988); Symposium on Pornography: Elizabeth Spahn, *On Sex and Violence*, 20 NEW ENG. L. REV. 629 (1985); Kathleen A. Lahey, *The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality*, 20 NEW ENG. L. REV. 649 (1985); Ruth Colker, *Legislative Remedies for Unauthorized Sexual Portrayals: A Proposal*, 20 NEW ENG. L. REV. 687 (1985); Ronald Chester, *Women Lawyers in the Urban Bar: An Oral History*, 18 NEW ENG. L. REV. 521 (1983).

The intersections between critical and feminist scholarship that were such a vital part of this period of the law school's intellectual history centered largely on the work and influence of Professor Mary Joe Frug, and are preserved in the two volume symposium found at 26 NEW ENG. L. REV. 637-1537 (1992).

12. Assistant Professor Geoffrey Peters.

13. Faculty meeting veterans can testify to the length and depth of meetings involving redesigning the core first year curriculum. The various studies and proposals were developed under the leadership of Professor Mary Joe Frug, whose patience and vision were legendary. Some proposals succeeded, for example the revamping of the first year orientation and first year legal methods programs.

The basic curriculum designed under Tim's deanship remains intact ten years later, perhaps as much a tribute to the high standards of deliberation demanded from the faculty as to satisfaction with the curricular design. Nevertheless, his contribution is enduring.

14. Retention and evaluation procedures for the untenured faculty were developed, and tenure rules adopted, after many years of extensive, painstakingly thorough analysis and debate.

There were crises during Tim's deanship as well as successes. The American Bar Association's pressure to bring New England's governance structure into conformity with more traditional university-owned law schools presented the type of political and diplomatic challenge Tim loved, mediating between the various ABA decisionmakers and New England School of Law's Board of Incorporators. One of Tim's proudest moments came, just a few weeks before his deanship ended, when the ABA finally lifted New England's probationary accreditation status and placed us back on full accreditation. Tim's final move as Dean was to begin bringing pressure on all full-time faculty to eliminate the outside practice of law.

Tim's personal style was modest and self-deprecating. He valued collegiality, cooperation, and consultation, often leaving more visible leadership roles to others. In my impatient youth I viewed his style as evasive, procrastinating. Only recently have I begun to understand the real lessons he was modeling for us, community building lessons about tolerance, patience, avoiding bitterness, balancing work with pleasure, being loyal to your friends, and staying focused on the major goals for the long haul.

Tim wore his genial, affable style like his impeccably tailored suits and elegant ties—with an understated enthusiasm for the finer things in life.[15] Comfortable in either an Irish pub or the Ritz, Tim integrated ethnic heritage and his Harvard education with an urbanity I still envy. He reserved his most subtle teachings for tutorial sessions, always the perfect gentleman, over a martini.

"What brings you to Boston?" he asked me fifteen years ago this fall, when I arrived as a much-too-young-to-be-taken-very-seriously assistant professor, the only woman then on the faculty.

"I'm interested in studying political power and where better to learn from than Boston Irish politics?" I said glibly, the fledgling constitutional law teacher instinctively hoping to gain a mentor. Tim seemed mildly

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15. One high point of Tim's deanship was the 1984-85 visitorship to New England School of Law by controversial Harvard University Law School professor and critical legal studies guru, Duncan Kennedy. Professor Kennedy taught first year required courses in Property at New England, and stirred the intellectual pot by his faculty development seminars. One of Professor Kennedy's more unusual contributions to New England, however, was his style of dress, which might be described as early bag lady, a full decade ahead of grunge fashions.

Over drinks at the local bar one night, Duncan, Tim, and I discussed the politically loaded issue of dress codes. Tim, you will remember, dressed in Bally shoes and finely tailored suits from Mr. Sid. I am known as the oldest living feminist who regularly wears matching clothing and lipstick. Duncan deconstructed the gender, class, and racial politics of the comparative dress styles of Harvard Law and New England. The Harvard stereotype, it turns out, assumes that the degree to which one's clothing matches is inversely correlated to one's intellectual sophistication. New England's stereotype is exactly the opposite.

The legend lives on in New England lore, where even today any faculty member appearing at the law school in casual attire is likely to be asked whether he or she has been shopping in Duncan's closet lately.

amused, and proceeded to regale me with stories about his father, a real Cambridge Irish politician during the Great Depression, who knew (U.S. Congressman and Speaker of the House) Tip O'Neill as a rambunctious kid in the neighborhood.

Some years later, when I'd read Tip O'Neill's book, *Man of the House*,[16] Tim and I compared the similarities of traditional Irish ward politics with feminism. Laughing over the story of O'Neill's lifelong neighbor who did not vote for him in a close election because Tip never came over to ask for her vote, Tim and I decided that "all politics is local" (the Irish political motto) and "the personal is political" (the feminist motto) were clearly first cousins.

When I think of lives that have mattered in our times, I think not so much of heroics and bold profiles in courage. Although Tim was very proud of his friendship with President John F. Kennedy,[17] proud of the years Tim served in his administration (and fond of recalling the era's exuberant social life), Tim's own life was more of the 1980s, less visibly heroic. Tim was what I think of as a "bridge person"—strategically playing the cards as dealt, while stretching himself to reach out to others defined as different, to form living connections of friendship between potentially conflicting worlds. Like our sorely missed late colleague, Professor Mary Joe Frug,[18] who "bridged" between New England School of Law and Harvard, between feminism, critical theory, and deconstructionism, Tim also "bridged" between the old guard and the new, between the Irish and the feminists, and between the intellectuals and the practitioners.

Tim's life and work made a tremendous difference in the development of the New England School of Law. He helped us to construct our institutional identity in a gentle and positive style, which enabled us to grow and change without losing our core commitments to excellence in the practice of law, to offering affordable and accessible legal education, and to the inclusion of women and other minorities in the legal profession. His role was central in transforming the nature of our community by helping us to find our own common grounds through the warm and personal friendships he so valued. Timothy J. Cronin, Jr.'s passing marks the end to a fine chapter in the history of the New England School of Law. He will be missed.

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16. TIP O'NEILL & WILLIAM NOVAK, MAN OF THE HOUSE: THE LIFE AND POLITICAL MEMOIRS OF SPEAKER TIP O'NEILL (1987).

17. Tim's invitation to President Kennedy's inauguration hung on the wall in his office just above the photograph of Tim with President Ronald Reagan. I teased Tim unmercifully about his conversion, along with many other Boston Irish Democrats, to Reagan Republicanism. Tim, however, felt perfectly comfortable with the Kennedy/Reagan combination both aesthetically and intellectually.

18. *See For Mary Joe Frug: A Symposium on Feminist Critical Legal Studies and Postmodernism*, 26 NEW ENG. L. REV. 637-1537 (1992).

Eulogies Delivered for Timothy J. Cronin, Jr.

October 6, 1993

Cornelius F. Daly

Tim was a classmate, a colleague, a mentor, a teacher, and, most importantly, a friend.

My memories of him are warm and joyful, for Tim was warm and joyful. In law school we held him in awe. While the rest of us were struggling to figure out why Mrs. Palsgraf couldn't recover from the Long Island Railroad or just what was the rule against perpetuities, Tim was holding court in his corner of the cafeteria debating the shouldness of ought and indulging in his favorite contract—bridge. In his spare time he led the class and served on law review.

A few years after graduation we found ourselves together again, this time on the faculty of the New England School of Law. There were moments when some of us doubted whether we'd be able to take a struggling institution through to full accreditation and beyond. Tim never wavered. He was the block of granite to that gang of five. Due in such great measure to Tim's unstinting dedication, the school grew and flourished.

When Tim became Dean I was glad for him. He had worked hard for the school he loved. I was proud of him too as I saw him serve with distinction, and, when it was time, return to the faculty.

But the memory of Tim that will be most lasting is simply that he was a decent, kind, gentle man who cared very much for all of us. Liz Spahn said a few days ago that she wished that she had had the opportunity to thank him. Perhaps we can by revering that memory.

Robert E. O'Toole

Professor Timothy J. Cronin, Jr.—Tim—was my friend, my colleague, and my contemporary.

I think of him, this day, with affection, admiration, and with warm remembrance and pride.

Tim was a model son to his parents—Timothy Sr. and Elizabeth. He was a loving and supporting brother to his sister Rita and his brother John.

Tim was a caring and affectionate uncle for his nephews and nieces.

Tim was also a son of Harvard University and Boston College Law School. He was a model citizen of Cambridge and North Scituate—the beach.

Tim was also a loyal son of the New England School of Law for twenty-five years as Professor of Law, Dean, and eventually as Dean Emeritus. Tim and I first met twenty-five years ago as we both started as entry-level teachers of the law at New England, when it was located on Beacon Hill. At that time, we were both too young, too inexperienced, and too naive to think of ourselves, or even imagine ourselves, as law professors or even Deans. Those thoughts would come much later in both our careers.

I admired Tim Cronin right from our first encounter. I admired his "lust-for-life," his "joy-of-life." Tim was always upbeat. He was rarely depressed, sullen, or down. He had an evenness of personality that was to be envied.

Tim, however, was not shy. He had strong convictions. In reality, he could talk, like-a-lawyer, with the best in the business. In fact, he had enormous passion for his beliefs.

Tim was a devoted teacher, a talented, and tireless Dean. He was a man with an incredible intellect and a thirst to know everything that was worth knowing!

Tim, my friend, my colleague—be at rest—be at peace. Your earthly chores have been completed and you are home now in the Father's house. Your law school work is finished and now your eternal sabbatical will begin. It will be ethereal!

Tim, you will now have the chance to see the Pacific rim. Your trip will be endless and comprehensive beyond belief. The experience will surely be something special but not of this world.

Tim, you will not be forgotten; for myself and the entire New England School of Law community, goodbye for now, be at peace until-we-all-meet again! And until that time, I wish you this old and timeless Irish Blessing:

-Tim-

May the road rise up to meet you
May the wind always be at your back
May the sun shine warm on your face
And the rains fall soft upon your fields
And until we meet again
May God hold you in the hollow of his hand.

James R. DeGiacomo

It was last Friday afternoon when Tim and I met. Neither of us realized it was for the last time.

When our business was finished and we were alone, we had a cup of coffee together, and two friends of over twenty-five years talked about the years past and our hopes for the years ahead.

It is in such personal discussion as my last one with Tim that the true person reveals himself. Tim was a kind, gentle man who was always loyal to those he befriended. His approach to problems was to solve them in a quiet, dignified manner.

Tim was very proud of his profession, and of the New England School of Law where he spent almost his entire professional career. During our last discussion, he spoke warmly and with appreciation of the support he had received over the years from his colleagues, the trustees and staff of the School. This was characteristic of Tim, for in all our years as friends, I never heard him speak harshly of any person.

But of all his character traits, one stood out as a prime example of the good man that he was. Tim loved his family but above all, he was a devoted and faithful son to his parents. He had an unfailing love for and deep commitment to his mother during her last years. Never complaining, the sole priority in his life was her care and comfort. Mrs. Cronin died at home less than a year ago. Her last months were spent as her entire life was—within the care, comfort, and love of her son.

Tim lived by the words of Sirach: "He obeys the Lord who brings comfort to his mother."

In many respects, Tim was a simple man. His pleasures were few. He loved his family home in Scituate and spent many days there reading and enjoying the beauty and serenity of the sea. He looked forward to the company of family and friends.

One of Tim's greatest joys in life was to travel. He used to say that great vacations aren't judged by how long they last, but how long they're remembered. On many an occasion, he would share those memories with his friends.

Tim enjoyed life. In many respects he loved it to its fullest, always mindful, as we should all be, of the words of the Latin poet who many years ago wrote: "Death plucks my ear and says: Live—I am coming."

Introduction

The *New England Law Review* sponsored a panel discussion on domestic violence to coincide with publication of this Symposium issue. The panel was held on Wednesday, November 17, 1993, at New England School of Law. The panelists and the themes they explored are detailed below.

ALICE M. MAURICE,
CAMBRIDGE DOCUMENTARY FILMS

Ms. Maurice began the presentation by televising ten minutes of the film *Defending Our Lives,* which was nominated for an Academy Award in the category of Best Documentary Short. The film reveals the stories of some of the women, known collectively as the "Framingham Eight," who were imprisoned in Massachusetts for killing their abusers. Ms. Maurice discussed the strategies her organization implemented to enable the women to verbalize the physical and emotional abuse they had endured. Leaving "handi-cams," which are hand-held video cameras, with the imprisoned women was one of the most effective methods they found to empower the women to confront and share the pain they suffered. The women used the equipment to make video diaries and to tell their stories to one another. Eventually, the women found support and strength in each other and were able both to understand and articulate the abuse they had endured.

Ms. Maurice also spoke about some of the problems that her organization faced in completing the project. The women's inability at times to communicate their feelings combined with funding concerns to temporarily delay production. In addition, the organization at first received sparse cooperation from the Massachusetts Department of Corrections. The organization was even banned from the prison for one year for "inappropriate touching"—which amounted to extending consoling hugs to the women as they publicly acknowledged the horror they lived in private—every day. Eventually, the Department of Corrections rallied for and supported the production of the film, and was instrumental in its completion.

The film is available from Cambridge Documentary films, P.O. Box 385, Cambridge, MA 02139. For more information call (617) 354-3677.

SANDRA E. LUNDY,
FISH & RICHARDSON

Ms. Lundy, an Associate in the law firm of Fish & Richardson, serves as co-chair of the Massachusetts Domestic Violence Counsel and is a member of the Board of Directors of the Massachusetts Lesbian and Gar Bar Association. Ms. Lundy spoke of a topic that is often ignored by the media and law enforcement officials: lesbian and gay domestic violence. She addressed the difficult situation that battered lesbians and gay men face in the Commonwealth, and suggested that homophobia plays a major role in the battering cycle. Ms. Lundy argued that although the dynamics in a same-sex violent relationship are similar to a heterosexual battering relationship, same-sex domestic violence victims face an additional hardship—dealing with the batter's use of homophobia as a weapon. The batterer often uses homophobia as a tool of control, such as threatening to expose his or her victim's sexual orientation if the partner is "in the closet." Ms. Lundy further argued that because such homophobia is prevalent in our society, homosexuals are often isolated from the larger community, and therefore become more attached to their mates and more dependent on the relationship.

Ms. Lundy also pointed out that homosexuals often do not recognize the problem within their own community and, even if they do, they are afraid of exploiting negative stereotypes. This, she urged, makes it difficult because there is no support network for the victim to turn to for help. No safe haven exists for battered gay men in Boston, and there are only two shelters for battered lesbians. Ms. Lundy then offered that same-sex domestic violence victims cannot depend on the criminal justice system to protect them. Although the Massachusetts 209A statute does technically include gay victims, she suggested that judges, who may not be able to discern who the victim is, unfairly apply the law by issuing mutual restraining orders. In addition, Ms. Lundy maintained that same-sex victims often encounter hostility from the police who respond to the calls for help. The officers often make insensitive remarks and treat the victim as though he or she is immoral and should be beaten. Ms. Lundy stressed that in order to improve the situation, state law enforcement officials, shelter workers, and the general community must be better educated about the seriousness of gay and lesbian domestic violence and of the need to commit more resources to address the growing problem.

SUSAN MOTIKA,
STATE ATTORNEY GENERAL'S OFFICE

Susan Motika, Esq., of the State Attorney General's Office, summarized Attorney General Scott Harshbarger's recommendations in his REPORT ON DOMESTIC VIOLENCE: A COMMITMENT TO ACTION. She began by stating that family violence is everyone's problem, affects every sector of society, and knows no boundaries, including those of race, color, or

creed. Ms. Motika offered three disturbing statistics as an illustration of the pervasiveness of domestic violence. First, in Massachusetts alone, a woman is murdered by her husband or boyfriend every fourteen days. Second, more than twice as many women are shot and killed by their husbands and boyfriends than are murdered by strangers. Third, in 1992 in Massachusetts, more than 44,000 restraining orders were issued in response to complaints of domestic violence.

Ms. Motika went on to state that the measures we already have to combat domestic violence, including restraining orders, mandatory arrest procedure, and prosecution and punishment, are critical but insufficient. She indicated that at the point law enforcement becomes involved in a domestic dispute, the damage has already been done. According to Motika, preventive measures are what is most lacking in our present approach. She noted that it was for this reason that Attorney General Harshbarger convened the Harvard Luncheon Series, a group consisting of policy-makers, legislators, advocates, members of the criminal justice system and law enforcement, academicians, and representatives of the media. According to Ms. Motika, "[w]e won't stop incidences of violence until we look at broad-based multi-disciplinary solutions that get to the root of problem on every front."

Ms. Motika next briefly reviewed the Attorney General's recommendations. One of the most crucial measures, according to Harshbarger and Motika, are battered women's programs with twenty-four-hour hotlines to respond to emergency situations. She also discussed the necessity of developing and funding culturally appropriate, multi-lingual services, as well as meeting the needs of differently abled women, those afflicted with substance abuse, and those who face same-sex domestic violence. She next asserted that our efforts to end domestic violence must involve all members of the medical community—people who must know how to talk to battered women as patients and, with the proper training, could help play a supportive and appropriate role in combatting domestic violence.

Ms. Motika next affirmed that we need to ensure that police have the correct information about the history of restraining orders in a particular case in order to act promptly and effectively in enforcing 209A. She also suggested that we need to better educate all those who come in contact with battered women, including child-protection officers, police, social workers, judges, and clerks. Among her final suggestions were the development and implementation of standardized grade-school curricula on domestic violence, dating, and peer-violence in order to raise public awareness. In addition, she stressed the need to address issues of economic and personal empowerment for domestic violence victims by providing support systems such as job training, permanant housing, educational and counseling programs. Ms. Motika concluded with the remark that, in order to change attitudes about accepting violence in so-

ciety, we must begin by challenging ourselves in our own relationships and by challenging our communities to not accept violence as part of our lives: "If ever you hear anyone say 'Domestic violence isn't my problem,' say 'It's all of our problem.'"

JOHN P. ZANINI,
SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE

John P. Zanini, Assistant District Attorney at the Suffolk County District Attorney's Office, outlined the content of the Abuse Prevention statute—MASS. GEN. L. ch. 209A. Structuring his talk as a response to Lenore E. Walker's work, *The Battered Women*, Mr. Zanini first answered Walker's criticism that the legal system is not set up to deal with the problem of spouse battering. He contended that MASS. GEN. L. ch. 209A addresses each and every one of her problems with the legal system, save one. According to Mr. Zanini, the one problem not addressed by the law is that police officers are prohibited by Article 3, Section 2 of the United States Constitution, from personally filing restraining orders against batterers because the officers are not parties in interest and, therefore, cannot file a civil complaint. Mr. Zanini pointed out, however, that police officers are now empowered—if not obligated—to make arrests whenever they have probable cause to believe that a restraining order has been violated. Mr. Zanini added that an arrest is the preferred response whenever an officer enters a scene in which there is probable cause to believe that a battery has been committed. Mr. Zanini asserted that the Abuse Prevention statute authorizes and encourages police officers to remain on the scene of a battery until the safety of the victim is assured. He also pointed out that police officers are immune to civil suits when they make arrests based on probable cause, and the arrest results in personal injury or property damage.

According to Mr. Zanini, the Abuse Prevention statute affects three distinct groups: police, victims, and the members of the District Attorney's Office. Having already discussed the statute's implications for police, he moved on to its effects on victims. Mr. Zanini proffered that Section 209A makes it very easy for victims to secure temporary restraining orders, especially since this option is now available twenty-four hours a day, without the added red-tape of a hearing. In addition, all courthouses in Suffolk County are equipped with Victim-Witness Advocates, who aid victims in filing restraining orders. Restraining orders provide various kinds of protection, including protection from physical and verbal abuse, protection from harassment in general, as well as from harassment in the workplace, and monetary compensation for economic damages, medical expenses, and property damage.

Finally, Mr. Zanini discussed the significance of the statute for the District Attorney's office. He indicated that those in the District Attorney's office are required to enforce the statute as soon as a criminal viola-

tion has occurred, and that the office sponsors a training session for Assistant District Attorneys and Victim-Witness Advocates. While admitting that there are occasional problems with judges and clerks who don't fully understand their obligations under the statute, he insisted that we are far ahead of other jurisdictions because of Chapter 209A. He concluded with the affirmation that "[w]e're in pretty good shape."

ANDREA CABRAL,
ROXBURY FAMILY VIOLENCE PROJECT

The next speaker was Andrea Cabral, Director of Roxbury Family Violence Project, which is funded in part by the Committee on Criminal Justice. Prior to her present job, she spent four years as an Assistant District Attorney. She was attracted to the Roxbury District Court because they were losing eighty-five percent of their domestic violence cases. Ms. Cabral maintained that although this poor performance was the result of a variety of different factors, some of which were beyond her control, she successfully implemented several remedial strategies. Ms. Cabral decided to subpoena all victims to ensure that victims would show up at trial. Ms. Cabral also changed the Victim-Witness Advocate Letter, which is sent out to all victims, to include information on sentencing options for batterers other than jail. Because victims were often afraid that their batterers would go to jail and would later seek revenge against them, this alteration significantly prompted victims to pursue trial. The batterer could be enrolled in an alcohol or drug treatment program and would only be sent to jail when he failed to show up for treatment; the victim therefore felt less responsible for his incarceration.

According to Ms. Cabral, it is essential that Assistant District Attorneys make good use of their Victim-Witness Advocates, so that victims realize that they can affect the outcome of sentencing and be involved in the trial in various other ways. Ms. Cabral also mentioned the importance of the Victim-Impact Statement, which enables the victim to stand up in court and tell the judge what she would like to happen. The victim often reasons that if she openly expresses her preference for mandatory treatment, rather than jail time, the batterer will not seek revenge against her if he is incarcerated.

Ms. Cabral also got the court to agree to put domestic violence cases and restraining order hearings in one session. This measure enabled victims to sit with other victims in the courtroom. According to her, battered women are usually astonished to learn that many other women face similar violence. Finally, Ms. Cabral convinced Roxbury District Court to try domestic violence cases within a month of arraignment. This accomplishment was significant because the average waiting time had formerly been six months with no pretrial conference.

Ms. Cabral ended with the powerful statement that "[e]verything we do will come to nothing if judges are not aware of their obligations and

don't understand domestic violence." She referred to one recent case in which a batterer violated a restraining order by sending his victim seven or eight pictures of himself with a gun. Although the judge convicted him, he gave the defendant a suspended sentence because he had written "I love you" on the backs of the pictures, and the judge believed this to be a sign of affection.

BETH BOLAND,
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO

Beth Boland, the last speaker, spoke about the themes underlying her article, *The Admissibility of Evidence of Past Abuse to Establish Duress*, publication of which is forthcoming in Book III of 28 NEW ENG. L. REV. (1994). Ms. Boland discussed two aspects of using evidence of past abuse to establish duress: (1) its use to defend a woman who has killed her batterer; and (2) its use to defend a woman who has committed a criminal act upon an innocent third person. Ms. Boland began her presentation with an illustration to demonstrate that there is nothing pithy to be said about domestic violence. "A batterer joked to his victim (whom he had punched while she was pregnant): 'What do 500,000 battered women have in common? They don't listen!'" As Ms. Boland maintained, domestic violence is about power and control; it is no more about violence than rape is about sex.

Ms. Boland then examined the term "battered woman's syndrome" and concluded that it is an inappropriate term because the person is reacting how any reasonable person would react. Ms. Boland gave an example of a scenario: The batterer threatens the women (who later becomes the defendant) to rob a store for him, and repeatedly suggests behavior to coerce her into doing what he wants her to do, without regard for what she wants. He may shower her with indulgences to fan hope that the relationship will be what she would like it to be.

Ms. Boland then explored the implications of using evidence of battered woman's syndrome to present a coercion defense. She stated that evidence of past abuse is necessary to demonstrate to the jury the reasonableness of the woman's fear and the imminence of the danger. Without the evidence, battered women under the control of their batterers may be unable to protect themselves or innocent third parties, and instead may be charged as accomplices of their abusers.

"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports

Stanley Z. Fisher*

TABLE OF CONTENTS

I. Introduction 2
II. The Reasons for Misleading Reports 6
  A. Introduction 6
  B. Police Lying and Deception 9
  C. The Place of Exculpatory Evidence in Police Reports: Police Norms and Practices 17
    1. Scholarship on Police Investigation Practices 18
    2. The Questionnaire 22
    3. Training Materials and Instruction 26
  D. Summary 31
III. Impact of Misleading Police Reports on the Criminal Justice Process 32
IV. Remedies For the Failure to Report Exculpatory Evidence .. 40
  A. Judicial Remedies: *Jones* and *Palmer* 40
    1. Tort Remedies 41
    2. Requiring the State to Record, Preserve, and Disclose Exculpatory Evidence: The Limits of Equitable Relief 42
    3. A Police Duty to Record Exculpatory Evidence: Scope and Implementation 48
  B. Administrative Reforms and the Police-Prosecutor Relationship 51
V. Summary and Conclusions 54
VI. Afterthought: Reporting Exculpatory Evidence and the Adversary Process 56

* Professor of Law, Boston University School of Law. For helpful and encouraging comments on earlier drafts, I wish to thank Eric Blumenson, Michael Meltsner, Harry Subin, and my colleagues at the Boston University Law School faculty workshops. Among the latter, I am especially grateful to David Rossman for so generously giving his time and insights. Finally, I appreciate the hard work and valuable contributions to this article by Christine M. Fortune, Mary Kuusisto Bejar, and Mark M. Seymour, student research assistants.

VII. Appendices 59
A. Questionnaire 59
B. Table: Combined Police Responses 61
C. City One Incident Report Form 62

I. INTRODUCTION

On May 4, 1981, twelve year old Sheila Pointer was raped and bludgeoned to death.[1] The crime was witnessed by her ten year old brother Purvy Pointer, who was beaten unconscious in the attack. When detectives interviewed the semi-comatose Purvy in his hospital bed, he said his assailant was a teen-aged gang member named "George" who lived near the Pointer home and had lighter skin than Purvy. George's last name, it seemed from Purvy's indistinct murmurings, was "Anderson" or "Henderson" or "Harrison." The police were unable to locate anyone with those last names in the Pointers' neighborhood. However:

> They discovered that George Jones lived a block away. A senior at Fenger High School, and the editor of the school newspaper, the bespectacled Jones was called "Bookworm" by his classmates in grudging tribute to his studious character. He was the son of a Chicago policeman and planned to join the Air Force upon graduation from high school and afterward attend college.[2]

Jones was not a gang member, nor was his skin lighter than Purvy's. Police presented Jones's photograph with other mug shots to Purvy. Purvy said he knew Jones, but he was unresponsive when asked if Jones was the assailant. The next day police returned and repeated the photo lineup, in the course of which Purvy identified Jones's photo as that of the assailant, but Purvy did not respond when asked if he knew the person's name, or nickname, or whether it was "Bookworm." The police arrested Jones. They subsequently showed his photograph to another witness, Nancy Coleman, who after some uncertainty identified it as a likeness of the person whom she had seen leaving an alley by the victim's residence shortly after the crime. Jones was then brought to Purvy's bedside. When asked whether Jones was the assailant, Purvy answered, "No, that's not the man, that's not the man, no, no, no." Jones was brought even closer and his glasses were removed. When asked again, Purvy said "No," then, "Yes, that's him, yes"; then "Yes, no, yes, no" over and over.

The next day the grand jury indicted Jones for murder, rape, and other crimes. Meanwhile, the police prepared an official arrest report, which was later described by Judge Richard Posner of the Seventh Circuit Court of Appeals as "full of falsehoods," such as:

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1. The facts described throughout the Introduction are drawn from Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) and Palmer v. City of Chicago, 755 F.2d 560 (7th Cir. 1985).

2. *Jones*, 856 F.2d at 988.

> that Nancy Coleman had picked out Jones's picture from a group of seven (his picture was the only one she had been shown), that Jones's father had not seen him on the morning of [the crime] (in fact his father had told the investigating officers that he had seen George at home that morning), and that Purvy had said that his assailant attended Fenger High School (Purvy had said no such thing).[3]

In addition, the report omitted several important exculpatory facts:

> The report did not mention that Purvy had described his assailant as a gang member . . . as being a lighter-skinned black than Purvy . . . and as having a name like Anderson. The report also did not mention that the doctors had warned the officers at least twice that Purvy's head injury had left him with serious memory problems.[4]

Nor did the report mention Purvy's conflicting responses at the identification procedures.

The prosecutor used the report to persuade the court to set a $250,000 bond. This resulted in George Jones spending a month in jail, where he fought off a rape attempt and suffered other abuse before the bond was reduced sufficiently for his family to bail him out.

Prospects were gloomy for Jones when, at the start of his murder trial, the prosecution announced an intent to seek the death penalty. Purvy testified at the trial, positively identifying Jones as the assailant. But the trial had a Hollywood ending:

> [Purvy's] testimony . . . appeared in the Chicago Tribune and caught the attention of Detective Frank Laverty, a member of the CPD [Chicago Police Department] who participated in the original investigation . . . . Purvy's testimony directly conflicted with Laverty's theory of the case, which he had presented to his supervisors [seven months before trial], that a Lester Pique was the assailant. After reading the newspaper article, Laverty immediately contacted the defense counsel and informed him that 'he had written . . . two reports—two separate memos on two separate occasions' concerning the investigation . . . . The defense counsel had not received either of these reports in response to the subpoenas served upon the CPD or the discovery motions filed with the [prosecutor's] office. As a result, the defense counsel not only subpoenaed the specific reports, but called Laverty to the witness stand and examined him in the presence of the state court judge.[5]

Laverty's reports undermined Purvy's identification of Jones. For example, six days after Jones's arrest, Laverty learned that not one, but two assailants had committed the crime, both wearing stocking masks. When he asked Purvy how he recognized "George Anderson" when the assailants were masked, Purvy broke down and cried. The reports also inculpated Pique, who confessed to a similar rape-murder committed near the Pointer home. Pique went by the nickname of "King George," was a gang

3. *Id.* at 990.
4. *Id.*
5. Palmer v. City of Chicago, 755 F.2d 560, 563 (7th Cir. 1985).

member, had lighter skin than Purvy, and had made incriminating statements to Laverty about the Pointer crime.

When Laverty told his findings to the detectives in charge of Jones's cases, they warned him not to interfere. When he said he might testify for Jones if the case went to trial, one detective threatened to "blow him away" if he did.[6] As Judge Posner speculated, these detectives "had a hunch [Jones] was guilty and were not going to let a mere absence of evidence stand in their way."[7] Laverty's supervisors refused to have Purvy view a lineup including Pique, suppressed Laverty's reports, and led him to believe that the case against Jones would be dropped.

After hearing Laverty's testimony, the trial judge declared a mistrial. The prosecutors *nolle prossed* all charges against Jones.

Police Reports

George Jones's ordeal was the product of, and in turn sheds light upon, police practices of investigating crimes and writing reports. Written police reports of criminal incidents and arrests[8] give details such as the time, place, and nature of criminal conduct; the names and addresses of victims and witnesses; physical characteristics of the perpetrator(s) or arrestee(s); weapons used; property taken, recovered, or seized from the arrestee; and injuries to persons and property. Through their reports, the police "have fundamental control over the construction of [the] 'facts' for a case, and all other actors (the prosecutor, the judge, the defense lawyer) must work from the framework of facts as constructed by the police."[9] This control depends upon the faith of "other actors" that police reports are basically objective and reliable. False reports, and reports that omit crucial exculpatory[10] information, undermine this trust. By "exculpatory" information I mean:

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6. *Jones*, 856 F.2d at 990-91.

7. *Id.* at 993. When Laverty protested the prosecution to his commander, the latter replied that if Jones was innocent, the jury would acquit him. See also Palmer v. City of Chicago, 562 F. Supp. 1067, 1072 (N.D. Ill. 1983), *rev'd*, 755 F.2d 560 (7th Cir. 1985), describing another case in which detectives omitted from their report an eyewitness identification of the fleeing perpetrator that was dissimilar to descriptions given by the prosecution witnesses, noting in explanation: "We did not put this in the [report] because it would just cloud the issue."

8. Hereinafter referred to as "police reports." Many other kinds of reports by police exist in addition to these. *See generally* Local Government Police Management ch. 20 (Bernard L. Garmire ed. 1977); Orlando W. Wilson, Police Records: Their Installation and Use 41-68 (1942).

9. Richard V. Ericson, *Rules For Police Deviance, in* Organizational Police Deviance: Its Structure and Control 96 (Clifford D. Shearing, ed. 1981) (discussing the police in Ontario, Canada).

10. An incomplete report might also misstate or omit important inculpatory facts, resulting in dismissed charges or unwarranted leniency to the defendant. *See, e.g.*, Sean P. Murphy, *Several Probes May Have Ignored Evidence Against Police*, Boston Globe, July 28, 1991, at 1, 18 (discussing several cases in which internal police investigators

> any fact, circumstance, or item of evidence actually emerging in the course of investigation before or after arrest, other than mere protestations of innocence, which tends to suggest a criminal suspect's innocence, or to raise doubt concerning his guilt or as to the reliability or inculpatory nature of other facts or circumstances.[11]

Created primarily to serve various internal needs of the police department,[12] police reports are also used in the criminal process. They influence criminal proceedings in many ways, affecting a defendant's fate even in cases that never go to trial. False and misleading reports injure the process as well as the defendant. In the nine months I recently spent working as a public defender in "City One,"[13] I was surprised and disturbed by the apparent frequency of such reports. Afterwards, I was left with a number of troubling questions: How typical was my experience?[14] Should we expect police reports to reflect all of the relevant facts available to them, or just the inculpatory facts? Should police reports be "neutral" documents, or opening salvos in the coming adversary battle, shaped by a strategic bias in favor of the prosecution? If the police should, but under current practice do not, report "all the relevant facts" they know, what can be done to change the system? And by whom?

Courts and legal scholars have given much attention to the prosecutor's duty to disclose exculpatory evidence at formal stages of the criminal process, but very little attention to the "dark no-man's-land"[15] of police discretion to report the same evidence. This article asks why false and

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concluded that no excessive force was used, but in which civil claims were paid. In one case, five bus passengers complained to police that an officer had beaten the driver; the internal investigator never contacted the five witnesses, but his report cleared the officer. In another case, the report credited an officer, accused of wrongful shooting, who said he saw the victim holding a "shiny metal object"; the report did not mention six civilian witnesses who said they never saw a gun).

11. Thomas M. Fleming, Annotation, *Liability of Police or Peace Officers for False Arrest, Imprisonment, or Malicious Prosecution as Affected by Claim of Suppression, Failure to Disclose, or Failure to Investigate Exculpatory Evidence*, 81 A.L.R. 4th 1031, 1035 & n.5 (1990). Under some circumstances, failure to disclose exculpatory evidence can violate the defendant's constitutional right to due process. *See infra* text accompanying notes 215-23.

12. *See infra* text accompanying notes 25-28.

13. "City One" (pop. 500,000) is located in the Northeast. My prior practice experience, also in the Northeast, included prosecution in the lower criminal courts, defense of juvenile delinquency clients, and part-time teaching and supervision in my law school's criminal clinic.

14. As a public defender working primarily in a lower criminal court, most of the reports I encountered were prepared by patrol officers, i.e., officers who typically respond to perceived or reported criminal activity, make arrests, and write reports. MICHAEL K. BROWN, WORKING THE STREET 6-7 (1981). These types of reports should be distinguished from reports prepared by detectives or other specialists to whom serious cases requiring further investigation are referred, and from reports of investigations supervised by prosecuting attorneys. Both latter categories, and especially the last, would normally be more detailed than initial response reports.

15. United States v. Bryant, 439 F.2d 642, 644 (D.C. Cir. 1971).

misleading police reports are produced, how they affect the criminal process, and how they are regulated. In Part II of this article I explore the chief reasons for misleading police reports: deliberate deception and a lack of incentive to report exculpatory evidence. In addition to pursuing these topics in the literature, I made modest attempts to gather empirical information on two questions. First, was my experience of unreliable police reports shared by other local practitioners, or was it unique to my court or caseload? To discover this, I administered a questionnaire to a small number of police, prosecutors, and defense attorneys, predominantly in City One and in an adjoining county, to explore their views and perceptions about the reporting of exculpatory information. The responses to these questionnaires are discussed below.[16] My second effort, also modest, was designed to learn whether police officers are trained to include exculpatory facts in police reports. To this end I examined training materials from six police departments in several jurisdictions, and supplemented this information by personal interviews with some training personnel. The fruits of this limited foray into the police academies are also discussed.[17]

Part III of this article reviews the negative impact of misleading police reports on criminal defendants, and Part IV considers remedies. I use *Jones v. City of Chicago*,[18] discussed above, and a related Seventh Circuit case, *Palmer v. City of Chicago*,[19] as well as cases from my own practice, to illustrate the damage done by false or one-sided reports, and the scope and limitations of judicial and administrative remedies. These cases show both the criminal justice system's dependence on police investigation and reporting practices, and the relative imperviousness of these practices to legal remedies. Part V summarizes my findings and proposes actions that police, prosecutors, and defense attorneys should take to ameliorate the problem.

II. The Reasons for Misleading Reports

A. *Introduction*

Police reports may mislead by misstating facts, omitting facts, or a combination of both. Numerous explanations for such police behavior could be given. Carelessness aside,[20] the two most convincing explana-

16. *See infra* text accompanying notes 107-31, apps. A & B.

17. *See infra* text accompanying notes 132-55.

18. 856 F.2d 985 (7th Cir. 1988).

19. 562 F. Supp. 1067 (N.D. Ill. 1983), *rev'd*, 755 F.2d 560 (7th Cir. 1985). *Jones* and *Palmer* are discussed in Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75, 101-02 (1992).

20. *See infra* note 163; *cf.* Orfield, *supra* note 19, at 101 (in study of police perjury to evade the Fourth Amendment exclusionary rule, some respondents attributed vague and inaccurate case reports to police laziness and sloppiness).

tions are deliberate deception, and a police stake in limiting reports to inculpatory facts, omitting "doubts and details."[21] Although I will discuss both causes, I do not mean to equate, either quantitatively or morally, lying and the omission of exculpatory evidence. The former is surely less common than the latter. And while some police might justify both behaviors as necessary to serve "higher" values,[22] the failure to report exculpatory evidence is subject to an additional legitimating claim: "it's not my job."

Police reports are produced in a three-step process: investigation, recording, and reporting. In a model of completely objective and reliable reporting, the police would investigate and record all relevant evidence, whether inculpatory or exculpatory; preserve the recorded information; and report it in clear, objective terms to the proper recipients. Departures from objective, reliable reporting could be plotted on a continuum: reporting fabricated evidence of guilt at one extreme, and omitting to report exculpatory evidence at the other. At intermediate points on the continuum the police, once in possession of some inculpatory evidence, might fail to investigate exculpatory leads, or fail to record or preserve exculpatory evidence known to them. Ultimately, the failure to pursue exculpatory leads is crucial, because evidence that is not discovered cannot be reported. However, this article does not directly address the duty to investigate.[23] It focuses, rather, on the reporting of relevant information actually known to the police.

Exculpatory Evidence and the Function of Police Reports

The ideal treatment of exculpatory evidence in police reports depends upon the perceived function of such reports, which in turn depends upon one's viewpoint. The police viewpoint differs from that of prosecutors,[24] judges, and other actors in the criminal process.

For the police, the report is primarily an "internal memorandum"[25] serving the perceived needs of the police department. Reports provide the department with information needed to determine the nature and

21. *See* Lloyd L. Weinreb, Denial of Justice 58 (1977).

22. *See infra* text accompanying notes 32-33 and 69-79.

23. For discussion of the defendant's right to a more complete police investigation, see Note, *Toward a Constitutional Right to an Adequate Police Investigation: A Step Beyond* Brady, 53 N.Y.U. L. Rev. 835 (1978) [hereinafter *Toward a Constitutional Right to an Adequate Police Investigation*]; Herald P. Fahringer, *Has Anyone Here Seen Brady?* 9 Crim. L. Bull. 325, 326 (1973) (arguing for police duty "to conduct an impartial investigation and collect all the evidence relating to the commission of an offense").

24. The police use different measures to define "success" than professional prosecutors; this causes some tension in their relationship. *See* 4 Donald M. McIntyre, *Impediments to Effective Police Prosecutor Relationships*, 13 Am. Crim. L. Rev. 201 (1975); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor*, 15 Am. J. Crim. L. 197, 208-09 (1988). The prosecutorial viewpoint is discussed *infra* at text accompanying notes 262-75.

25. Weinreb, *supra* note 21, at 48.

type of follow-up investigations, to solve other crimes, and to guide allocation of resources for future law enforcement. The department also uses reports to evaluate personnel, and to generate data required for FBI Uniform Crime Reports. For the individual officer, the report form serves as an investigative tool, guiding the officer's conduct of the initial investigation. Later, the report serves to refresh the officer's recollection in preparation for court testimony.[26]

When an arrest is made, the report's primary function for the police is "to justify the arrest and clear the case."[27] This can be achieved by confining reports to what is necessary to satisfy the probable cause standard, ignoring exculpatory evidence. For example, in a robbery case hinging on the victim's identification of the arrestee, the victim's intoxication or discrepant original description of the assailant would be irrelevant unless they actually negated probable cause.[28] This minimalist approach serves two police interests not directly shared by the prosecutor: resource conservation and self-protection.

Resource Conservation

In busy police departments, officers are under severe time pressure to respond to calls, leaving them little time to investigate or to write reports.[29] For example, City One officers are given only twenty minutes to write an incident report, and must ask their supervisor for extra time if needed.[30] In addition to requiring more time to compose, a more complete report might require the police to conduct a more extensive, time-consuming investigation, and to record more information. This would take time that might otherwise be used to perform tasks that are, from the police standpoint, of higher priority.

Self-protection

Detailed investigations and reports, especially if they revealed exculpatory facts, might cast doubt on the arrestee's guilt, thus exposing the po-

26. The purposes of an incident report include "[t]o examine the past, keep other officers informed, continue investigations, prepare court cases, provide the court with relevant facts, coordinate law enforcement activities, plan for future law enforcement services or to evaluate performance." City One Police Academy, Introduction to Incident Reporting (unpublished training materials of City One Police Department) (on file with author) [hereinafter City One Introduction to Incident Reporting].

27. Weinreb, *supra* note 21, at 48. If no arrest has been made, the report serves to communicate sufficient information to guide further investigation. Both the report and the officer's "field notes," see *infra* text accompanying notes 134-35, are used to refresh the officer's memory before testifying.

28. *See infra* text accompanying note 204.

29. *See infra* text accompanying notes 97-99.

30. Interview with anonymous report writing instructor, City One Police Academy, in City One Police Academy (July 1, 1991) [hereinafter Interview with City One writing instructor].

lice to potential embarrassment or even civil liability for false arrest.[31] Aware of how attorneys might discover their reports and put them to hostile use, police have a negative incentive to report exculpatory facts.

PARTISANSHIP

A narrow approach also serves a third interest which prosecutors do share: partisanship. This refers to an interest in punishing the guilty, coupled with a psychological stake in believing that a particular suspect or arrestee is ("factually")[32] guilty. Reports that include exculpatory facts might lead to the acquittal of such persons, whereas reports limited to inculpatory evidence increase the government's chances to win the adversary contest.[33] A victory, in turn, also protects the police, because a convicted defendant will find it difficult to win a civil suit for false arrest or imprisonment.[34]

The following discussion of police deception and of the police incentive to limit reports to inculpatory facts shows the importance of these overlapping police concerns.

B. *Police Lying and Deception*

Deliberate[35] deception in reports can take two forms. A report might contain a deliberate lie,[36] or it might deliberately omit exculpatory facts. By definition, a report that contains a lie will also mislead by omitting exculpatory facts, i.e., those that expose the lie. But the converse is not

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31. *See infra* text accompanying notes 203-05.

32. *See infra* text accompanying note 69.

33. *See infra* text accompanying notes 146-54. Some reports are written before any particular individual is arrested or suspected. In such cases the police have no incentive to slant the report against the defendant. In other cases, police might include exculpatory information in a report, for whatever reason, as a signal to the prosecutor to "kill" the case.

34. Federal circuits split on whether the fact of conviction necessarily bars relief. *See* MICHAEL AVERY & DAVID RUDOVSKY, POLICE MISCONDUCT § 2.3(a) (1992).

35. A police report might be termed "inaccurate," "misleading," or even "deceptive" without necessarily implying that the maker intended or knew of its defects. Although "knowing" but "unintentional" deceit might be considered "deliberate," for the sake of simplicity I exclude that category here.

36. Scholars define "lying" differently. *See* Christopher J. Shine, Note, *Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception,* 64 NOTRE DAME L. REV. 722 n.1 (1989); SISSELA BOK, LYING 14-17 (1978). I use "lie" to mean a "statement intentionally uttered to deceive." Carl B. Klockars, *Blue Lies and Police Placebos: The Moralities of Police Lying, in* 4 POLICE & L. ENFORCEMENT 131 (1987). Police lying in written reports does not necessarily constitute the crime of perjury, which is defined as "a false oath in a judicial proceeding in regard to a material matter." *Id.* at 133; *see also* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 511 (3d ed. 1982). Police reports might not be sworn, but it might be a crime to make a false police report. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 268, § 6A (West 1990).

true: a report that deliberately deceives by using half-truths, omitting exculpatory facts, might contain no lies.[37]

How often, in what circumstances, and why the police write deliberately deceptive reports in order to "make" or strengthen the case against an arrestee is not easily ascertained.[38] Neither my academic career in criminal law and procedure,[39] nor my experience as a prosecutor,[40] pre-

37. *See* ERNEST J. HOPKINS, OUR LAWLESS POLICE 280 (1931) ("Failure to tell 'the whole truth' is a type of routine perjury.").

38. As discovered by the prosecutors who failed to convict Los Angeles police officers for filing false police reports to cover up the beating of motorist Rodney King, an officer's deliberate deception, as opposed to good faith inaccuracy, is difficult to establish. *See* People v. Powell, No. BA035498 (Cal. Super. Ct. April 20, 1992) (LEXIS, Cal Library, LAPD file) (Closing Arguments). In some instances, an inaccurate report might result from unconscious reconstructions of memory that serve the witness's psychological needs. *See* ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 3.08 (1987). Without a confession of deceptive intent, good faith errors of recall are very difficult to distinguish from lies. But such errors are more likely to occur in later testimony than in police reports, which are typically prepared soon after the reported observations.

39. I have taught in this field since 1964. Law professors are not likely to focus on questions of lying and distortion in police reports. Court opinions, law review articles, and teaching casebooks treat mainly the roles of lawyers in the system. To the extent they focus on police lying, legal scholars treat police lying and distortion in discrete contexts, such as evasion of the various exclusionary rules, and not as a pervasive feature of police behavior. Despite the obvious connection between police suppression of exculpatory evidence and the prosecutor's failure to disclose such evidence, the law treats disclosure primarily as an obligation of the prosecutor, not the police, and focuses on disclosure issues primarily as they affect the rarely reached trial stage. *See infra* text accompanying notes 218-23.

40. I spent a sabbatical year (1982-83) as an Assistant District Attorney in a suburban county near Boston. My changed perspective as a result of working as a public defender suggests that what you see depends significantly on where you stand. Professor Richard Uviller, a former prosecutor, calls police perjury the "demon in the criminal process." He writes:

> We all know it's there, lurking just outside the radius of proof . . . . [It] is extremely elusive, almost impossible to identify with certainty in a particular instance. Suspicion, sometimes amplified by skepticism, is the best perjury detector we have been able to devise—the best only because it is virtually the exclusive index of whether a sworn police officer is telling the whole truth.

H. RICHARD UVILLER, TEMPERED ZEAL 111 (1988).

This passage mirrors my own experience as a prosecutor. Lacking the resources (if not the incentive) to conduct an independent investigation of the facts, and without access to the defendant, a prosecutor who suspects police witnesses of lying is left with only suspicion and skepticism. Except for matching the officer's account against the accounts of other witnesses and using common sense, the prosecutor is largely stuck with the facts as reported by the police. In contrast, the "defense view" of police lying and deception reflects not only a partisan bias—which undoubtedly affects one's "standard of proof"—but also greater exposure to the problem. A defense attorney has access to information which a prosecutor lacks: clients (and investigators) sometimes produce persuasive corroborating witnesses not listed on the police report; subpoenaed Police Department tape recordings of 911 calls and police radio broadcasts are another—objective—source of facts, not always known to the prosecutor. In-

pared me for the extent of apparent deception I encountered as a public defender. Court decisions and legal scholarship present an image of police deception that is troubling, but that is confined to discrete contexts such as undercover investigations,[41] manipulative interrogation of suspects,[42] and efforts to defeat Fourth and Fifth Amendment exclusionary rules.[43] Thus, deceptive practices appear as aberrations from a norm of

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dependent investigation of the facts inevitably gives greater awareness of police deception to defense attorneys than to prosecutors.

Differences in the timing of preparation may also give defense counsel greater exposure than prosecutors to police deception. As a defense lawyer, due to prompt investigation, I sometimes knew of deception in the police report before the probable cause hearing took place. The prosecutor typically knew nothing about the case until the hearing date, and prepared only if the prosecution witnesses showed up. If, as often happened, the victim or police officers did not appear, the case might (after one or more continuances) be dismissed without the prosecutor ever learning of the deception. The same might be true in cases disposed of by plea negotiation: defense counsel might take the "deal" without sharing evidence of police deception with the prosecutor. Unless defense counsel expects disclosure to be followed by some remedial action, there is little incentive to educate the prosecutor. However, remedial action is quite unlikely and might, in any case, expose both counsel and the client to retaliation.

Myron Orfield's study of police, prosecutor, defense attorney, and judge perceptions of police lying to avoid suppression under the Fourth Amendment exclusionary rule confirms the point. Although all groups believed that the police falsified documents and testimony some of the time, public defenders reported more frequent occurrences than the others. *See* Orfield, *supra* note 19, at 98 & n.103 (12/14 (86%) of public defenders believed that police perjury hindered deterrent efficacy of exclusionary rule, but only 7/11 judges and 1/13 prosecutors agreed). Similar discrepancies were reported regarding the perceived frequency of: fabrication in police reports, *id.* at 100 & nn.113-14; deceptive applications for search warrants, *id.* at 105 & n.138; and police perjury at suppression hearings, *id.* at 107 & nn.147-48. *See also infra* text accompanying notes 116-31.

41. *See* Katherine Goldwasser, *After ABSCAM: An Examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations,* 36 EMORY L.J. 75, 76-77 (1987).

42. *See* Miranda v. Arizona, 384 U.S. 436, 455 (1966); Welsh S. White, *Police Trickery in Inducing Confessions,* 127 U. PA. L. REV. 581 (1979).

43. *See generally* Orfield, *supra* note 19. Orfield's interviews with Chicago police, lawyers, and judges lend a discomforting degree of support to Alan Dershowitz's twelve "Rules of the Justice Game," half of which concern police lying:

> Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.
>
> Rule V: All prosecutors, judges, and defense attorneys are aware of Rule IV.
>
> Rule VI: Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants.
>
> Rule VII: All judges are aware of Rule VI.
>
> Rule VIII: Most trial judges pretend to believe police officers who they know are lying.
>
> Rule IX: All appellate judges are aware of Rule VIII, yet many pretend to believe the trial judges who pretend to believe the lying police officers.

ALAN M. DERSHOWITZ, THE BEST DEFENSE XXI-XXII (1982).

police truthfulness.[44] Social scientists who have studied the police paint a different picture.[45] Their studies suggest that lying—to suspects, to judges, to members of the public, and to one's own superiors—is an integral feature of urban police work, a "subcultural norm rather than an individual aberration."[46] If true, this is an important datum in assessing the accuracy and reliability of police reports. It is therefore relevant to consider the circumstances and motivations that produce police deception generally.

Social scientists have developed taxonomies to describe police deception.[47] Peter Manning draws a useful distinction between "internal" and "external" lies. "Internal" lies are those told to fellow officers and members of the police hierarchy; "external" lies are those told to manipulate members of the public. Following this terminology, lies in police reports are both "internal" (because they involve false internal documents) and "external" (because they are also meant to manipulate the judicial system).

INTERNAL LIES

That police in criminal proceedings regularly commit perjury is well known to criminal lawyers, judges, and others familiar with the criminal

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44. To some, these practices are understandable, if not pardonable, tactics in the battle against crime. *See, e.g.*, UVILLER, *supra* note 40, at 116-18. Although Professor Uviller condemns police perjury, he "cannot confidently contradict the idea that some varieties of perjury, if not exactly virtuous, are less treacherous than others." *Id.* at 116-17. Perjury designed merely to get around the exclusionary rules, he points out, appears morally justified to "[m]any morally—even religiously—dedicated cops," while justifications for the exclusionary rules appear to them "not entirely convincing." *Id.* at 118.

45. *See generally* BROWN, *supra* note 14 (study of three southern California police departments: Los Angeles, Inglewood, and Redondo Beach); HOPKINS, *supra* note 37 (discussion of the Wickersham Commission's reports on the New York City Police Department); Klockars, *supra* note 36 (discussion of the types of police lying); Peter K. Manning, *Police Lying*, 3 URB. LIFE & CULTURE 283 (1974) (based in part on research on the London Metropolitan Police); JOHNATHAN RUBINSTEIN, CITY POLICE (1973) (study of the Philadelphia Police Department); POLICE CORRUPTION: A SOCIOLOGICAL PERSPECTIVE (Lawrence W. Sherman ed., 1974) (compilation of descriptive and analytical research on police corruption); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL (1966) (study of an anonymous American city's police department) [hereinafter SKOLNICK, JUSTICE WITHOUT TRIAL].

46. Jerome H. Skolnick, *Deception By Police*, CRIM. JUST. ETHICS 40, 42-43 (1982) [hereinafter Skolnick, *Deception By Police*]. Based on his observations of one urban police department, Professor Skolnick calls police lying a "routine way of managing legal impediments—whether to protect fellow officers or to compensate for what [the policeman] views as limitations the courts have placed on his capacity to deal with criminals." *Id.* at 43.

47. *See, e.g.*, Manning, *supra* note 45, at 286; Klockars, *supra* note 36, at 134. At times in this section I follow the usage of the non-legal literature, which tends to discuss "lying" and "perjury" rather than the broader term, "deception."

justice system.[48] That they just as regularly deceive others in the police bureaucracy may be less well known. Patrol officers[49] have been described as "bureaucrat[s]" enmeshed in a "system of administrative rules, policies, and managerial controls designed to ensure conformity to administrative directives."[50] These regulations cover a broad spectrum of police practices ranging from such mundane matters as sick days, lunch breaks,[51] and required equipment for patrol cars,[52] to crucial matters like corruption.[53] They are enforced by both formal and informal internal disciplinary measures. Because it is difficult or impossible to comply with all of these regulations and, at the same time, to accomplish the core tasks that both the public and the police hierarchy expect patrol officers to perform, "manipulation, secrecy, and avoidance" [of internal discipline] become necessary to the patrol officer's survival.[54] Such survival tactics entail lying, both to protect oneself and, in deference to the code of loyalty that prevails in police subculture, to protect fellow officers.[55]

48. Fred Cohen, *Police Perjury: An Interview with Martin Garbus,* 8 CRIM. L. BULL. 363, 367 (1972) ("[A]mong all the lawyers that I know—whether they are into defense work or prosecution—not one of them will argue that systematic police perjury does not exist. We may differ on its extent, its impact . . . but no trial lawyer that I know will argue that police perjury is nonexistent or sporadic."). A lie often requires more lies to cover up the first. For a classic instance of lies piled one on the other, forming a structure of deception too unwieldy to stand, see Commonwealth v. Lewin, 542 N.E.2d 275 (Mass. 1990); Larry Wentworth, Comment, *The XYZ Affair of Massachusetts Prosecutorial Misconduct: The Curious Case of* Commonwealth v. Lewin*—Was Dismissal Warranted?* 25 NEW ENG. L. REV. 1019 (1991).

49. *See supra* note 14 for a definition of "patrol officer."

50. BROWN, *supra* note 14, at 8, 28. For an explanation of the rationale for such detailed controls over individual officers, see *id.* at 87-93.

51. RUBINSTEIN, *supra* note 45, at 43.

52. In Philadelphia, for example, all patrol cars are required to carry fire hydrant wrenches. *See id.* at 107 (officers responding to open hydrant complaint deceived radio dispatcher in order to conceal their failure to comply with this regulation).

53. Regulations forbidding police from accepting illegal favors are widely flouted. *See* THE KNAPP COMMISSION, REPORT ON POLICE CORRUPTION 170 (1972); RUBINSTEIN, *supra* note 45, at 43. Rubinstein attributes police corruption in part to the political nature of decisions allocating scarce police services in the face of limitless demand. *Id.* Just as the mayor, to retain the residents' political support, orders the police to issue parking tickets in certain areas of the city, so the police go out of their way to "keep an eye" on restaurants that serve the police free or discounted meals. *Id.* at 406-10.

54. BROWN, *supra* note 14, at 291. *See also* Manning, *supra* note 45, at 292, 299.

55. William Westley found that 77% of police officers questioned would perjure themselves rather than testify against another officer. WILLIAM A. WESTLEY, VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY 151 (1970). *See also* R. E. Ewin, *Loyalty: The Police,* 9 CRIM. JUST. ETHICS 3 (Fall 1990); Ellwyn R. Stoddard, *A Group Approach to Blue-Coat Crime, in* POLICE CORRUPTION: A SOCIOLOGICAL PERSPECTIVE 289 (Lawrence W. Sherman ed., 1974). Tests of a rookie's loyalty to other police officers often include accepting payoff money. EDWIN J. DELATTRE, CHARACTER AND COPS 82-83 (1989).

For an extreme, and hopefully rare, example of lying to avoid internal discipline, see Joseph Berger, *A False Report, Racial Issues and Officers Lose Their Jobs,* N.Y. TIMES,

Nor are these tactics confined to patrol officers. In one police department studied, "every supervisor violates [the] regulations to produce the conditions and circumstances which enable him to get the required work from his men . . . ."[56]

Another feature of police work that fosters lying—both internal and external—is the pressure on patrol officers to produce "activity" (such as arrests, traffic stops, or parking tickets) that will demonstrate to the public that the department is "doing something" about crime.[57] This motivation applies to police work generally, but vice law enforcement is especially problematic. If a police department relies on ordinary patrol officers (as opposed to specialized vice units) to enforce laws against gambling, prostitution, and illegal drugs, then the patrol officer experiences relentless pressure to produce vice "activity."[58] Unless satisfactory quantities are produced, an officer is cut off both from prospects for promotion and valuable job "perks,"[59] as well as from lucrative overtime pay for court appearances.[60] But to produce, the officer must engage in freelance activities (location, cultivation, and protection of informants) that are not only inconsistent with regulations governing daily activities, but are steeped in secrecy, deception, coercion, and corruption. "Every patrolman," according to one observer, "learns that he must be a liar and a conspirator if he wants to remain a district policeman. He must become an expert in telling untruths or transfer to a unit that has no vice-work obligations."[61]

Apr. 24, 1993, at 1, 26 (to cover up a fistfight between Yonkers police officers which resulted in serious injuries, police broadcast a false report describing a "tall black man in a blue jacket and sneakers" as the white officer's assailant. Five officers who allegedly participated in the false report were disciplined and a sixth resigned).

56. RUBINSTEIN, *supra* note 45, at 43. Rubinstein describes the preparation of false search warrants as a routine, open, "collective enterprise," in which police supervisors select officers skilled in perjury to obtain warrants. *Id.* at 386-88; *see also* Orfield, *supra* note 19, at 108-09.

57. "Activity" is defined as the "internal product of police work. It is the statistical measure" by which police performance is judged internally and, ultimately, by the public. RUBINSTEIN, *supra* note 45, at 44. The system for measuring "activity" rewards officers who make large numbers of arrests, car stops, or "ped stops," regardless of quality. *Id.* at 44, 45, 210-11, 377-78.

58. *Id.* at 381.

59. *Id.* at 43.

60. A super-active vice detective in the City One court where I worked reportedly made over $100,000 a year in overtime pay.

61. RUBINSTEIN, *supra* note 45, at 388. The need to produce vice activity fosters intense competition among officers to find and protect "their" informants. "[T]he relationships among colleagues in a squad are anything but harmonious and trusting." *Id.* at 438. Some police falsify evidence of "activity" by reporting a stop they never made. *Id.* at 186.

External Lies

"The police subculture permits and sometimes demands, deception of courts, prosecutors, defense attorneys, and defendants . . . ."[62] Police also lie in a variety of circumstances to manipulate ordinary members of the public, including citizen complainants and crime victims.[63] As with internal lying, officers justify deception in terms of the need to safeguard competing values that are perceived as superior to truth-telling.[64] Justifications for external lying include the maintenance of order,[65] self-protection, and the apprehension and punishment of the "guilty." The latter two justifications are likely to affect the writing of police reports.

Lies for Self-Protection

Police lie to protect themselves against civil liability for false arrest or the use of excessive force. For example, in charges arising from the infamous Rodney King beating, police were prosecuted for falsifying reports to exaggerate Mr. King's resistance to arrest and to understate the amount of force used to subdue him.[66] Also, the police frequently lodge false "cover charges" of assault and battery against an arrestee whom they have injured by the use of excessive force. Paul Chevigny has described this as "[l]ying to cover a mistake and [using] a criminal charge to buttress the lie . . . ."[67] Officers also fabricate evidence of crime by innocent persons in order to satisfy the demand for "vice activity."[68]

Lies to Ensure Conviction of the "Guilty"

The given justification for much police lying is to convict and punish "factually guilty" suspects in the face of obstacles that—but for police de-

62. Skolnick, Justice Without Trial, *supra* note 45, at 76.

63. Manning, *supra* note 45, at 286; Klockars, *supra* note 36, *passim.*

64. *See, e.g.*, Skolnick, Justice Without Trial, *supra* note 45, at 93 ("The detective measures the costs of the act of lying against the benefits to the crime victim and the general public.").

65. Manning, *supra* note 45, at 294; Klockars, *supra* note 36, at 135-36.

66. For example, the reports stated that the police repeatedly struck Mr. King with a baton on the "arms, legs, and torso," but omitted mention of the many blows—apparent on the videotape—to his head. *See* People v. Powell, No. BA035498 (Cal. Super. Ct. April 20, 1992) (LEXIS, Cal. library, LAPD file) (Closing Argument for the Prosecution, First Close by Attorney Terry White). The defendant officers were acquitted of this charge.

67. Paul Chevigny, Police Power: Police Abuses in New York City 143 (1969); Brown, *supra* note 14, at 80-81; Manning, *supra* note 45, at 297-98. Frequently, in this situation, the authorities offer to drop the criminal charges if the defendant agrees to waive all civil claims against the police. *See* Town of Newton v. Rumery, 480 U.S. 386 (1987) (release must be informed and voluntary). *But see* Foley v. Lowell Div. of Dist. Court, 501 N.E.2d 1151, 1154 (Mass. 1986) (disapproving practice under state law).

68. *See, e.g.*, Allan N. Kornblum, The Moral Hazards 80 (1976) (describing New York City practice of "flaking," when police plant evidence on suspects to meet "norms of production").

ception—might "unjustly" defeat the prosecution's ability to convict.[69] As Jerome Skolnick has written, "the policeman will . . . lie to get at the truth."[70] Under this broad category of deception one might distinguish several sub-categories, including: (a) deceptive investigative techniques, such as the use of undercover agents[71] and deceptive questioning of suspects;[72] (b) lies to facilitate evasion of Fourth Amendment limitations on police investigative powers, including the fabrication of legal grounds to conduct searches and seizures,[73] and the preparation of false applications for search warrants;[74] (c) perjured testimony to avoid exclusion of illegally obtained evidence, including "dropsy" testimony,[75] and false testimony about police questioning or the circumstances of an identification procedure; (d) lies to "improve" a weak substantive case,[76] such as false testimony about a defendant's incriminating conduct[77] and statements;[78] (e) lies that inculpate innocent persons for the purpose of forcing them

69. On the distinction between "factual guilt" and "legal guilt," see Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). *See also* UVILLER, *supra* note 40, at 115-16 (characterizing police perjury to avoid exclusion of illegally seized evidence as "[a] slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result.").

70. Skolnick, *Deception By Police*, *supra* note 46, at 42.

71. *See generally* GARY T. MARX, UNDERCOVER (1988).

72. *See, e.g.*, Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3 (1992).

73. For example, an officer who suspected gambling activity in a private home generated "probable cause" for a warrantless "exigency" entry and search of closed containers by telephoning an anonymous false "report of gunshots" at that address. RUBINSTEIN, *supra* note 45, at 122-23.

74. *See, e.g.*, Commonwealth v. Lewin, 542 N.E.2d 275 (Mass. 1989); Wentworth, *supra* note 48.

75. *See* sources cited *infra* note 282. Perjured "plain view" testimony has been called "indoor dropsy testimony." Cohen, *supra* note 48, at 372.

76. Uviller calls this "artificial evidence" of guilt. UVILLER, *supra* note 40, at 117. For a shocking example, see Jon Nordheimer, *Trooper's Fall Shakes Both Police and Public*, N.Y. TIMES, Nov. 15, 1992, at 41, 56, and *Third State Trooper Arrested in Evidence-Tampering Case*, N.Y. TIMES, May 1, 1993, at 29 (two New York State Police investigators pleaded guilty to deliberately falsifying forensic evidence in more than 20 criminal cases between 1988 and 1992. The two "waited for other investigators to identify a suspect and then claimed they had found that suspect's fingerprints at a crime scene." The Lieutenant supervising their investigations was also charged.).

77. Drawing on the report by the National Commission on Law Observance and Enforcement on Lawlessness in Law Enforcement in 1931 (the Wickersham Commission), Ernest Hopkins described "routine perjury" of police making up evidence to secure the conviction of persons believed guilty. HOPKINS, *supra* note 37, at 280-81. For a contemporary account, see Cohen, *supra* note 48, at 367 (If a defendant held an officer by the arm, it comes out as "a stranglehold around my neck.").

78. In the District of Columbia, a rash of police testimony of defendants' spontaneous apologies to victims during police-supervised confrontations was criticized by Judge Skelly Wright in Veney v. United States, 344 F.2d 542, 542-43 (D.C. Cir. 1965).

to inform against the guilty,[79] or to punish them for other crimes which the police suspect but cannot prove.

CONCLUSION

Lying and deception are widely practiced in police work. This accounts for some of the reports that exaggerate the evidence of a suspect's guilt, but probably for only a small number as compared to those attributable to the omission of exculpatory evidence. Despite the apparent "acceptability" of lying in the police subculture, common experience suggests that sins of omission are easier to justify, and less stigmatic, than those of commission. More important, as will appear below, neither the police nor external agencies expressly require the officers to report exculpatory evidence. As a result, writing a one-sided report is not necessarily inconsistent with "good police practice."

But deliberate police deception and the practice of excluding exculpatory evidence from police reports are related in two ways. First, if decision makers are educated in the great variety and extent of workaday police deception, they might view police reports more skeptically. A judge who treats the report as a one-sided, partisan document will be more open to defense claims of innocence than one who regards the report as neutral and objective. Second, if the police were required to report certain objective, potentially exculpatory facts, such as the victim's sobriety, inconsistent witness statements, or alibi evidence, a false report would require the officer to increase the number of specific false responses subject to disproof. This might deter false reports by making them easier to detect, and reduce the incentive to falsify later reports or testimony.[80]

C. *The Place of Exculpatory Evidence in Police Reports: Police Norms and Practices*

This section explores the place of exculpatory evidence in police reports. I review three sources of knowledge about police reporting norms and practices: scholarship on police investigation, responses to our questionnaire, and police training materials. From these, I draw two conclusions. First, it is difficult to know how police treat exculpatory evidence. American police departments are so numerous and decentralized, and operate under such widely varying conditions of size, location, workload, and training, that any generalizations are hazardous. This is especially true of generalizations about police investigatory and reporting practices, which until quite recently were little studied, and then not with a focus

79. "'Farming,' the planting of evidence, is practiced throughout the department." RUBINSTEIN, *supra* note 45, at 390. Some officers will plant drugs or numbers slips on a person believed vulnerable to pressure to inform on others. *Id.* at 390-91.

80. *See infra* text accompanying notes 254-59.

on exculpatory evidence.[81] Given the first conclusion, the second is necessarily tentative: most police probably[82] do not generally report exculpatory evidence. While giving lip service to formal departmental policies requiring "complete" investigations and reports of "all relevant facts," many, if not most, police follow "working rules" that prefer minimal investigations and reports limited to inculpatory facts.

1. Scholarship on Police Investigation Practices

Scholars have approached the subject of police investigation from at least three perspectives: comparative criminal justice, the rights of criminal defendants, and law enforcement. Regardless of perspective, their scholarship supports the view that police reports do not normally contain exculpatory facts.

In the first group are scholars who argue the comparative deficiencies of our system of criminal investigation. For example, in his 1977 book, Professor Lloyd Weinreb criticized the American criminal process for failing to base convictions on adequate investigation of the facts.[83] He argued that the police are primarily dedicated to keeping order. They are neither trained nor equipped to conduct more than quick, superficial criminal investigations. If a patrol officer makes an arrest, the report tends to include only sufficient facts to justify the officer's actions.[84] Nor, he argued, do prosecutors or defense counsel take up the investigative slack. With the exception of very serious or unusual cases, many defendants enter negotiated guilty pleas on the basis of inadequately developed accounts of the relevant facts.[85] Weinreb's proposed solution was to transfer criminal investigatory functions from the police to a new, continental-style office of investigating magistrate which would conduct a "neutral, complete and convincing" investigation of all relevant evidence, including exculpatory evidence.[86]

Although not disagreeing with Weinreb's diagnosis of the problem, a second group of legal scholars have focused on the harm caused defendants by the lack of access to exculpatory evidence.[87] Their proposed solu-

81. JOHN E. ECK, POLICE EXECUTIVE RESEARCH FORUM, SOLVING CRIMES: THE INVESTIGATION OF BURGLARY AND ROBBERY 2 (1983) [hereinafter ECK, SOLVING CRIMES]; LOCAL GOVERNMENT POLICE MANAGEMENT, *supra* note 8, at 211-12.

82. With the understanding that all general descriptions of police practices hereinafter below are subject to the same qualification, I will stop using "probably."

83. WEINREB, *supra* note 21, at 48-49. *See also* Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932).

84. WEINREB, *supra* note 21, at 48.

85. *Id.*; *see infra* text accompanying notes 193-94.

86. WEINREB, *supra* note 21, at 48. Weinreb's solution has not been received warmly. *See, e.g.*, Philip E. Johnson, *Importing Justice*, 87 YALE L.J. 406 (1977) (reviewing LLOYD L. WEINREB, DENIAL OF JUSTICE (1977)); Norval Morris, Book Review, 91 HARV. L. REV. 1367 (1978).

87. *See* Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 408 (1984)

tions build on the defendant's existing constitutional rights, such as the *Brady* due process right of access to exculpatory evidence known to the government,[88] and Sixth Amendment rights to confrontation,[89] compulsory process,[90] and the effective assistance of counsel.[91] According to some, these rights not only guarantee defendants access to exculpatory evidence in the government's possession, but support the more fundamental right to a police investigation that gathers and preserves potentially exculpatory evidence in the first instance.[92]

The non-legal literature on police science provides a third, more empirically based perspective. A number of government-sponsored studies of police investigation practices have been conducted during the past two decades.[93] In contrast to the legal scholars mentioned above, these au-

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(proposing *in camera* judicial review of prosecutor's file as means of enforcing defense right of access); *Toward a Constitutional Right to an Adequate Police Investigation, supra* note 23, at 836.

88. *See* Brady v. Maryland, 373 U.S. 83 (1963), discussed *infra* at text accompanying notes 215-35; Jay Y. Bostic, Comment, *Due Process and Section 1983: Policemen's Duty to Expose Exculpatory Information,* 22 WAKE FOREST L. REV. 235, 246-47 (1987) (proposing recognition of police duty under *Brady* to "expose" to the prosecution evidence that the officer subjectively recognized as exculpatory); *see also* Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel,* 34 STAN. L. REV. 1133, 1163-74 (1982) (*Brady* and *Agurs* necessitate high standards for constitutionally effective assistance of counsel and adequate support services for defense attorneys to ensure access to exculpatory evidence).

89. Although the Supreme Court has rejected the view that the Confrontation Clause protects the defendant's right to discover exculpatory evidence, Pennsylvania v. Ritchie, 480 U.S. 39, 51-61 (1987), some Justices disagreed. *See id.* at 61-66 (Blackmun, J., concurring); *Id.* at 61-66 (Brennan, J., dissenting). *See also* Commonwealth v. Santiago, 567 N.E.2d 943, 951-53 (Mass. App. Ct. 1991) (right to confrontation endangered where officer testified entirely on basis of admittedly selective notes, confined to defendant's incriminating statements, excluding any exculpatory statements that defendant might have made); *Toward a Constitutional Right to an Adequate Police Investigation, supra* note 23, at 846-47.

90. The Supreme Court has not decided whether the Sixth Amendment right to compulsory process requires the government to produce exculpatory evidence. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987) (issue "unsettled"). In support of the argument, see United States v. Nixon, 418 U.S. 683, 709, 711 (1974); United States v. Augenblick, 393 U.S. 348, 356 (1969); *Toward a Constitutional Right to an Adequate Police Investigation, supra* note 23, at 844-46; Peter Westen, *The Compulsory Process Clause,* 73 MICH. L. REV. 71, 121-23 (1974).

91. *Toward a Constitutional Right to an Adequate Police Investigation, supra* note 23, at 843-44.

92. *See* sources cited *supra* note 23.

93. These have been funded by the Law Enforcement Assistance Administration of the Department of Justice. The literature includes ECK, SOLVING CRIMES, *supra* note 81; JOHN E. ECK, MANAGING CASE ASSIGNMENTS: THE BURGLARY INVESTIGATION DECISION MODEL REPLICATION (1979); ILENE GREENBERG & ROBERT WASSERMAN, NATIONAL INST. OF LAW ENFORCEMENT AND CRIM. JUST., MANAGING CRIMINAL INVESTIGATIONS (1979); PETER W. GREENWOOD, ET. AL., THE CRIMINAL INVESTIGATION PROCESS (1977); NATIONAL INST. OF JUSTICE, ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY 244 (1983) [hereinafter ARRESTS WITHOUT CONVICTION]; TONY PATE, ET AL.,

thors express no concern for innocent defendants who risk the consequences of sloppy or incomplete investigations. On the contrary, they focus upon investigation practices as they affect police efficiency and conviction rates.[94] Naturally, studies examining the adequacy of efforts to gather and report inculpatory evidence shed only indirect light on police practices relative to exculpatory evidence. Also, for various reasons, the law enforcement studies do not afford a basis for confident generalization.[95] Nevertheless, the results are consistent with the conclusion that the police typically confine investigation and reports to brief statements of inculpatory evidence.

The law enforcement studies describe police investigatory practices as inadequate. Lacking better "objective" measures, the public tends to evaluate police investigation by the number of crimes "cleared" rather than by the number of resulting criminal convictions.[96] This encourages the police to devote primary attention to their order-maintenance duties: responding to incidents promptly, restoring order, and leaving. Patrol officers in busy departments are under constant time pressure to respond to new citizen calls.[97] Therefore, they conduct minimal investigations at the scene,[98] focusing on the "solution" of cases by identifying and arresting a suspect.[99] If no arrest is made, a follow-up investigation, if any, is left to detectives, who—facing a cold trail—may be hampered by deficiencies in the initial report.[100] Patrol officers and detectives are relatively unconcerned with questions such as whether sufficient evidence

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THREE APPROACHES TO CRIMINAL APPREHENSION IN KANSAS CITY: AN EVALUATION REPORT (Police Foundation, 1976); JOAN PETERSILIA, ET AL., THE RAND CORP., POLICE PERFORMANCE AND CASE ATTRITION (1987). For a brief critical history of the literature, see *id.* at 5-6. The major two year study, conducted by the Rand Corporation, is discussed in GREENWOOD, *supra.*

94. *See, e.g.*, GREENBERG & WASSERMAN, *supra* note 93, at 4.

95. Among other difficulties, the studies tend to rely on small, sometimes self-selected samples.

96. *See, e.g.*, LOCAL GOVERNMENT POLICE MANAGEMENT, *supra* note 8, at 211; McIntyre, *supra* note 24, at 226. For purposes of the FBI Uniform Crime Reports, "clearance" is defined as at least one person arrested, charged with commission of the offense and turned over to court for prosecution. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 163 (1990). The concern with clearance filters down to the patrol officer, who may be evaluated on the basis of street "activity," *see supra* text accompanying notes 57-61, even though scholars argue that clearance rates are a poor measure of investigative efficiency. *See* GREENWOOD, *supra* note 93, at 225-29; LOCAL GOVERNMENT POLICE MANAGEMENT, *supra* note 8, at 211.

97. *See* NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON POLICE (1973) (Commentary to Standard 24.1, "Police Reports"); THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 56 (1967).

98. LOCAL GOVERNMENT POLICE MANAGEMENT, *supra* note 8, at 211-12.

99. William F. McDonald, *Prosecutors, Courts, and Police: Some Constraints on the Police Chief Executive, in* POLICE LEADERSHIP IN AMERICA, 203, 207-08 (William A. Geller ed. 1985); ARRESTS WITHOUT CONVICTION, *supra* note 93, at 244.

100. *See* LOCAL GOVERNMENT POLICE MANAGEMENT, *supra* note 8, at 164-67, 218.

exists to file a charge, go to trial, or gain a conviction.[101] Those worries belong to the prosecutor.

The relative indifference of the police to post-arrest proceedings results in inadequate police investigation and the loss of crucial inculpatory evidence.[102] To remedy these problems, some departments have experimented with new methods to improve the quality of police investigations and reports. These include giving patrol officers more time and training to conduct thorough investigations, team policing, and increasing police-prosecutor communications.[103] But, without incentives for police departments to change, some doubt that reforms will succeed.[104]

The widely recognized inadequacy of police investigation practices to serve basic law enforcement goals has strong implications for police treatment of exculpatory evidence. If, generally, the police are insufficiently trained, equipped, and motivated to gather and report crucial inculpatory evidence, then, absent circumstances that cast extreme doubt on the existence of probable cause,[105] they are unlikely to spend time investigating exculpatory leads and recording the exculpatory facts in their possession.[106] Doing so would consume scarce resources and threaten police interests in self-protection and punishment of presumptively guilty individuals.

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101. *See* PETERSILIA, *supra* note 93, at 41 ("the department feels that it is being asked to 'solve crimes.' A solution occurs when an arrest is made. What happens after that is, by law, the responsibility of other agencies."); *see also* WEINREB, *supra* note 21, at 48, *accord.* But see Orfield, *supra* note 19, at 82, 85-90, distinguishing in evidentiary suppression cases between patrol officers, who have relatively little interest in what happens after the arrest, and detectives or police serving in specialized units, who care about convictions. Orfield also distinguishes between police attitudes of indifference toward the success of prosecution in "little" cases (which usually involve patrol officers) as opposed to "big" cases (usually involving detectives or specialized units). *Id.* at 85-90.

102. *See* PETERSILIA, *supra* note 93, at 5; ARRESTS WITHOUT CONVICTION, *supra* note 93, at 218-20, 244-45.

103. *See* ECK, SOLVING CRIMES, *supra* note 81, at 26-29; PETERSILIA, *supra* note 93, at 5-6; GREENBERG & WASSERMAN, *supra* note 93, *passim.*

104. *See* PETERSILIA, *supra* note 93, at 5, 41-42; *see also* GREENBERG & WASSERMAN, *supra* note 93, at 6-7. *But cf.* ECK, SOLVING CRIMES, *supra* note 81, at 28 (increasing investigatory role of patrol officers can increase clearance rates).

105. The fact that the police severely doubt the alleged victim's credibility may not, in the police view, suffice. Professor Uviller's study of New York City police showed that the police were unsure whether they possessed the power to resolve credibility issues against a complainant, and were reluctant to do so in deciding whether to arrest. H. Richard Uviller, *The Unworthy Victim: Police Discretion in the Credibility Call,* 47 LAW & CONTEMP. PROBS. 15, 20-21 (No. 4 1984).

106. WEINREB, *supra* note 21, at 132 (police investigation is "not seriously concerned to uncover information that might ambiguously cast doubt on their conclusions").

2. The Questionnaire

To learn whether my experience of police reports was shared by others, written questionnaires, loosely modeled on the facts of a case I had defended,[107] were administered to a small number of defense attorneys[108] in the same "City One" court where I had practiced as a public defender, and to a small number of defense attorneys,[109] prosecutors,[110]

107. The questionnaire is contained in Appendix A, *infra.* In the actual case, police officers responded to a mid-afternoon radio call about a man with a gun. The victim told them that three unknown black males had robbed him with a hand gun, and one had punched him in the face. The three had fled on foot with his wallet containing $100 and personal papers. Ten minutes later my client, Mr. Bowman, was stopped in the courtyard of a public housing project adjacent to the robbery scene. Police officers brought the victim there and, according to the police report, he identified Bowman as the assailant who had punched him in the face. According to the booking sheet, Bowman had no gun, money, or other property belonging to the victim when arrested.

Bowman insisted to me that he had nothing to do with the alleged robbery, and that the victim appeared to be very intoxicated. According to Bowman, the arresting officer told him that he knew Bowman had not done it, that the victim probably would not show up, and that the judge would let him go.

The 911 recordings revealed that the victim, obviously very drunk, had called from a public telephone. His speech was slurred, rambling, and non-responsive to the operator's attempt to elicit basic information. Although he was calling in broad daylight from a pay telephone located on a major downtown avenue, just outside the entrance to a large supermarket, and in full view of street signs and prominently marked buildings, he was unable to tell the exasperated operator where he was, or to describe any visible landmarks. Finally traced to the location with the help of the telephone company, he was able to describe only one of his three assailants. Bowman's age and clothing differed sharply from the description.

The police report failed to mention the victim's intoxicated condition or his hazy description of his assailants. Nor did it describe either the victim's original broadcast description of his assailants or the defendant's clothing when arrested: spaces in both his report and the booking sheet for describing, respectively, the perpetrator's "special characteristics (including clothing)" and his "scars, marks, [or] other descriptive data" were left blank.

At the scheduled probable cause hearing a month later, the victim failed to appear. The arresting officer confided to me that the victim was very drunk at the time of the incident, but that his identification of Bowman had put the officer in "a bad position," forcing him to arrest Bowman. He predicted that the victim would never show up. Over my objection, the case was continued for two more weeks to give the prosecution another chance to bring in the victim. At the next court appearance, again without the victim, the prosecutor told the court he did not expect ever to be ready for trial, and the case was dismissed.

108. I mailed or handed these questionnaires directly to approximately eight public defenders and four private bar attorneys whom I knew. Ten completed questionnaires were mailed back to me. All questionnaires in the survey were completed anonymously.

109. Six questionnaires were mailed to public defenders and seven to private defense attorneys. Seven completed questionnaires were returned.

110. I sent ten questionnaires to the county District Attorney, who solicited cooperation from prosecutors on his staff. Eight completed questionnaires were returned to me by individual prosecutors.

and "City Two" police officers[111] in a neighboring county ("County Two"). It was also administered to a small number of police officers ("Quantico class") from different states and localities attending a course at the FBI Academy in Quantico, Virginia.[112]

The questionnaire asked whether police reports "usually, sometimes, or rarely" would contain seven potentially exculpatory facts: the victim's initial description of the perpetrator, the victim's intoxication, the names and addresses of bystanders who witnessed the incident, a description of the defendant's jacket and cap when arrested, names and addresses of two persons in the defendant's company at the time of arrest, the defendant's alibi statement to the police, and the companions' statements corroborating the alibi. For each fact, respondents were also asked whether police reports *should* contain the information. Finally, those respondents who said that the police would not usually report any of the specified facts were asked to indicate why they thought that was so.

Although the questionnaire was designed to check my own perceptions rather than to produce scientifically reliable data about police reporting practices and attitudes, the responses revealed three striking patterns. Most surprising was the near-unanimous opinion of the police,[113] as well as of the prosecutors and defense counsel, that police reports should contain all of the specified information.[114] For example, ninety-four percent (16/17) of the police respondents said that the report should contain the alibi statements made by the defendant and his witness at the arrest scene, as well as the names and addresses of the two persons defendant was with when arrested; eighty-eight percent (15/17) said it should contain the victim's initial description of the perpetrator, names and addresses of witnesses, and a description of the defendant's clothing; and eighty-two percent (14/17) said that it should mention the victim's intoxication.[115]

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111. City Two is the largest city (pop. 85,000) in a mostly suburban county (pop. 616,000). The lieutenant in charge of training distributed ten questionnaires to officers in the City Two department, and returned eight completed questionnaires to me.

112. Eleven of the thirteen officers in the class completed the questionnaires, from which I eliminated two completed by foreign nationals. The Quantico class respondents were all police administrators or supervisors of the sergeant rank, with substantial prior field experience.

113. These included both the County Two police and the Quantico class. In general, the responses of the two police groups to all questions were substantially similar. *See* Tables *infra* accompanying notes 121-30 and in Appendix B.

114. In County Two, 93% of the police, 100% of the prosecutors, and 98% of the defense attorneys said that police reports should contain all of the specified information. 98.75% of the City One defense lawyers, and 86% of the Quantico sample agreed.

115. *See infra* Appendix B, *Table: Combined Police Responses: County Two and Quantico Class.* All of the prosecutors and all but one defense attorney thought that all of the facts should be included.

Also striking was the consistent pattern of disagreement between the different groups about whether, in practice, exculpatory facts would be reported. Typically, the police were most likely to say that the report would contain exculpatory details, and defense counsel were least likely to say so. Prosecutors were generally in between, agreeing with the police about some exculpatory facts and with defense counsel as to others.[116] Thus, on average for the seven hypothetical facts, eighty-three percent of the County Two police respondents said that the report would "usually" contain the information.[117] The comparable figures for County Two prosecutors were forty-eight percent, and for County Two defense attorneys, thirty percent.

Finally, City One defense attorneys consistently expected to find less exculpatory information in reports than defense attorneys in County Two. This tended to confirm my own experiences with City One police reports, and to suggest that police reporting practices differ in different departments.[118] As one County Two defense attorney commented, "[d]ifferent police departments report arrests differently. The [City One] Police Department gives almost nothing, whereas [smaller] towns write dissertations . . . ." In fact, City One officers, who in some areas write up to twenty incident reports a night, are given only twenty minutes to write an incident report, and must ask their supervisor for extra time if needed.[119] By comparison, City Two patrol officers write two or three incident reports in the same period, and have at least until the end of their shift to complete the reports.[120] Thus, heavier demands on the police in a larger city leave less time for writing detailed reports.

The following illustrative table gives responses to three of the seven questions by all County Two respondents and by City One defense attorneys:

116. For the reasons why defense attorneys would experience more one-sided reports, see *supra* note 40.

117. The comparable average for the Quantico class was 86%.

118. For a more detailed comparative study of reporting practices in two jurisdictions, see *infra* text accompanying notes 268-72.

119. Interview with City One writing instructor, *supra* note 30.

120. Interview with anonymous training instructor, City Two Police Department, in City Two Police Dept. (July 30, 1991).

TABLE

		WOULD IT BE INCLUDED?			
QUESTION	PEOPLE RESPONDING	(YES) IT SHOULD BE INCLUDED	USUALLY	SOMETIMES	RARELY
Question 1: Victim's initial description of perpetrator					
	City Two Police	7/8[121] (87.5%)	8/8[122] (100%)	0	0
	County Two Prosecutors	8/8 (100%)	7/8 (87.5%)	1/8 (12.5%)	0
	County Two	7/7	5/7	11/7	1/7
	City One	10/10	3/10	4/10	3/10
Question 2: Victim's Intoxication					
	City Two Police	6/8[123] (75%)	5/8[124] (62.5%)	1/8[125] (12.5%)	2/8[126] (25%)
	County Two Prosecutor	8/8 (100%)	1/8 (12.5%)	6/8 (75%)	1/8 (12.5%)
	County Two Defense Counsel	7/7 (100%)	1/7 (14%)	4/7 (57%)	2/7 (29%)
	City One Defense Counsel	10/10 (100%)	0	3/10 (30%)	7/10 (70%)

121. Quantico Class response: 8/9 (89%).
122. Quantico Class response: 9/9 (100%); all police: 17/17 (100%).
123. Quantico Class response: 8/9 (89%).
124. Quantico Class response: 7/9 (78%); all police: 12/17 (71%).
125. Quantico Class response: 2/9 (22%).
126. Quantico Class response: 0/9 (0%).

		WOULD IT BE INCLUDED?			
QUESTION	PEOPLE RESPONDING	(YES) IT SHOULD BE INCLUDED	USUALLY	SOMETIMES	RARELY
Question 7: Other person's statement supporting defendant's alibi?					
	City Two Police	8/8[127] (100%)	7/8[128] (87.5%)	1/8[129] (12.5%)	0[130]
	City Two Prosecutor	8/8 (100%)	2/8 (25%)	6/8 (75%)	0
	City Two Defense Counsel	7/7 (100%)	0	4/7 (57%)	3/7 (43%)
	City One Defense Counsel	9/10 (90%)	0	0	10/10 (100%)

In sum, the questionnaire responses suggest that: (1) police subscribe formally to the norm that reports should include exculpatory facts; (2) in the police view, their conduct substantially conforms to the agreed norm; and (3) in the view of prosecutors and defense attorneys, police practice substantially departs from that norm, to a greater or lesser extent depending upon the department and the respondent's role in the system.

That police might articulate a policy and practice of reporting all the relevant facts, including exculpatory facts, while neglecting to do so in practice, is understandable in light of their training, to which we now turn.[131]

3. Training Materials and Instruction

To learn about police attitudes regarding the function of police reports and the perceived importance of investigating and reporting exculpatory information, I reviewed report forms and training materials from

127. Quantico Class response: 8/9 (89%).

128. Quantico Class response: 7/9 (78%); all police: 14/17 (82%).

129. Quantico Class response: 2/9 (22%).

130. Quantico Class response: 0/9 (0%).

131. For another instance where police claims of compliance with legal norms proved inconsistent with observations of other knowledgeable actors, see Orfield, *supra* note 19, at 81-82 (first study, based on interviews with Chicago police, convinced author that "police perjury at suppression hearings is a minor problem"; subsequent study, based on interviews with Chicago prosecutors, defense lawyers, and judges disclosed pattern of "pervasive police perjury").

six police agencies in several states.[132] Interviews were also conducted with administrative or training staff from three of the departments. Based on these modest inquiries, I conclude that police are trained to ignore exculpatory facts, except when they clearly negate probable cause (in which case, presumably, no arrest will occur). This lesson is not taught explicitly; rather, it is inferred from things said and left unsaid.

Report writing is considered an important skill to which some police academies devote substantial training time.[133] Recruits are taught the proper way to complete departmental incident and arrest forms. These consist both of boxes requiring specific items of information, and a narrative portion. Instruction, based on detailed training manuals and classroom exercises, covers topics ranging from style, spelling, and grammar to the proper description of scars and tattoos.

Training materials also instruct patrol officers to take detailed field notes, erring on the side of recording all details, and the names and addresses of all witnesses.[134] Field notes form the raw material for reports, but not all facts recorded in field notes are necessarily reported.[135] Officers are taught to write "complete" and "accurate" reports of "all relevant information."[136] These instructions would seem to require the reporting of exculpatory facts. But that conclusion is undermined by

132. These were the police departments of City One and City Two, and of Atlanta, Chicago, and Detroit. I also reviewed the statewide Report Writing Handbook published by the Massachusetts Criminal Justice Training Council, *see infra* note 136, and, courtesy of Lt. Samuel T. Ragland, University of Arizona Police Dept., I reviewed the Report Writing Manual co-edited by him, and published by the Arizona Law Enforcement Training Academy. That manual is intended for use by all Arizona law enforcement agencies. *See* Arizona Law Enforcement Training Academy, Report Writing Manual (1988) (on file with author) [hereinafter Arizona Report Writing Manual].

133. In City One, recruits receive 44 hours of instruction in report writing (38 basic, 6 on use of force), plus later in-service training. In Atlanta, the basic course is 12 hours. The Arizona Basic Training program requires cadets to pass a 45 hour course in report writing to graduate.

134. For example, Atlanta recruits are told: "Don't be afraid of making your notes too complete. . . . Everything pertinent, including the state of the weather, starts out in your notes and winds up in one form or another in your report." Atlanta Police Dept., Preliminary Inquiry, Field Notes and Police Reports 14 (rev. Sept. 1990) (unpublished materials, on file with author) [hereinafter Atlanta Preliminary Inquiry]; *see also* Arizona Report Writing Manual, *supra* note 132, at 7-2 (notes should be complete and detailed).

135. *See, e.g.*, Atlanta Preliminary Inquiry, *supra* note 134, at 9; City One Police Department, Rules and Procedures Manual (on file with author) (patrol officer is "encouraged to keep a private record of his work, noting all matters of importance in which he is engaged in his official capacity").

136. In Massachusetts, for example, the report should be "complete: as full an account as possible." Massachusetts Criminal Justice Training Counsel, Report Writing Handbook 6 (1986); *see also* REPORT ON POLICE, *supra* note 97, at 571 (Commentary to Standard 24.1, "Police Reporting," provides that police departments "should require that all relevant criminal information be reported."); Atlanta Preliminary Inquiry, *supra* note 134, at 14.

other, more subtle aspects of most of the examined training materials, namely: (1) the omission of exculpatory facts from the specific, affirmative categories of what should or must be reported; (2) an emphasis on the need for self-protection; and (3) a tone of partisanship.

In most of the training materials, exculpatory facts are excluded from reportable information by a process of negative inference. With the exception of Atlanta,[137] none of the report forms examined specifically calls for any exculpatory facts, such as the victim's intoxication or the defendant's alibi. An officer could report such information in the narrative portion. However, officers are generally[138] instructed to write concise narratives eliminating "irrelevant" and "unnecessary" information. But what information is "relevant" and "necessary"? By implication, it seems, exculpatory evidence does not qualify.[139]

For example, the City One manual for completion of incident reports addresses "What Goes In and What is Left Out of the Narrative?"[140] "In" includes "whatever is necessary to get evidence into court," elements of all the crimes alleged, the names and addresses of "everyone," and anything that "justifies some subsequent [police] action" or aids in future investigation of the crime. "Out" is other behavior which neither qualifies as "in" nor fulfills some other specified purpose of the report.[141]

The failure of otherwise comprehensive and detailed training materials to address the proper treatment of exculpatory facts also implies their "irrelevance." It cannot be rare for officers to encounter, for example, a victim whose original description of the assailant differed from that of the arrestee whom was later identified. But the training materials I reviewed give no explicit instruction on whether to record and report the discrepancy.

At the same time, these materials stress the importance of proper note-taking and report-writing to protect individual officers and the department from criticism or civil liability. For example, the Chicago Police Department's Field Reporting Manual teaches that reports are needed to "protect the Department and the officer handling the investigation from unwarranted accusations that improper police action was taken or that no service was rendered."[142] This concern might undermine any inclination to record or report exculpatory facts.

137. Exceptionally, the Atlanta offense report form has a box for "victim sobriety," requiring a check for "Sober," "Drinking," or "Drunk." City of Atlanta Department of Police, Offense Report (unpublished material, on file with author).

138. The Arizona training materials encourage a more detailed report. *See infra* note 143.

139. *See Palmer, infra* at text accompanying notes 189-90 (what is "pertinent" information varies from one detective to another).

140. City One Introduction to Incident Reporting, *supra* note 26.

141. *See supra* text accompanying notes 25-26.

142. Chicago Police Department, Chicago Police Department Field Reporting Manual—General Reporting Instructions, ¶ I(C)(6) (rev. Dec. 1985) (unpublished

Other protective concerns are reflected in training materials that teach the use of paraphrases or approximations instead of the exact words used by a witness.[143] For example, the Chicago Police Department's training materials direct officers to "[r]ecord all descriptions concerning possible offenders as approximations," and to "[r]ecord information learned from witnesses as 'in summary it was determined from Mr. . . .' or 'the facts in essence are . . . .'"[144] Similarly, the City One Police Department instructs officers to record the time of the offense, distances, and a non-arrested suspect's age, height, or weight in approximate ranges rather than in exact figures.[145] A suspect's weight, for example, should be estimated in ten pound increments, e.g., 140-150 lbs.

Several justifications are offered for these practices. One is the belief that the witness's own words, spoken under stress, will likely be unclear and, as to some matters, can only be approximations. By not recording them, the officer deprives defense attorneys of an "unfair" opportunity to conduct possibly damaging cross examination.[146] Another justification for withholding details from the report is to avoid the risk that media publicity will threaten the integrity of ongoing investigations and victim

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training materials of the Chicago Police Department, on file with author) [hereinafter Chicago Field Reporting Manual]; *see also* DONALD O. SCHULTZ, THE POLICE AS THE DEFENDANT 21 (1984) (advising writing reports in "great detail" if it appears that a [civil] lawsuit might arise from the situation).

143. An extreme version of this practice is found in City One, where patrol officers who initially respond to sexual assaults are forbidden to investigate or report specifics of the sexual assault; details volunteered by the victim must be omitted from the incident report. City One Police Academy, Training Bulletin (unpublished material, on file with author). The given rationale for prohibiting detailed questioning of the victim is that patrol officers lack the special skills needed to minimize further traumatization of the victim. The rationale for prohibiting the reporting of volunteered statements is unclear. State law governing City One protects the confidentiality of police reports of sexual assaults.

In contrast to the other training materials I reviewed, the Arizona materials stress the importance of writing specific, detailed reports. These materials also approve the practice of taking detailed statements from witnesses, and to note (but not necessarily in the report) whether the witness statement "conflicts with or substantiates other statements made by the victim, the suspects, or other witnesses." Arizona Report Writing Manual, *supra* note 132, at 8-8 & apps.

144. Chicago Field Reporting Manual, *supra* note 142, ¶ VI(C)(2)-(3); *see also* City One Introduction to Incident Reporting, *supra* note 26, at 20 ("Your job is to listen carefully and assist the victim in recalling the details of the event. When you believe you have gathered all pertinent information, *repeat what you have learned to the victim in your own words.* This is called 'paraphrasing.' If you and the victim are in agreement, you are ready to begin your report.") (emphasis added).

145. City One Introduction to Incident Reporting, *supra* note 26, at 6, 12.

146. Interview with anonymous instructor, City One Police Academy, in City One Police Academy (July 2, 1991) [hereinafter Interview with City One instructor]. "The police don't want a defense attorney to be able to argue, 'You said he was 5'9" and the defendant is 5'11.'" *Id.* *See infra* text accompanying notes 289-90.

privacy.[147] Even if one were persuaded by these concerns, in effect the practice substitutes a police description of events for the witness's own, and risks the loss of exculpatory details.

Finally, none of the training materials addresses the importance of investigating, recording, or reporting exculpatory facts to avoid punishment of a possibly innocent arrestee. On the contrary, the materials reflect a psychological set in which the arrestee's guilt is presumed, and the only use of notes and reports in the criminal process is to ensure conviction.[148] In this view, there is no thought that accurate notes might clear an innocent suspect, and the only value of defendant's exculpatory statements lies in their falsehood.[149] Correspondingly, potential defense uses of deficient reports are presented as tactics to free a guilty person.[150] For example, the Atlanta materials discuss the advantages and disadvantages of using a loose-leaf versus spiral bound field notebook:

> The loose-leaf notebook allows the officer to take only those notes relevant to a case into court, but the defense attorney can claim that the notes are incomplete or imply that the officer removed or lost some pages. The bound kind reduces the claim of incompleteness, but the defense attorney can look through all your notes whether or not the notes have anything to do with the case.[151]

By implying that police must anticipate and defend against partisan use (perceived as misuse) of police notes and reports by the defense, this sort of instruction encourages a "strategic" approach to report-writing as a means to prevent embarrassment, civil liability, or loss of the prosecution's case. Indeed, researchers have found that some police believe that detailed reports will, through defense discovery, "facilitate the impeachment of prosecution witnesses, frequently policemen," and that police should therefore communicate details orally to prosecutors.[152] In this connection, a report-writing instructor at City One Police Academy ex-

147. We learned of a debate within the City One Police Department between those who support the current policy that "everything should go into the report" and those who advocate putting only a sketch of the crime into the report. Advocates of the latter view argue that media access to reports, which are public records in the state, poses the key threat. Interview with City One instructor, *supra* note 146.

148. *See, e.g.*, INTERNATIONAL ASS'N OF POLICE CHIEFS, TRAINING KEY NO. 46, FIELD NOTE TAKING 1-2 (1966) ("Evidence to establish proof of guilt is difficult enough to obtain without further weakening a case by failing to testify accurately and effectively. . . . The officer's notes can help the witness to recall what he said, or can be used to counteract the denials of a reluctant witness or the accused.").

149. McDonald, *supra* note 99, at 208 (sometimes police do not transmit information, "such as false exculpatory statements . . . because it is not recognized as having any evidentiary value.").

150. Thus, for example, a poorly written report "give[s] the defense attorney something to use to try to confuse your testimony." Arizona Report Writing Manual, *supra* note 132, at 5-1.

151. Atlanta Preliminary Inquiry, *supra* note 134, at 11-12.

152. GREENWOOD, *supra* note 93, at 172 n.3; McDonald, *supra* note 99, at 208. I suspect that this belief is widespread in some departments.

plained to an interviewer that, while "of course we have to document anything that is exculpatory," knowledge of the fact that defense attorneys will read the report definitely "affects the way the report is written."[153] As an extreme example, the City One Department changed the criteria for answering one question on the incident report form, solely in response to regular defense exploitation of an apparently exculpatory response.[154]

D. *Summary*

In this Part, I have explored the reasons for inaccurate or misleading police reports. They can be understood both by looking at the functions that reports serve for the police, and by looking at police culture and practices. Deliberately false and misleading reports, which probably account for only a fraction of misleading reports, are best viewed in the wider context of police work, where lying is widely tolerated, if not accepted, as a response to various individual and institutional pressures. A more common reason for misleading reports is probably the failure to report exculpatory evidence: the literature, questionnaire responses, and training materials suggest a disparity between the announced rules (report "all relevant information") and the working rules (report only inculpatory evidence).[155] The revealed pattern of superficial, one-sided reporting, hostile to the inclusion of exculpatory evidence, is understandable in light of the fact that the police design reports to meet their own needs, without particular concern for the needs of other actors in the criminal justice system. But when the latter receive police reports uncritically, as if they were balanced and objective accounts of the facts, innocent defendants suffer. As I argue in the next Part of this paper, this may occur quite often, at various stages of the criminal process.

153. Interview with City One instructor, *supra* note 146. Training materials uniformly remind officers to "keep the audience [for reports] in mind," an audience that expressly includes, inter alia, defense attorneys and the media. In Chicago, recruits are informed at the outset of the Illinois Supreme Court Rule permitting defense discovery of police notes, reports, memoranda, etc. Chicago Field Reporting Manual, *supra* note 142, ¶ I(A)(3).

154. Previously, if a suspect's name and address were unknown, police were told to answer "no" to the incident report question, "[c]an the suspect be identified at this time?" This served the question's original purpose, to steer scarce investigative resources to the most "solvable" crimes. Because of defense counsels' use of "no" responses to impeach witness credibility at trial, now the police are told to answer "yes" if a witness says he can recognize the suspect. In sexual assault incident reports, patrol officers are instructed to answer "yes" "regardless of how little information the victim can recall." City One Police Academy, Training Bulletin (unpublished material, on file with author).

155. On the distinction between "formal rules" and "working rules" in police work, see Mike McConville, *Videotaping Interrogations,* 1992 CRIM. L. REV. 532, 535 (police practices are based not so much in the official rules as in police-generated "working rules" which control "in situations where officers believe that their job 'cannot be done by the book.'").

III. Impact of Misleading Police Reports on the Criminal Justice Process

Police reports can affect the criminal process because, at various stages, the report, rather than the officer's personal knowledge of the events reported, "come[s] to stand for the reality of what happened."[156] This happens often because the patrol officers and detectives who write the reports are unavailable when criminal justice personnel must make decisions. Relying on the report is faster and cheaper than finding the officer and arranging an interview. Also, the police, responding to their own personal and organizational imperatives, sometimes ignore or balk at interview requests by prosecutors, probation officers, and defense attorneys. Finally, reports become important because, especially in minor cases, police and other witnesses might have little or no independent memory of the events reported. As the primary record of the underlying facts, the reports are used weeks, months, or years after the incident to refresh their memory prior to testifying. (They also serve to corroborate or impeach such testimony).

Jones v. City of Chicago,[157] offers a particularly egregious example of how false police reports, and reports that omit important exculpatory facts, can adversely affect the defendant. Reports may vitally affect official decisions such as charge selection, whether to release the defendant pending trial, decisions on mental health status, plea-bargaining, and probation revocation. Police reporting practices also determine the defendant's access to exculpatory evidence, whether by subpoena, routine discovery motions, or prosecutorial initiatives under *Brady*.[158]

Charge Selection

As in *Jones*, a report may influence charge selection by providing the basis of probable cause to support particular charges. In jurisdictions where initial charge screening relies primarily on the police report,[159] a report that exaggerates the defendant's guilt can lead to overcharging. This, in turn, can cause a judge to set higher bail, or—by increasing the risk of conviction at trial—coerce the defendant to plead guilty to a lesser offense.[160] Consider the following case, where the officer's technically

156. Ericson, *supra* note 9, at 96.

157. 856 F.2d 985 (7th Cir. 1988); *see supra* text accompanying notes 1 to 7.

158. Brady v. Maryland, 373 U.S. 83 (1963).

159. In Massachusetts, for example, the initial charging document, the "complaint," may be issued by a clerk-magistrate based on a police application specifying charges selected by the latter. Typically, the application consists of an abbreviated version of the police incident report. *See* Stanley Z. Fisher, *Complaints and Indictments, in* 1 Massachusetts Criminal Defense § 4.2(A) (Eric D. Blumenson ed., 1990 & Supp. 1992). In practice, clerk-magistrates do not screen police applications for probable cause if the alleged perpetrator has been arrested. *Id.*

160. *See infra* text accompanying notes 194-99.

accurate but misleading description led to overcharging and consequent hardship for the defendant.

JACKSON'S CASE: THE ASSAULTED NURSE[161]

> Mr. Jackson, a homeless, thought-disordered client, sought treatment one cold night for "frostbite" in the City Hospital Emergency room. After a frustrating wait, Jackson had an argument with a nurse, which resulted in his arrest. According to the police report, Jackson "assault[ed]" the nurse "by hand to face."[162] He was charged with assault and battery. Jackson was committed to a locked psychiatric facility for twenty days to determine his mental competence and criminal responsibility. When I interviewed him, he admitted having an argument with the nurse but denied striking her. The arresting officer confirmed to me during a telephone conversation that Jackson never hit the nurse; the report's language, "hand to face" meant to describe only a threatening motion.[163] After six weeks of incarceration, and six court appearances over a ten month period, we were able to get the charges dismissed.

Even in jurisdictions where prosecutors conduct pre-charge screening, including interviewing the police officer and the victim,[164] the prosecutor might not have the time or ability to discover the relevant facts needed to correct misleading impressions created by a sketchy, one-sided report.[165]

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161. To protect confidentiality, all names of clients, victims, and police, and some location names, have been changed.

162. The report also alleged that the defendant had been removed and escorted off hospital property three times that night, was disorderly in the Emergency Room and Nursing Station, and had kicked the arresting police officer; these allegations resulted in additional charges of disorderly conduct and assault and battery (against the officer) with a dangerous weapon (to wit, a "shod foot"). The officer in question was notorious for charging his "disorderly" arrestees with the latter offense. I do not believe that either of these two charges influenced the disposition of Jackson's case at any stage. Rather, official concern focused on the alleged striking of the nurse.

163. The misleading report might have resulted from carelessness. The arresting officer's terminology, "assault . . . hand to face," was technically correct but ambiguous. Why the officer applied for an assault and battery complaint, rather than one for simple assault, is a matter of speculation; he might have acted out of ill will, but ignorance of the criminal law seems as likely. This officer was a hospital security guard, not a city police officer. The harsh consequences for Jackson flowed from an inefficient, almost Kafkaesque screening process: pro forma issuance of the complaint by a clerk, the officer's failure to appear in court on any of the scheduled dates, and the complete absence of communication between the officer and the rotating prosecutors who handled the file. In a system struggling to stay afloat in a massive tide of cases, "minor" cases like Jackson's do not get much attention.

164. *See* 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.4(f) (1984 & Supp. 1991).

165. *See e.g.*, DAVID HEILBRONER, ROUGH JUSTICE 27-30 (1990); WEINREB, *supra* note 21, at 57-59 (on the sole basis of police report, prosecutor brings the most serious plausible accusation); GREENWOOD, *supra* note 93, at ch. 11, discussed *infra* at text accompanying notes 268-72 (in study of two California jurisdictions, the one with less detailed police reports experienced more dismissals and charge reductions).

BAIL

Prosecutors and judges may rely heavily upon police reports in bail decisions. If, as was true in *Jones*, the report exaggerates the evidence of guilt, unjustifiably high bail may be set.[166] In the court where I served as a public defender, typically neither the arresting officer nor the victim was present at the arraignment, and the police report thus became the exclusive source of factual information to support the defendant's arrest. In Jackson's case,[167] for example, neither the officer nor the victim ever appeared in court, but no official was willing to agree to the defendant's release until the misleading nature of the police report was firmly established.[168]

MENTAL EVALUATIONS

Police reports—and the charges based on those reports—may also influence mental health professionals conducting court-ordered examinations to assess the defendant's criminal responsibility or dangerousness. The judge in Jackson's case, discussed above,[169] influenced by the misleading police report and the inflated charge of assault and battery on a nurse, committed Jackson for twenty days to an inpatient facility for examination of his competency and criminal responsibility. Based partially on the same incorrect belief that Jackson had slapped the triage nurse, the examining psychologist concluded that Jackson was dangerous and required a further commitment for thirty days to determine whether it would then be safe to release him to the community.[170] The second hos-

166. *See* Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988), discussed *supra* at text accompanying notes 1-7. In *Jones*, the prosecutor used a police report that was "full of falsehoods" and that omitted important exculpatory information, to obtain a $250,000 bond for the teenaged murder suspect, who was brutalized in jail for a month before the bond was reduced.

167. *See supra* text accompanying notes 161-63.

168. At Mr. Jackson's arraignment, for example, the judge replied to defense counsel's plea for Jackson's release on personal recognizance with the comment, "I don't release people who slap nurses." Most of Jackson's pretrial detention occurred in hospital settings, under statutes permitting court-ordered commitment for psychiatric examination.

Another client, Mr. Bowman, see *supra* note 107, only narrowly escaped detention because of the one-sided report. When arrested, he was on probation for an intrafamily assault and battery conviction. The prosecutor recommended substantial cash bail, which would normally be imposed for an armed robbery with injury to the victim and a "prompt identification." Fortunately, we were able to get Bowman's probation officer to help persuade the judge to release him on personal recognizance. Had Bowman been before a less open-minded judge, if his probation officer had been unavailable, or if his relationship with her had been less satisfactory, he might well have been jailed during at least part of the three weeks it took to get the charges dismissed.

169. *See supra* text accompanying notes 161-63.

170. I learned this from the examining psychologist when I informed him of the actual criminal allegations after he had completed his report. However, his report

pital report concluded that Jackson could safely be released to the community for outpatient treatment, and he was. One cannot know whether—given a more accurate police report—the defendant might have avoided all or part of the six weeks he spent in locked psychiatric wards.

Evidentiary Hearings: Grand Juries, Preliminary Hearings, and Trial

Because grand jury indictments usually may rest on hearsay testimony,[171] a misleading police report could influence a grand jury to indict when it otherwise would not. This might occur, for example, if a police witness without direct knowledge of the facts testifies on the basis of the report, unaware of important exculpatory facts omitted from it.[172] At a preliminary hearing or trial, on the other hand, a police report, if offered by the government, might be inadmissible as hearsay.[173] But the report can be used to impeach a testifying officer's credibility.[174] This possibility discourages the police from testifying inconsistently with statements included in the report. By the same token, a report's silence as to exculpatory information frees police witnesses to "forget" or deny the information's existence. Thus, in *Jones v. City of Chicago*,[175] the suppression of Detective Laverty's and other reports describing Purvy's shaky

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also cited two incidents in the hospital in which staff reported that Jackson had acted violently. One of the incidents, in which Jackson allegedly "jammed [a] fork in [a silverware] basket in a manner that was seen as an attempt to injure staff," probably also influenced the report's conclusions, and clearly influenced the court to commit Jackson for further examination. The psychologist also concluded that Jackson was incompetent to stand trial and was not criminally responsible for his alleged criminal conduct.

171. 2 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 15.4(a)-(d) (1984 & Supp. 1991).

172. In most jurisdictions the government has no duty to reveal the existence of exculpatory evidence to the grand jury. LaFave & Israel, *supra* note 171, § 15.4(d); United States v. Williams, 112 S. Ct. 1735 (1992) (federal courts lack inherent "supervisory power" to require prosecutors to reveal the existence of substantial exculpatory evidence to the grand jury).

173. A police report might be inadmissible, at least if its maker does not testify, as offensive to the defendant's constitutional right to confrontation. This concern underlies the exclusion in criminal cases, under Federal Rule of Evidence 803(8)(B), of "matters observed by police officers and other law enforcement personnel" from admission as public records, *see* Fed. R. Evid. 803(8) advisory committee's notes, 56 F.R.D. 312, 313, or under other hearsay exceptions, *see* United States v. Oates, 560 F.2d 45, 63-77 (2d Cir. 1977), except, perhaps, if the reports concern only "routine nonadversarial observations." *See* United States v. Hernandez-Rojas, 617 F.2d 533 (9th Cir. 1980); 2 Charles T. McCormick, McCormick on Evidence § 296 (John W. Strong ed., 4th ed. 1992).

174. A retired Boston police officer boasted to my colleague David Rossman that he used to bring his field notes to the witness stand, hidden inside his hat. To guard against impeachment by a sharp-eyed defense attorney, he wrote his notes in Gaelic.

175. 856 F.2d 985 (7th Cir. 1988); *see supra* text accompanying notes 1-7.

identifications of Jones enabled Purvy to make a "positive identification" of defendant at trial. The suppression of these reports also allowed an assistant state's attorney, who had witnessed Purvy's "yes, no, yes, no" identification, to testify that Purvy's identification of George Jones "was the best identification he had ever seen."[176] Unless every such defendant has a Detective Laverty waiting in the wings, tragic injustice can result.

Defense Investigation and Strategy

Defense attorneys also may be dependent upon police reports in several ways. Because police investigate the case first, and often have the sole opportunity to gather and record crucial facts, defense counsel may have no comparable source to learn what happened. This is true especially for lawyers representing indigent clients, who frequently lack prompt or easy access to independent investigative services.[177] If discoverable at an early stage, the police report also gives defense counsel insight into the strength of the government's case, and facilitates (or, by silence, obstructs) prompt defense investigation of the case. The report can also influence important defense decisions such as whether to seek early disposition of the case by plea negotiation, or to bring certain pretrial motions.

Discovery: The Chicago Police Department's "Double File" System

By controlling what information goes into reports and what stays out, the police are able to control access to exculpatory evidence by both prosecutors[178] and defense attorneys.[179] The Chicago Police Department's reporting practices, as revealed in *Jones* and in *Palmer*,[180] illustrate this. The practices also reflect the general pattern described earlier:[181] customary disregard of exculpatory facts in the face of formal policies requiring "complete and accurate" reporting.

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176. *Id.* at 990.

177. *See* John M. West, Note, *Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of* Ake v. Oklahoma, 84 Mich. L. Rev. 1326 (1986); *Toward a Constitutional Right to an Adequate Police Investigation, supra* note 23, at 836, 852-53. For a similar observation about the defense plight in England, see Patrick O'Connor, *Prosecution Disclosure,* 1992 Crim. L. Rev. 464.

178. *See, e.g.,* Jones v. City of Chicago, 856 F.2d 985, 993 (7th Cir. 1988) (police may have "systematically concealed" exculpatory information from prosecutors); Palmer v. City of Chicago, 562 F. Supp. 1067, 1071 (N.D. Ill. 1983), *rev'd,* 755 F.2d 560 (7th Cir. 1985) (Chicago prosecutors may have been unaware of the city-wide existence of street files).

179. New York City prosecutors only recently discovered a Police Department practice of generating intra-departmental "unofficial" "confidential" reports that were not disclosed to prosecutors. *See* People v. Young, 591 N.E.2d 1163, 1165 & n.* (N.Y. 1992).

180. *Palmer,* 562 F. Supp. at 1072.

181. *See supra* Parts II(C)(2)-(3).

The police in *Jones* had gathered substantial exculpatory evidence. They had also recorded this information in notes and memoranda. Yet, these documents were not produced in response to several defense subpoenas for Chicago Police Department (CPD) records, including one requesting "[a]ny and all police reports, arrest reports, . . . supplementary reports, witness statements, . . . or written memorandum of any kind" concerning the crime.[182] Nor were they produced in response to discovery motions requesting exculpatory information under *Brady*. The reason for nonproduction, learned only as a result of Detective Laverty's disclosures, lay in the CPD's "double file" system. Laverty's reports, and other exculpatory documents like the one describing Purvy's "Anderson" interview, were placed:

> not in the police department's regular files but in its 'street files.' These were files that the police did not turn over to the state's attorney's office as they did with their regular investigative files. As a result, the street files were not available to defense counsel even if they contained exculpatory material.[183]

Before Laverty's revelations, the Chicago criminal defense bar had been unaware of the need to draft subpoenas and discovery requests broadly enough to encompass documents not contained in regular police files.[184] Nor had the State's Attorney's Office, in response to discovery motions, tried to learn whether any investigative documents existed outside the regular files.[185]

Upon learning of the practice from Jones's trial, attorneys brought a class action in federal court (*Palmer*) to discover exculpatory information in "street files" for already-convicted plaintiffs and for those awaiting trial.[186] In district court hearings, details of the CPD double file system emerged. Detectives investigating violent crimes recorded the results of their investigations in both "unofficial reports" (such as detectives' notes, witness statements, incident worksheets, and intra-departmental memoranda), and "official reports" (such as standardized incident reports). Only the latter were transmitted to the CPD Records Division, and given file numbers, and only they were produced in response to subpoena requests for "'any and all' documents." Unofficial Reports ("street files") were kept at the Areas's detective facilities.

Although the existence of Unofficial Reports was well known within the Department, the CPD "took no official cognizance of and had no official policy" concerning them, and established "no uniform practice

182. *Palmer*, 755 F.2d at 562.

183. *Jones*, 856 F.2d at 989.

184. *Palmer*, 562 F. Supp. at 1071.

185. *Id.* at 1072.

186. *See id.* at 1068-72.

. . . as to [their] preparation, retention, use or storage . . . ."[187] The Department's policy was:

> that all official reports prepared in the course of a violent felony investigation must be complete and accurate; that is, such reports must contain all information known to the preparer(s) which pertains to the offense or to the person(s) accused thereof.[188]

However, it was conceded, "[w]hat's pertinent to one [detective] might not be to another."[189] In practice:

> Official Reports have sometimes been prepared from the perspective of what fits the preparer's concept of the crime, so they omit information that—though highly relevant and sometimes exculpatory of the defendant charged with the offense—the preparer does not deem "pertinent."[190]

Although the federal district court ordered the CPD to cease using double files, its order was reversed by the Seventh Circuit Court of Appeals.[191] Whether the double file system persists in Chicago to this day is unclear.[192]

Plea Bargaining and Sentencing

Because many more convictions result from guilty pleas than from trials, the greatest impact of inaccurate or incomplete police reports is on the plea-negotiation process. In theory, the defense attorney has the duty to conduct a thorough, independent factual investigation before advising the defendant whether to plead guilty or go to trial.[193] In practice, however, many defendants plead guilty without any meaningful defense investigation.[194] Also, because the police do not generally conduct a follow-up investigation after a case has been "cleared" by arrest,[195] the initial police

187. *Id.* at 1070.
188. *Id.*
189. *Id.* at 1070 n.3.
190. *Id.* at 1070.
191. *See infra* text accompanying notes 212-14.
192. *Compare* Jones v. City of Chicago, 856 F.2d 985, 989 (7th Cir. 1988) ("the practice was discontinued following [the] class-action suit") *with* Orfield, *supra* note 19, at 102 ("virtually impossible to know" whether dual file system still exists).
193. Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (defense counsel has a duty to conduct reasonable investigation); ABA Standards for Criminal Justice, Std. 4-4.1 (2d ed. 1980 & Supp. 1986).
194. A study of indigent representation in New York City shows that this is blatantly true for defendants represented by appointed private attorneys, who lack free access to investigative services, but less true for public defenders, who do have such access. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. Rev. L. & Soc. Change 581, 761-66, 770-74 (1987). *See also* Malcolm M. Feeley, The Process is the Punishment 10 (1979); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179 (1975); Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. Rev L. & Soc. Change 137, 140-44 (1986) (reasons for pleas without investigation).
195. *See supra* text accompanying notes 96-101.

report may be the principal "objective" source of facts influencing the prosecutor in plea negotiations[196] and providing the factual basis required for a valid guilty plea.[197] To the extent that a report misstates or exaggerates the evidence inculpating the defendant, it can coerce him to plead guilty to a crime he did not commit.[198] Furthermore, a police report can exert influence long after the case ends, when an offender's record becomes relevant for purposes of sentencing for new offenses. In this way, a report that exaggerates the offender's culpability might result in increased punishment years later.[199]

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196. "[I]n the typical case, both the prosecution and the defense must form an impression of the facts from a cold [prosecutor's] file, a sketchy (and sometimes illegible) police report, and a hurried conference with the complainant or the accused." Schulhofer, *supra* note 194, at 144. *See also* FEELEY, *supra* note 194, at 179-80; WEINREB, *supra* note 21, at 48-49, 68-69.

197. In Massachusetts, for example, the report is typically read aloud to form the "factual basis" for the plea, as required by MASS. R. CRIM. P. 12(c)(5)(A). *See also* FED. R. CRIM. P. 11(f). A report that exaggerates the defendant's guilt might also influence a judge to reject an appropriate plea bargain as excessively lenient.

198. For the proposition that more than a few innocent defendants plead guilty, see C. Ronald Huff & Arye Rattner, *Convicted But Innocent: False Positives and the Criminal Justice Process, in* CONTROVERSIAL ISSUES IN CRIME AND JUSTICE 130, 140 (Joseph E. Scott & Travis Hirschi eds., 1988); Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory,* 43 HASTINGS L.J. 717, 732-34 (1992); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process,* 40 HASTINGS L.J. 957, 984-94 (1989). *But see* Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt,* 16 J. LEG. STUDIES 395, 415-16 (1987) (arguing that "few [innocent] defendants who are misidentified plead guilty to serious felony charges"). Professor Gross based his conclusion on a study of 136 proven cases of eyewitness misidentifications by strangers, of which 97 cases resulted in conviction, but only two of the convictions resulted from a guilty plea. *Id.* at 412-15. Gross's argument does not apply to the myriad street crimes that are not serious felonies, nor to crimes not involving misidentification. But even for the cases he studied, Gross's data do not dispel the concern that innocent defendants succumb to the coercive pressures of plea-bargaining. Over half of his cases occurred between 1900-1960. *Id.* at 413. At least in the earlier part of that period, reliance on plea-bargaining was less extensive than now. *See, e.g.,* Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process,* JUSTICE SYSTEM J. 338 (1982); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial,* 67 NOTRE DAME L. REV. 403, 466-68 (1992). Also, in most cases the suspects were exonerated as a result of deliberate investigation, conducted either by representatives of the defendant (attorney, investigator, family) or by the authorities acting in response to such persons. Gross, *supra,* at 422. Many defendants, including those most vulnerable to a coerced plea of guilty, lack the resources necessary to mobilize such an investigation.

199. The facts underlying a conviction for "assault and battery with a dangerous weapon" might be more culpable (an unprovoked beating of a stranger, resulting in serious injury) or less so (provoked fight with a neighbor, not resulting in serious injury). An objective, detailed report provides a firmer basis for future culpability judgments than a one-sided, cursory report.

Probation Revocation

Police reports can also affect decisions to revoke probation and parole. Because a judge may revoke probation and order the defendant to jail based on a new arrest,[200] issuance of a probation surrender notice "raises the ante" for a defendant both immediately (e.g., as a potentially negative influence on the bail decision) and in the long-term (e.g., by strengthening the prosecutor's hand in plea bargaining, or by actually leading to revocation).

Summary

Police reports that exaggerate guilt or omit important exculpatory facts can harm the defendant at various stages of the criminal process. If the accuracy and reliability of police reports could be improved, or, if decision makers were alert to the common deficiencies in police reports, this might result in fairer treatment of defendants as well as more efficient use of scarce judicial resources.

We will next consider judicial and administrative remedies for the problem of deceptive and one-sided police reporting.

IV. Remedies for the Failure to Report Exculpatory Evidence

In this Part I discuss the actions that courts, prosecutors, and police administrators can take to induce the police to expand their reporting of exculpatory evidence. The goal, I suggest, should be to require the reporting of several objectively-defined categories of exculpatory, or potentially exculpatory, information. How to induce or compel this reform is problematic. Serious doctrinal and institutional obstacles to judicial relief exist, especially in the federal courts, and neither the police nor prosecution agencies are likely to want this change. I conclude, however, that defense lawyers might succeed in persuading state courts to order systemic relief, and that more can be done to induce prosecutors to locate and review exculpatory evidence known to the police.

A. *Judicial Remedies: Jones and Palmer*

A variety of judicial remedies might be sought for harm to defendants resulting from deceptive police reports, and from police failure to report exculpatory evidence. They include civil actions for damages and injunc-

200. In Massachusetts, for example, the defendant might receive a notice of surrender at the arraignment on the new charges. Although it is not usual to revoke probation before final disposition of the new charge, courts in Massachusetts and elsewhere sometimes do so. *See, e.g.*, Commonwealth v. Durling, 551 N.E.2d 1193 (Mass. 1990) (upholding probation revocation based solely on police arrest reports read aloud by a probation officer who had no personal knowledge of the facts reported; reliance on hearsay reports bearing "substantial indicia of reliability" does not offend due process).

tive relief, and motions for discovery, dismissal of charges,[201] or post-conviction relief in criminal cases. The *Jones* and *Palmer* cases, discussed above,[202] provide an occasion for considering all of these remedies. They also illustrate the severe limits upon effective judicial remedies.

1. Tort Remedies

George Jones sued individual police officers and the City of Chicago under 42 U.S.C. section 1983 for false arrest, malicious prosecution, and other wrongs. In an opinion by Judge Richard Posner describing Jones's treatment as "a frightening abuse of power by members of the Chicago police force," the Seventh Circuit Court of Appeals upheld an $801,000 damage award.[203]

Jones won his civil rights suit against the individual officers because he was able to prove that they culpably caused the injuries that resulted from his wrongful arrest and prosecution.[204] However, recovery in tort would not be available in many other cases of arrest and prosecution based on police reports that omit important exculpatory facts. For example, no claim for false arrest or malicious prosecution would lie if the exculpatory evidence were significant, but not so overwhelming that it clearly negated probable cause.[205] Also, in addition to the usual difficulties of recovering against police officers, daunting proof problems would exist if the police had learned of exculpatory evidence but not recorded it, had recorded it but not preserved it, or had recorded and preserved it but not made known its existence. Regarding the last possibility, the district court in *Palmer* noted that in Chicago "the exclusion of potentially exculpatory information from Official Reports was not a random or infrequent occur-

201. *See, e.g.*, Commonwealth v. Henderson, 582 N.E.2d 496 (Mass. 1991) (charge dismissed where police lost or destroyed potentially exculpatory notes of robbery victim's description of her assailant).

202. *See supra* text accompanying notes 1-7, 178-90. *Jones* and *Palmer* are discussed in Orfield, *supra* note 19, at 101-02.

203. Jones v. City of Chicago, 856 F.2d 985, 988 (7th Cir. 1988).

204. The jury found that no reasonable officer could have believed there was probable cause to arrest Jones. *Id.* at 994; *see also* Malley v. Briggs, 475 U.S. 335, 341 (1986) (establishing officer's qualified immunity from liability for unlawful arrest "if officers of reasonable competence could disagree" on the existence of probable cause). Jones also recovered against the City of Chicago on proof that the Department's custom of maintaining clandestine street files, unavailable to the prosecutor and defense counsel, denied him due process of law under Brady v. Maryland, 373 U.S. 83 (1963). He also sued in tort under Illinois common law. *Jones*, 856 F.2d at 988.

205. Absence of probable cause is an element of both unlawful arrest and malicious prosecution under common law and the Federal Civil Rights Act. 42 U.S.C. § 1983 (1988). *See* AVERY & RUDOVSKY, *supra* note 34, § 2.3(a)-(b); *see also* cases collected in Fleming, *supra* note 11, at 1031-62. Civil rights claims for deprivation of due process under *Brady* resulting from police suppression of exculpatory evidence would have to satisfy the strict standards established by United States v. Bagley, 473 U.S. 667 (1985), discussed *infra* at text accompanying notes 215-23.

rence."[206] Sadly, the most unusual aspect of George Jones's case might have been, not the egregious suppression of exculpatory facts, but the persistence and courage of Detective Laverty.[207] The plaintiffs in *Palmer* sought equitable relief to free past and future criminal defendants from dependence on rare individuals like Laverty for access to exculpatory evidence. Both their success in the district court, and their cooler reception in the Seventh Circuit, are instructive.

2. Requiring the State to Record, Preserve and Disclose Exculpatory Evidence: The Limits of Equitable Relief

Palmer was a class action suit against the City of Chicago and Cook County, Illinois on behalf of two plaintiff sub-classes: persons who had been convicted and sentenced for felonies, and charged felons awaiting trial. Plaintiffs sought: (1) a declaration that the CPD's double file system deprived them of due process by evading the requirements of *Brady* and state discovery rules; (2) an order prohibiting the double file system and requiring the maintenance of single files subject to "proper discovery and production"; (3) an order preserving existing street files for future production in state court post-conviction actions; and (4) damages.[208]

The district court promptly granted plaintiffs' request for a temporary restraining order requiring the CPD to preserve intact all existing street files and their contents.[209] After evidentiary hearings, the district court issued a sweeping preliminary injunction that not only required the police to maintain unfiled files, but also, in effect, to act as truly neutral investigators. Under the court's regime, detectives investigating violent crimes were required to: (1) "conduct . . . investigations in an impartial and objective manner" and "take . . . complete notes of all relevant matters" including "not only . . . information and materials indicating the possible guilt of the accused . . . but also . . . any information and materials that may tend to show his possible innocence or aid in his defense . . . "; (2) preserve all handwritten and other notes and investigative docu-

206. Palmer v. City of Chicago, 562 F. Supp. 1067, 1072 (N.D. Ill. 1983), *rev'd*, 755 F.2d 560 (7th Cir. 1985).

207. Detective Laverty's rewards took the form of departmental disciplinary charges "for having failed to advise the state's attorney that he planned to testify for the defense in George Jones's criminal trial should that become necessary"; transfer out of the detective division; ostracism by his fellow officers; and assignment "to a series of menial tasks culminating in the monitoring of police recruits giving urine samples." *Jones*, 856 F.2d at 991. None of the defendants in *Jones* were disciplined for misconduct. *Id.* at 991-92.

208. Palmer v. City of Chicago, 755 F.2d 560, 569 (7th Cir. 1985).

209. Resisting the order, some detectives considered case notes and memos as their "personal property" and, therefore, exempt from preservation orders. Two Area Commanders testified in support of this interpretation. *Palmer*, 562 F. Supp. at 1072. The temporary restraining order was then amended to require preservation of "all . . . papers and documents formally [sic] put in such files . . . ." *Palmer*, 755 F.2d at 565-66 (emphasis omitted).

ments in a single file, together with a checklist showing the file's contents; and (3) respond to subpoenas or discovery motions by transmitting copies of the checklist to the prosecutor.[210] Prosecutors were required to provide defendants, on request, with a copy of the checklist, copies of discoverable police writings, and notice of documents that the prosecutor considered were not discoverable. Prosecutors were also required to "assure that no police writings have been withheld" from them.[211] Finally, the City of Chicago was required to train detectives in the new procedures.

On appeal, the Seventh Circuit Court of Appeals upheld only one part of the district court's preliminary injunction: the order preserving the existing street files of the first sub-class, convicted felons. As to the other sub-class, criminal defendants awaiting trial, the court abstained, finding even this modest relief an improper interference with ongoing state court criminal proceedings under *Younger v. Harris*.[212] Those defendants in this sub-class were left to seek relief in the state criminal courts. As for the other remedial measures ordered by the district court, the Court of Appeals both rejected their propriety at this particular stage of the proceedings,[213] and expressed substantive reservations about such broad judicial intervention into the processes of gathering, recording, and disclosing exculpatory evidence. Noting that the injunction required the CPD and the Cook County prosecutor's office to "restructure their internal procedures for the recording, maintaining and production of investigative files," the Circuit Court emphasized the limits imposed by Supreme Court precedents defining the duty of police to preserve, and of prosecutors to disclose, exculpatory evidence.[214] The relevant federal constitutional duties derive mainly from two lines of cases under the due process clause: *Brady-Agurs-Bagley* (duty to disclose)[215] and *Trombetta-Youngblood* (duty to

210. *Palmer*, 755 F.2d at 568.

211. *Id.* at 568-69; *see also Palmer*, 562 F. Supp. at 1075.

212. *Palmer*, 755 F.2d at 573-76 (relying on Younger v. Harris, 401 U.S. 37 (1971)). Judge Cudahy dissented from key parts of the panel's decision. *See Palmer*, 755 F.2d at 579-82 (Cudahy, J., dissenting in part and concurring in part).

213. Dissenting Judge Cudahy conceded this point. *Palmer*, 755 F.2d at 579 & n.1 (Cudahy, J., dissenting in part and concurring in part).

214. *Id.* at 576-77. The Circuit Court's invalidation of these portions of the injunction rested on two narrow grounds: (1) the sub-class of convicted felons lacked standing; and (2) comity concerns barred relief to criminal defendants in pending trials. *Id.* at 576.

215. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985). For the prosecutor's professional responsibility to disclose exculpatory evidence, which is defined more broadly than the constitutional standard, see MODEL RULES OF PROFESSIONAL CONDUCT 3.8(d) (1990); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) (1983); A.B.A. STANDARDS FOR CRIMINAL JUSTICE Std. 3-3.11(a) (1980 & Supp. 1986). Disciplinary sanctions for violating *Brady* are rarely sought or imposed on prosecutors. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987).

preserve).[216] Violation of a defendant's rights under either *Brady* or *Trombetta* will, in certain circumstances, lead to dismissal, void a conviction, and/or give rise to civil liability. However, the United States Supreme Court construes both doctrines too narrowly to support the broad relief ordered in *Palmer.* Nor has the Supreme Court endorsed other constitutional theories which might potentially support such relief.[217]

The prosecutor's duty under *Brady v. Maryland* to disclose exculpatory evidence extends to evidence in the hands of police.[218] Because, as a practical matter, the prosecutor cannot disclose what the police do not report, her duty might seem logically to require a corollary police duty to record, preserve, and report.[219] But the Supreme Court has not followed this logic. Both *Trombetta* and *Youngblood* involved the duty to preserve physical evidence already "collected" by the police. Neither case has been construed to support a constitutional right to have the police record intangible exculpatory evidence in the first place, as ordered by the district court in *Palmer.*[220] This severely limits the usefulness of these precedents as leverage for compelling the police to broaden the scope of their investigations and reports.

Also, as the Seventh Circuit Court of Appeals stressed in *Palmer,* the defendant is entitled under *Brady* to receive only evidence that is "material."[221] The Supreme Court has defined "materiality" only for purposes of deciding whether a conviction should be reversed. In that context,

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216. California v. Trombetta, 467 U.S. 479 (1984); Arizona v. Youngblood, 488 U.S. 51 (1988).

217. *See supra* text accompanying notes 88-92.

218. *See, e.g.,* Moore v. Illinois, 408 U.S. 786, 810 (1972) (Marshall J., concurring in part and dissenting in part); United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992); State v. Gammill, 585 P.2d 1074, 1079-80 (Kan. Ct. App. 1978). This is true even if the prosecutor is unaware of its existence despite a good faith effort. Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964). *But see* Bostic, Comment, *supra* note 88 (*Brady's* application to exculpatory evidence in hands of police but unknown to prosecutor is unclear).

219. Logic might further suggest a police duty to make reasonable efforts to gather exculpatory evidence that is readily available—such as the names of witnesses present at the scene—and which, if not then obtained, might be lost forever. This reasoning underlies the district court's injunction in *Palmer,* requiring the police to perform all of these tasks. *See generally Toward a Constitutional Right to an Adequate Police Investigation, supra* note 23.

220. The duty to disclose and preserve exculpatory evidence is limited to evidence that the Government has already "gathered and taken possession of . . . ." United States v. Bryant, 439 F.2d 642, 651 (D.C. Cir. 1971). *See also* Colon v. Kuhlmann, No. 87-C2980, 1988 U.S. Dist. LEXIS 5890, at *7 (S.D.N.Y. June 1, 1988), *aff'd on other grounds,* 865 F.2d 29 (2d Cir. 1988); State v. Pemental, 434 A.2d 932, 936 (R.I. 1981). However, a bad faith failure to collect potentially exculpatory evidence might violate due process. *See, e.g.,* Miller v. Vasquez, 868 F.2d 1116, 1120 (9th Cir. 1989).

221. The *Palmer* Court, writing before *Bagley* was decided, applied the *Agurs* standard, limiting the prosecution's disclosure duty to evidence that "would create 'a reasonable doubt [about the defendants' guilt] that did not otherwise exist . . . .'" Palmer

evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,"[222] i.e., the defendant would not have been convicted. Considering the stage at which police must usually decide what evidence to seek and record, this retrospective definition is not especially useful either to guide or judge their conduct.[223]

Finally, the state's duty to preserve exculpatory evidence under *California v. Trombetta*[224] and *Arizona v. Youngblood*[225] applies only to "material" evidence, i.e., "evidence that might be expected to play a significant role in the suspect's defense."[226] Accordingly, its exculpatory nature must have been apparent to the police at the time they lost or destroyed it, and the evidence must also be such that "the defendant would be unable to obtain comparable evidence by other reasonably available means."[227] While the meaning of "comparable evidence" is unclear, this requirement might restrict the disclosure duty to unique physical evidence that would completely exonerate the defendant (such as fingerprints or blood stains), but not evidence (such as witness statements) valuable "merely" to impeach or corroborate other testimony.[228] If so, the duty to preserve would not reach crucial exculpatory evidence, such as the street files in *Jones*, that might make the difference between conviction and acquittal.

To establish a due process violation under *Trombetta* and *Youngblood* the defendant must do more than satisfy the requirements of materiality and "incomparability." The defendant must also prove that the police acted in "bad faith." This requires proof that the police knew that the evidence was exculpatory[229] and, it seems, that they displayed "official animus . . . or of a conscious effort to suppress exculpatory evidence."[230] Whatever this means exactly, it will undoubtedly be very difficult to prove.[231]

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v. City of Chicago, 755 F.2d 560, 574 (7th Cir. 1985) (quoting United States v. Agurs, 427 U.S. 97, 112 (1976)).

222. United States v. Bagley, 473 U.S. 667, 682 (1985).

223. The test would require the police to speculate about such matters, for example, as whether the defendant would give a full confession, or whether the defense would find the exculpatory evidence without police assistance. *See* United States v. Agurs, 427 U.S. 97, 112 (1976).

224. 467 U.S. 479 (1984).

225. 488 U.S. 51 (1988).

226. *Trombetta*, 467 U.S. at 488.

227. *Id.* at 489.

228. *See Youngblood*, 488 U.S. at 61-74 (Blackmun, J., dissenting).

229. *Youngblood*, 488 U.S. at 56 n.*.

230. *Trombetta*, 467 U.S. at 488.

231. *See Youngblood*, 488 U.S. at 66-67 (Blackmun, J., dissenting) (ambiguity of "bad faith" test). Bad faith is unlikely to be found if the normal police practice is not to record exculpatory evidence. *See* Killian v. United States, 368 U.S. 231, 242 (1961) (no due process denial in agents' destruction of field notes "in good faith and in accord with their normal practices").

Applying the foregoing federal constitutional doctrines, and restrained by comity concerns, the Seventh Circuit Court in *Palmer* took a hands-off approach to the underlying police processes that control the prosecutor's ability to comply with *Brady*. Except for ordering the police to preserve street files of convicted defendants,[232] the court rejected any constitutional right to measures to ensure that potentially "material" exculpatory evidence will reach the prosecutor. Given the current antipathy to judicial activism in the federal courts, this response was not surprising. However, state courts might respond to due process arguments more favorably. For example, some have refused to adopt the Supreme Court's narrow test of materiality in *Bagley*[233] or its "bad faith" requirement in *Youngblood*.[234] They might also prove more receptive to arguments based upon Sixth Amendment rights to counsel, confrontation, and compulsory process.[235]

Alternatively, a court might be persuaded to order broad prophylactic measures to enforce defendants' non-constitutional rights. Both federal and state courts may impose sanctions against the prosecution for failure to disclose exculpatory evidence in violation of discovery rules.[236] Sanctions are often imposed for nondisclosure of prior written or recorded[237] statements of government witnesses discoverable under Jencks-type requirements, even if the statements were lost or destroyed.[238] In effect, this creates a duty to preserve the evidence. In New York, for example:

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232. Palmer v. City of Chicago, 755 F.2d 560, 579 (7th Cir. 1985).

233. *See, e.g.*, Commonwealth v. Tucceri, 589 N.E.2d 1216 (Mass. 1992); People v. Vilardi, 555 N.E.2d 915, 920 (N.Y. 1990); Commonwealth v. Gallarelli, 502 N.E.2d 516 (Mass. 1987).

234. *See, e.g.*, Commonwealth v. Henderson, 582 N.E.2d 496, 497 (Mass. 1991) (citing high court cases in Alaska, Delaware, Hawaii, and New Hampshire). Absent bad faith, the Massachusetts due process test requires the court to "balance the degree of culpability of the government, the materiality of the evidence, and the potential prejudice to the defendant . . . ." *Id.* at 496.

235. *See supra* text accompanying notes 89-91.

236. *See, e.g.*, People v. District Court, 793 P.2d 163, 168-69 (Colo. 1990) (sanction of witness preclusion too severe for prosecutor's non-willful failure to disclose impeachment material regarding crucial eyewitness). In the federal system, the duty to disclose exculpatory evidence under FED. R. CRIM. P. 16 applies to the government as a whole, including its investigative agencies. United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971). But, except for mandated disclosure of exculpatory evidence and Jencks materials, police investigation notes and reports are protected from discovery as the government's work product. *See* FED. R. CRIM. P. 16(a)(2); Cooks v. State, 276 So. 2d 634 (Ala. Crim. App. 1973); Steven W. Feldman, *The Work Product Rule in Criminal Practice and Procedure*, 50 U. CINN. L. REV. 495, 524-28 (1981). The same is true of some states. *See* LAFAVE & ISRAEL, *supra* note 171, § 19.3(h).

237. Typically the statements are recorded in undercover tape recordings, tapes of 911 calls, and field notes or reports. *See, e.g.*, People v. Kent, 509 N.Y.S.2d 841, 842 (N.Y. App. Div. 1986) (tapes of telephone calls made to an emergency telephone 911 operator subject to mandatory disclosure to defense).

238. An illustrative case under the Jencks Act, 18 U.S.C.A. § 3500 (West 1988), is Slye v. United States, 602 A.2d 135 (App. D.C. 1992) (Jencks Act violated by failure to

> Just as the People have a duty to produce [witness statements] they also have a correlative "obligation to preserve evidence until a request for disclosure is made."... If the People fail to exercise care to preserve it and defendant is prejudiced by their mistake, the court must impose an appropriate sanction. The determination of what is appropriate is committed to the trial court's sound discretion, and while the degree of prosecutorial fault may be considered, the court's attention should focus primarily on the overriding need to eliminate prejudice to the defendant.[239]

In deciding whether to impose sanctions in such cases, courts typically use a balancing test in which factors such as materiality, bad faith, and prejudice are less rigidly applied than under *Brady* and *Trombetta*.[240] Also, whether the state has instituted "rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation" might be relevant.[241]

Case-by-case remedies to enforce criminal discovery are of limited value. They do not penalize the state for police failure to gather exculpatory evidence,[242] or, at least without a showing of "bad faith,"[243] for failure to record exculpatory evidence of which they know. Because defense

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preserve recording of 911 call giving description of robber, but no abuse of trial judge's discretion to refuse to impose sanction). Other states have similar requirements. *See, e.g.*, New York's statutory "*Rosario* Rule," N.Y. CRIM. PROC. LAW §§ 240.45 [1][a], 240.70 (Consol. 1983 & Supp. 1992); People v. Martinez, 524 N.E.2d 134 (N.Y. 1988); People v. Ranghelle, 503 N.E.2d 1011 (N.Y. 1986); People v. Malinsky, 209 N.E.2d 694 (N.Y. 1965); People v. Rosario, 173 N.E.2d 881 (N.Y. 1961); New York v. Geathers, 577 N.Y.S.2d 796 (N.Y. App. Div. 1991).

239. People v. Martinez, 524 N.E.2d 134, 136 (N.Y. 1988) (quoting People v. Kelly, 467 N.E.2d 498, 500 (N.Y. 1984) (citations omitted).

240. *See, e.g.*, Slye v. United States, 602 A.2d 135, 139-40 (App. D.C. 1992).

241. *See* United States v. Bryant, 439 F.2d 642, 652 (D.C. Cir. 1971) (holding that sanctions for non-disclosure of evidence under Federal Rule of Criminal Procedure 16 and the Jencks Act will be imposed in the future "unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation."). Although *Bryant's* continuing vitality in the D.C. circuit has been questioned, *see* United States v. McKie, 951 F.2d 399, 403 (D.C. Cir. 1991), it was recently reaffirmed. *See* Slye v. United States, 602 A.2d 135, 140 (App. D.C. 1992). But this factor tends to get lost in the multi-factor balancing test. *See* State v. Fain, 774 P.2d 252, 262-67 (Idaho 1989); Commonwealth v. Willie, 510 N.E.2d 258, 263-64 (Mass. 1987) (Liacos, J., concurring in part and dissenting in part).

242. See, e.g., state cases confining to dictum the court's disapproval of failure to gather or record potentially exculpatory evidence: Commonwealth v. Santiago, 567 N.E.2d 943, 951-52 & n.5 (Mass. App. Ct. 1991) ("potential for unfairness" in the officer's "selective note taking"; "an officer should at least jot down the general thrust of the conversation and note any exculpatory statements, or the fact that none were made"); Commonwealth v. Reid, 562 N.E.2d 1362, 1365 (Mass. App. Ct. 1990) (improper for police to release witnesses to drug transaction without recording their names, but defendant had no right to jury instruction that failure to follow normal police procedures may create reasonable doubt); Hammond v. State, 569 A.2d 81, 88 (Del. 1989) ("duty to gather and to preserve", but dictum).

243. Miller v. Vasquez, 868 F.2d 1116, 1120 (9th Cir. 1989).

discovery is so limited, the threat of sanctions mainly applies, under Jencks-type rules, to the relatively few cases that go to hearing or trial, but not to the many cases settled by plea bargaining without any evidentiary hearing.[244] Nevertheless, the very existence of these remedies might result in greater police efforts generally to preserve evidence.[245]

3. A Police Duty to Record Exculpatory Evidence: Scope and Implementation

Suppose that a court[246] were persuaded that traditional, case-by-case measures to enforce discovery were ineffective to assure defendants their right of access to exculpatory evidence. If the court were willing to order increased police reporting, how should it define the mandate? Some parts of the district court injunction in *Palmer* offer desirable models, but others go too far. Requiring the police to preserve and give prosecutors access to all investigatory notes, documents, and physical evidence in their possession is an appropriate prophylactic measure: it is fairly definite and easy to implement, if not to enforce.[247] The same cannot be said, however, of the *Palmer* Court's order requiring police to gather and record exculpatory evidence.

The district court in *Palmer* ordered the Chicago police to conduct "impartial and objective" investigations and to take complete notes of "all relevant matters," including "information . . . that may tend to show [the accused's] possible innocence or aid in his defense."[248] Putting aside the important but distinct question of what evidence the police should be required to gather,[249] this approach is too vague to give the police adequate guidance as to what evidence known to them must be recorded. If construed broadly, it would require significant expenditures of police resources, intrude upon the legitimate exercise of administrative discretion, and threaten police interests in self-protection and crime control.

First, what do "all relevant matters" and "[all] information that may tend to show [the accused's] possible innocence or aid in his defense" include? Information that "may tend to show" the accused's innocence

244. *See* McMunigal, *supra* note 198, at 957-58 (prosecutor should be required to disclose *Brady* material in plea bargaining, but "constitutional, ethical, and statutory requirements for such disclosure are largely unresolved.").

245. Of course Jencks rules also have a counter-tendency to discourage the recording of witness statements at all.

246. For reasons discussed *infra*, a court is more likely to order such measures than either police or prosecution authorities.

247. Police could evade this mandate by failing to record potentially exculpatory evidence in the first place, or, as in *Jones*, see *supra* text accompanying notes 178-91 and 207, by keeping such records in their personal possession, outside of "official" files. These avoidance techniques could be mitigated by adoption of specific reporting requirements as discussed *infra* at text accompanying notes 254-56.

248. Palmer v. City of Chicago, 562 F. Supp. 1067, 1078 (7th Cir. 1985), *rev'd*, 755 F.2d 560 (7th Cir. 1985).

249. *See supra* text accompanying note 23.

or aid in his defense potentially includes not only obviously exculpatory matters ("Purvy said darker skin, but Jones's skin is lighter"), but also many more subtle facts ("when requested to stop shortly after commission of the crime, suspect cooperated, and was neither sweating nor out of breath"). The *Palmer* injunction neither defines nor limits the universe of relevant exculpatory facts.[250] If the standard of "relevance" is that applied by an adequately funded private defense investigator in an important case, much more information would have to be recorded by patrol officers responding to the scene of a serious crime than they will have time to record. Resource limitations must be considered.

Second, how "complete" must police notes be? Must police record witness accounts of relevant information verbatim, or may they restate and record their own summary version? Verbatim accounts are more "complete," but—whether recorded manually or electronically[251]—they require a greater expenditure of resources.

The broader the police obligation to report exculpatory evidence, the greater the threat to police interests in resource conservation, self-protection, and crime control, and the less police discretion to allocate scarce resources according to the perceived needs. An externally-imposed policy requiring some floor of exculpatory reporting, even if limited to serious crimes,[252] threatens this discretionary power. This is an added reason for courts, bound to respect the separation of powers, to refrain from blanket orders to the police to record exculpatory evidence.[253] It also argues for administrative reforms, supplemented by judicial relief narrowly tailored to abuses in particular cases.

A better alternative to the *Palmer* injunction's approach would be to require the police to record specific categories of potentially exculpatory evidence, such as the identities of percipient witnesses,[254] their state of

250. Compare *Toward a Constitutional Right to an Adequate Police Investigation*, *supra* note 23, at 861, proposing a state duty to gather "all possibly material evidence." Under this proposal, violations would be measured by three factors: (1) the degree of bad faith or negligence on the part of the police; (2) whether the police should reasonably have known that the evidence was material (i.e., "whether it should have been apparent at the time the evidence was lost that, had it been introduced at trial, there would have been any reasonable likelihood that it might have affected the [verdict]" *Id.* at 867); and (3) the ability or inability of the defendant to have gathered the evidence while it was available. *Id.* at 863-68. This test does not meaningfully narrow the field.

251. *See infra* text accompanying note 257.

252. The *Palmer* suit covered only violent felony cases. *See Palmer*, 562 F. Supp. at 1069.

253. *See* Palmer v. City of Chicago, 755 F.2d 560, 578 (7th Cir. 1985) (citing Bell v. Wolfish, 441 U.S. 520, 548 (1979) (advising judicial deference to administrators)).

254. The police reports submitted in the aftermath of the Los Angeles police beating of Rodney King did not identify any of the three civilian witnesses present at the scene, including Mr. King's two passengers and the driver of the vehicle whose location forced King to stop his car. The police simply told the latter to leave. Telephone Interview with Terry White, Assistant District Attorney, Los Angeles District Attorney's

sobriety,[255] discrepancies in witness descriptions of the perpetrator,[256] discrepancies between such descriptions and the defendant's appearance, any alibi offered by the defendant, and the identity of any alibi witnesses. Spaces could be provided for these items in standard report forms, and explanations required for their omission. As we enter the age of computerized reporting, these requirements can be enforced by appropriately designed software.[257] Compared to more global approaches, specifying the required information would have the disadvantage of underinclusiveness, but it would offer more guidance to the police. It would also facilitate training, internal monitoring, communication with prosecutors, and enforcement.[258] Most important, limiting the reporting duty to specific categories of exculpatory information would reduce the threat to police interests and therefore increase the likelihood that the reform would be accepted.

However, even this modest reform would prove difficult to enforce. Police would probably resist the change. From their point of view, the duty to report specified categories of potentially exculpatory information known to them would create pressure to conduct more detailed investigations in order to confirm or negate the exculpatory value of that information. For example, an officer testifying in court whose report stated that the victim did not appear sober would be vulnerable for not investigating how long or how much the victim had been drinking, or the victim's level of impairment. Similarly, the officer would be vulnerable for reporting the defendant's alibi but failing to check it out promptly, or for recording the names of eyewitnesses but never taking their statements. As a result, police might have to choose between devoting even more effort to the investigation of exculpatory leads, and suffering embarrassment (or worse) once the case reaches court. Although this pressure might be countered by jury instructions explaining the limited goal of police inves-

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Office (July 28, 1992); *see also* People v. Powell, No. BA035498, (Cal. Super. Ct. April 30, 1992) (LEXIS, Cal library, LAPD file) at *44 (Closing Argument for the Prosecution, First Close by Attorney Terry White). An enforced requirement that the police report the identity of civilian witnesses to crime would have complicated their task of fabricating details of the beating incident.

255. As required in the Atlanta offense report form. *See supra* text accompanying note 137.

256. *See supra* text accompanying note 143.

257. In the future, manually prepared notes and reports will likely be displaced by electronic reporting. *See* Robert Garcia, *"Garbage In, Gospel Out": Criminal Discovery, Computer Reliability and the Constitution,* 38 UCLA L. REV. 1043, 1076-77 (1991) (Los Angeles Police Department studying use of lap top computers to prepare police reports in squad cars). The central computer could be programmed to reject reports that omit required information without explanation. I thank my former colleague Avi Soifer for this thought.

258. One might argue presumptive culpability if the police violate "normal practice" by failing to gather and/or record potentially exculpatory information that they have been specifically trained to report.

tigation, it might still make police reluctant to report mandatory categories of exculpatory evidence in the first place.

In some proportion of cases, defendants would claim that the police disregarded their obligations to record, preserve, or report the specified information. Courts would then determine, case-by-case, whether a violation occurred, and if so, what sanction to apply.[259] The choice of sanction would probably turn upon familiar criteria: materiality, prejudice, and police culpability. For violations consisting of failure to record or preserve facts that were only potentially exculpatory, such as witness identities, courts would have to decide whether to impose sanctions in the face of uncertain materiality and prejudice: should some degree of individual or collective[260] police culpability be required? Another significant variable, the burden of proof, would also have to be decided. Unless courts radically departed from their past approaches to these issues, case-by-case enforcement would probably benefit few defendants, and do little to induce police compliance with the law.

More promising than case-by-case review, a court could require police administrators to take specific steps designed to implement the court's order, such as the amendment of report forms, training, and supervision. While this might be most effective, it would require a greater degree of ongoing judicial involvement in police administration than most courts would find comfortable.

B. *Administrative Reforms and the Police-Prosecutor Relationship*

The Circuit Court in *Palmer* deferred to the CPD and the Cook County State's Attorney's Office to carry out their "combined responsibility" to safeguard defendants' *Brady* rights, free of judicial "meddling."[261] In light of the minimal protection afforded defendants by judicial remedies, reliance on administrative action to ensure the reporting of exculpatory evidence deserves consideration.

Can we look to prosecutors, who are directly responsible to the courts for disclosing exculpatory evidence to the defense, to lead the police to change their reporting practices? This would require prosecutors both to desire greater police reporting of exculpatory evidence, and to have the ability to get the police to change.

Scanty, one-sided police reports deprive prosecutors of information they need to perform effectively both as "quasi-judicial" seekers of jus-

259. Possible sanctions include dismissal, continuance, missing witness instruction, witness preclusion, and reversal. *See supra* text accompanying notes 236-45.

260. Whether the police department takes seriously its obligation to comply with investigative requirements, by adequate training and monitoring programs, might be considered. Prosecutorial efforts are also relevant. *See supra* text accompanying note 239 and *infra* Part IV(B).

261. Palmer v. City of Chicago, 755 F.2d 560, 578 (7th Cir. 1985). In the court's view, this is an "inherently internal and discretionary function." *Id.*

tice,[262] and as "adversarial advocates." On both counts, prosecutors have an interest in receiving reports that contain all of the information needed to decide the proper charge and to evaluate the prosecutive merit of the case.[263] To negotiate pleas and prepare for trial intelligently, a prosecutor needs access to exculpatory facts and other details relevant to establishing or negating potential defenses.

In practice, however, most prosecutors subordinate their interest in exculpatory evidence to adversarial concerns. Influenced by a "conviction psychology," prosecutors widely resist their duties under *Brady*.[264] A prosecutor might want to know exculpatory evidence that was so strong that it was convincing of the defendant's innocence. Also, to avoid surprise, the prosecutor would want to know whatever exculpatory facts the defense could prove. In most cases, however, the evidence will be neither so convincing nor capable of proof by the defense. In these types of cases then, the reporting of more exculpatory evidence would simply create a dilemma—to disclose or not—that most prosecutors would rather avoid.

Therefore, although some prosecutors might complain about insufficiently detailed police reports, as a group they would probably not favor more reporting of exculpatory evidence, especially if such evidence became available for use by defense attorneys. On the contrary, some prosecutors have been known to encourage police to write vague reports, in order to leave the police witnesses more "running room" in court.[265]

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262. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991); Fisher, *supra* note 24, at 208-09.

263. This view of the report was adopted by the National Advisory Committee on Criminal Justice Standards and Goals in its Standard 12.9, "Prosecutor Relationship with the Police and with Other Agencies of the Criminal Justice System":

> The prosecutor should develop for the use of the police a basic police report form that includes all relevant information about the offense and the offender necessary for charging, plea negotiations, and trial. . . . The police report form is the single most important document in the prosecutor's case file. Prosecutors . . . rely on the . . . report to identify necessary witnesses, to familiarize themselves with the facts of the case, and to identify the problems that may arrive at trial. Since the police report form is the basic prosecutive document, it should be designed by the prosecutor to meet his requirements and not by the police based on their interpretation of the prosecutor's requirements.
>
> A well-designed report form should require police officers to detail all of the evidence which supports each element of the offense, the relevant surrounding circumstances, and all known witnesses and their addresses.

NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON COURTS 247, 248 (1973) (project of the Law Enforcement Assistance Administration) [hereinafter REPORT ON COURTS].

264. *See, e.g.*, Capra, *supra* note 87, at 405-06; Rosen, *supra* note 215, at 732.

265. Orfield, *supra* note 19, at 101, quotes a Chicago prosecutor: "The [police] report is vague. The report is written that way for a reason. A good police report is written in such a way that the officer can expand any way and anything. And it's true, we do tell them how to do that." *Id.*

Even if prosecutors wanted more reporting of exculpatory evidence, it is doubtful whether, on their own, most could bring about change. By and large, state and local police agencies operate independently of prosecutors, and answer to different constituencies.[266] Therefore, the ability of prosecutors to change police reporting practices is more often a matter of persuasion than command.[267] In some jurisdictions, it seems, the opposite is true. This is demonstrated by a study of two California jurisdictions (A and B) with contrasting police investigative styles.[268] Prosecutors in office A enforced strict charging standards, rejecting police files that lacked persuasively detailed reports. Police in office A responded by filing reports containing, e.g., verbatim accounts of victim, witness, and suspect statements, including multiple accounts "so that inconsistencies among the statements would be noted."[269] Prosecution office B had more relaxed charging criteria, "accommodat[ing] to routine police . . . practice[s] of presenting minimal information to substantiate the filing of a case."[270] Researchers found a significantly lower rate of dismissals and charge bargaining in jurisdiction A than B, but "no consistent conclusions regarding case disposition or final sentences."[271] The authors also found no support for the argument that detailed police reports will, through defense discovery, "facilitate the impeachment of prosecution witnesses, frequently policemen."[272]

The California study suggests that, at least under some conditions, prosecutors can and will effectively insist on more detailed police reports and the inclusion of exculpatory evidence. Exercising that power, both by negotiation and by active participation in police training,[273] would alleviate the problems exposed in *Palmer*. Where prosecutors lack that power, they can still improve their ability to comply with *Brady* by informing themselves in detail about local police record-keeping and reporting practices, and by attempting to get the police to preserve and give them access to all records, both "formal" and "informal." They should be required to make these efforts by court rules and amendments to the rules

266. McIntyre, *supra* note 24, at 203-09, 220-27. In exceptional circumstances, such as white collar criminal investigations, prosecutors directly employ and supervise police investigators.

267. It is telling that the National Advisory Commission's proposal, *supra* note 263, that police reporting forms should be designed by prosecutors, is not reflected in the Commission's standards for the police. *See* Report on Police, *supra* note 97, at 570-74.

268. GREENWOOD, *supra* note 93, ch. 11.

269. *Id.* at 172.

270. *Id.* at 169.

271. *Id.* at 189.

272. *Id.* at 172 n.3.

273. The ABA STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-2.7, enjoins prosecutors "to aid in training police in the performance of their function in accordance with law," and many prosecutors do so. *See, e.g.*, Robert Wennerholm, *Legal Understanding of Police Officers—The Continuing Challenge for Prosecutors*, 25 THE PROSECUTOR 11, 14 (1991).

of professional responsibility.[274] Achieving this might not be easy. Reporting procedures differ from department to department, and most prosecutors must deal with multiple departments and police agencies.[275] Reviewing "informal" records, like handwritten field notes, takes more work than reviewing typewritten reports.[276] Also, some police will not preserve and/or transmit complete records. Despite these difficulties, the alternative—prosecutorial ignorance and passivity—invites systematic suppression of exculpatory evidence, at a high cost to defendants and society.

The possibility also exists that more police agencies will voluntarily reform their reporting practices. Reforms inspired by the drive for efficient crime control, imposed from within police bureaucracies, would more likely succeed than changes perceived as meant to benefit criminal defendants, imposed from outside. As discussed earlier, law enforcement leaders recognize that more thorough police investigation and reporting would result in better crime control.[277] Because more complete police reports would inevitably reveal more exculpatory as well as inculpatory facts, the change would also benefit innocent defendants. However, considering the powerful disincentives for police to increase their investigative responsibilities or to report exculpatory evidence, whether they will initiate or welcome significant change is questionable.

V. Summary and Conclusions

The impact of police investigation and reporting practices on the administration of criminal justice has not been sufficiently studied. The available data suggest that intentional deception is more widespread than the legal literature reflects, a fact that should color our view of all police reports. However, most often a report will be misleading because, while

274. Language could be used from the ABA Standards for Criminal Justice (2d ed. 1980). For example, Standard 11-2.2(c) provides: "The prosecutor shall ensure that a flow of information is maintained between the various investigative personnel and the prosecutor's office sufficient to place within the prosecutor's possession or control all material and information relevant to the accused and the offense charged."

Although none of the ABA rules of professional responsibility refer to Standard 11-2.2(c), court rules or decisions in several states have enforced its mandate. *See, e.g.*, Colo. Ct. R. Crim. P. 16(I)(b)(4), *applied in* People v. District Court, 793 P.2d 163, 167-69 (Colo. 1990); Ill. Ct. R. Crim. P. 412(f); Wash. Super. Ct. Crim. R. 4.7(a)(4), *construed in* State v. DeWilde, 529 P.2d 878, 881-82 (Wash. Ct. App. 1974); *see also* Long v. State, 431 N.E.2d 875, 876-77 (Ind. Ct. App. 1982); Wold v. State, 204 N.W.2d 482, 486-87 & n.2c (Wis. 1973).

275. For example, in Middlesex County, Massachusetts, the District Attorney's Office prosecutes cases from 54 police departments.

276. Some police write notes on napkins and matchbook covers. *Palmer* shows that allowing such documents to remain in the personal possession of police, or in "unofficial" files, risks loss or suppression of exculpatory evidence.

277. *See supra* text accompanying notes 96-104.

inculpatory facts are investigated, recorded, and reported, exculpatory evidence is not. This practice serves police interests in resource conservation, self-protection, and partisanship, but "fundamentally impairs the functioning of the fact finding process and its ability to determine guilt or innocence correctly."[278] To remedy this, the police should be required to report certain limited categories of potentially exculpatory facts known to them. Although this requirement would entail extra costs,[279] it could be probably be implemented without destroying police effectiveness as peacekeepers. Expanded reporting of exculpatory facts would not prevent lying in police reports, but it would make that practice more difficult. In the case of truthful reports, a more thorough, balanced account would result.

Achieving this change will be difficult. Reforms by police agencies themselves would have the greatest chance of success, but are unlikely to occur. Prosecutors are probably no more motivated than the police to see more exculpatory evidence reported. But they do have an obligation to learn all of the exculpatory facts that the police possess in a given case. Without that knowledge, prosecutors cannot meet their legal and ethical responsibilities to give discovery to the defense, to avoid the presentation of perjured evidence, and to perform other important functions. Therefore, rules of procedure and ethics should require prosecutors to familiarize themselves with police investigative and record-keeping procedures, to press the police to report specified categories of potentially exculpatory facts, and to make good faith efforts to ensure their access to all relevant records.

As a practical matter, no change will occur without the efforts of defense attorneys. But their ability to force change in police behavior is also quite limited. Taking a lesson from *Jones*,[280] their first task is to document both the formal rules governing local police investigation and reports, and the "working rules" followed in practice. Departmental forms, bulletins and training materials will reveal the former, including the universal instructions to take and preserve detailed field notes, and to produce "complete" reports which contain "all relevant information."[281] Actual police practices can be elicited in evidentiary hearings.

Once documented, local practices vis-a-vis gathering, recording, and reporting exculpatory evidence can be used in various ways. One is for defense attorneys to educate judges and other decision makers in the one-sidedness, and therefore the unreliability, of reports. As a result,

278. *Toward a Constitutional Right to an Adequate Police Investigation*, *supra* note 23, at 835.

279. *See supra* text following note 258 (expanded duty to report potentially exculpatory evidence could pressure police to conduct more detailed investigations) and *infra* text accompanying notes 288-90 (shift in adversary balance).

280. Prior to *Jones*, the Chicago defense bar was apparently ignorant of the CPD street file system. *See supra* text accompanying note 186.

281. *See supra* text accompanying note 136.

courts might place less faith in the objectivity of police reports than they sometimes do now.[282] Within the limits of discovery law and practice in each jurisdiction, defense attorneys could draft subpoenas and discovery requests specifically to cover "informal" documents such as field notes. Where feasible, they could bring *Palmer*-style suits in state court, seeking systemic, equitable relief based on defendants' right of access to exculpatory evidence on both constitutional and non-constitutional grounds. The relief sought should include ordering the police to record specific categories of exculpatory evidence, and to preserve and transmit all relevant records to the prosecutors. Winning either type of relief, but especially the former, will be difficult under existing case law. It will require convincing a court that the evils to be avoided, and the inadequacy of more conventional remedies, justify this much intrusion into police and prosecutorial functions.

VI. AFTERTHOUGHT: REPORTING EXCULPATORY EVIDENCE AND THE ADVERSARY PROCESS

Focusing attention on the processes of police investigation illuminates the relationship between police investigation and the adversary process. According to one view, police investigation—including the gathering, recording and reporting of relevant facts—not only should be,[283] but normally is, "neutral." For example, Professor Samuel Gross describes our system of criminal law enforcement as an investigatory-adversarial "hybrid," characterized by investigative neutrality which shifts into adversariness only if and when the guilty-plea process breaks down. Until then, the police work as "quasi-judicial investigators," attempting to "uncover the facts, determine the truth, and bring the criminal to punishment."[284] In Professor John Mitchell's contrasting view, the shift to adversariness occurs much earlier: "Once an arrest has been made, or the 'prime suspect' determined, the police abdicate the role of neutral inves-

282. The fate of "dropsy" testimony might be relevant. Although the publicity given to police perjury practices in "dropsy" cases has not eliminated that abuse, concern that judges will react skeptically to dropsy testimony has probably curbed it. *See, e.g., Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J. L. & SOC. PROBS. 87 (1968) (empirical evidence shows changes in police testimony regarding probable cause to seize narcotics after *Mapp* decision); KORNBLUM, *supra* note 68, at 80-81 (noting the greater use of fictitious informants as a consequence of courts losing faith in "dropsy" testimony). See *supra* note 75 for a definition of "dropsy" testimony.

283. Writing in the wake of the 1931 Wickersham Commission Report, Ernest Hopkins identified as the principal source of police perjury (and of the intentional "suppression" of exculpatory facts), the officer's "customary abandonment of his legal role as a finder of fact, and his assumption of the role of advocate," usually for the prosecution. HOPKINS, *supra* note 37, at 278. In Hopkins's view, the police, like judges, are meant to be neutral players in the adversary battle between prosecution and defense. *Id.* at 278-79; *see also* text accompanying note 23.

284. Gross, *supra* note 198, at 434.

tigators and become advocates of the prosecution team."[285] "Advocate" is perhaps an overstatement, but Professor Mitchell correctly identifies the stage at which the police acquire both a positive interest in promptly closing the investigation, and a negative interest in supplying evidence that might prevent a conviction. These interests strongly affect the scope and depth of further investigation, and decisions to record and report already known exculpatory facts. Thus, reports by American police differ from those produced under a truly neutral system of investigation, such as reportedly exists in France and Germany, where the police are required to investigate and record exculpatory as well as inculpatory facts.[286] In our system, the police investigation and report are themselves, to some extent, artifacts of the adversary process.[287]

The early loss or suppression of exculpatory facts undermines a justifying premise of our adversary system: that the defense and prosecution are evenly matched.[288] Whatever validity might generally attach to this premise, it fails at the stage of fact investigation. In most cases, if the police do not conduct an objective, neutral, and thorough investigation, no one will. In most cases they do not, and no one does. This defect seriously impairs the system's ability to base judgments of guilt on all the relevant evidence, and undermines its claim to fairness.

However, just as the present bias in police investigation and reporting affects the adversary balance, so would the changes recommended in this article. Consider how increasing the amount of potentially exculpatory information in police reports would affect criminal proceedings. In cross-examination before a jury, defense attorneys could effectively exploit this material. Even trivial, remote, or speculative information might gain importance simply by virtue of its inclusion in the police report. If discoverable by the defense, and available for use at trial, police reports peppered with alibis, inconsistent descriptions, and discrediting facts

285. John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 304 (1980). Professor Mitchell continues: "Such advocacy may lead police to overlook or negligently destroy exculpatory evidence or to suppress evidence in their possession which is helpful to the accused." *Id.* at 304.

286. *See* John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1554, 1562-63 & n.51 (1978); GERMAN CODE CRIM. PRO. §§ 136 (II), 160(II) (Gerhard O.W. Mueller, ed., 1965).

287. The law intermittently denies and acknowledges this insight. *Compare* United States v. Mendenhall, 446 U.S. 544, 554 (1980) and Miranda v. Arizona, 384 U.S. 436, 543-44 (1966) (White, J., dissenting) (custodial questioning justified by interest in prompt discovery of exculpatory evidence for the purpose of "clearing" and releasing innocent suspects) *with* United States v. Hernandez-Rojas, 617 F.2d 533, 535 (9th Cir. 1980) (exclusion of police reports from hearsay exceptions under Federal Rule of Evidence 803(8)(B) because police reports "lack sufficient guarantees of trustworthiness because they are made in an adversary setting and [are] likely to be used in litigation."). As one Congressman remarked in hearings on the Rule, "[p]olice reports . . . tend to be one-sided and self-serving." 120 CONG. REC. 40, 891 (1974) (statement of Rep. Hungate). *See also supra* note 173.

288. United States v. Bagley, 473 U.S. 667, 694 & n.2 (Marshall, J., dissenting).

about the star prosecution witness would result in more dismissals, favorable pleas, and acquittals. Some of these outcomes would be deserved, others not. Would this shift in the adversary balance give too many defendants an undeserved windfall?

Thoughtful observers of the system might differ in their answers to this question.[289] But even those who oppose shifting the balance in the defendant's favor should not reject the goal of expanded police reporting. The desired balance of adversary advantage should be sought in regulating defense access to or use of reported exculpatory evidence at trial.[290] For the sake of both innocent defendants and the efficient administration of justice, the present system, in which exculpatory evidence is systematically lost or suppressed, should be changed.

289. Presumably, increased reporting of exculpatory evidence would produce some increase in the number of innocent defendants who, like George Jones, would be saved from wrongful conviction, and also an increase in factually guilty defendants who would escape "rightful" conviction. Even if we could know how many defendants would fall into each category, it would be difficult to know how to weigh them against each other. How many "false negatives" are justified by saving just one innocent defendant from capital punishment?

290. Allowing the defense access and use, but permitting the court to caution the jury as to the police duty to report certain information, regardless of its potential insignificance, would preserve legitimate defense rights to compulsory process and confrontation of opposing witnesses. *But see* Pennsylvania v. Ritchie, 480 U.S. 39, 59-61 (1987) (government duty to produce confidential but potentially exculpatory files on sexual assault victim for *in camera* judicial review before giving access to defense).

VII. APPENDICES

A. *Questionnaire*

Please read the following paragraph and respond to the questions below by checking the most appropriate answer.

Incident:

V is reportedly robbed at knifepoint in the doorway of a building on an urban residential street by a sole assailant. When police respond, V, who is obviously drunk, describes the perpetrator as a white male, about 5'7", wearing khaki pants, a red sweatshirt, and sneakers. The description is broadcast. Several other people are sitting or standing on stoops in the vicinity, watching the police.

Twenty minutes later other officers stop D in the courtyard of a nearby housing project, where he is standing with two other persons. D is 5'9", moustached, wearing khaki pants, sneakers, a purple zippered jacket with a white emblem on the breast and "Tigers" in large white letters on the back, and a red "Tigers" baseball cap. In response to questions D says, "I've been here for the last two hours. Ask them." "That's right," says one of the other two.

V is brought to the stop scene, where he identifies D as the robber. D is arrested.

Questions:

(A) In practice, do you think the police incident/arrest report in these circumstances *would* contain the following information, and (B) do you think a proper police report *should* contain it? *If you do not know or have no opinion please leave the answer blank.*

	A. (REPORT WOULD CONTAIN?)		B. (REPORT SHOULD CONTAIN?)		
	USUALLY	SOMETIMES	RARELY	YES	NO
1. Victim's initial description of perpetrator?					
2. That the victim was drunk?					
3. Names and addresses of the bystanders who witnessed the incident or saw the assailant: A. If the information is volunteered? B. If the information is not volunteered, but must be gathered?					
4. Description of defendant's jacket and cap?					

If you have indicated that you would not expect the arresting police officer to include certain information in the arrest report, why do you think that is so? (*Check as many reasons as apply*):

— The police do not have the time to gather/report such details.
— The police do not want to give ammunition to defense lawyers.
— The police are not supposed to report such details—that job is for the detectives or the defense lawyer.
— Once the police decide to arrest someone, they don't want to see the person go free.
— The police don't want to invite a law suit for arresting the wrong person.
— The police are mainly interested in clearing the case by arrest.
— *Other*:

Your Occupation:
Police Officer
Prosecutor
Defense Attorney
Judge

Number of Years in Present Occupation:
____ 0-2
____ 2-5
____ over 5

B. *Table: Combined Police Responses: County Two and Quantico Class*

QUESTION	SHOULD IT BE INCLUDED?	WOULD IT BE INCLUDED? USUALLY	SOMETIMES	RARELY
Question 1: Victim's initial description of perpetrator?	Yes: 15/17 (88%) No: 0	17/17 (100%)	0	0
Question 2: That the victim was drunk?	Yes: 14/17 (82%) No: 2/17 (12%)	12/17 (71%)	3/17 (18%)	2/17 (12%)
Question 3: Names and addresses of the bystanders who witnessed the incident or saw the assailant:				
A. If the information was volunteered?	Yes: 15/17 (88%) No: 1/17 (6%)	15/17 (88%)	1/17 (6%)	0
B. If the information was not volunteered, but must be gathered?	Yes: 15/17 (88%) No: 1/17 (6%)	14/17 (82%)	0	2/17 (12%)
Question 4: Description of the defendant's jacket and cap	Yes: 15/17 (88%) No:: 1/17 (6%)	14/17 (82%)	3/17 (18%)	0
Question 5: Names and addresses of the two persons in defendant's company when arrested	Yes: 6/17 (94%)	13/17 (76%)	4/17 (24%)	0
Question 6: Defendant's alibi statement	Yes: 16/17 (94%)	15/17 (88%)	2/17 (12%)	0
Question 7: Other person's statement supporting defendant's alibi	Yes: 16/17 (94%)	14/17 (82%)	3/17 (18%)	0

C. *City One Incident Report Form*

ORIGINAL ☐ SUPPLEMENTARY ☐

INCIDENT REPORT

01. KEY SITUATIONS ☐ DRUGS ☐ LICENSED PREMISES ☐ ELDERLY ☐ JUVENILE ☐ COMMUNITY DISORDERS ☐ DOMESTIC ☐ OTHER	02. COMPLAINT NO.	03. REPORT DIST.	CLEARANCE DIST.	PAGE	OF
04. TYPE OF INCIDENT	05. CRIME CODE	06. STATUS ☐ INACTIVE ☐ UNFOUNDED ☐ ARREST ☐ UNDER 18 ☐ EXCEPT CL ☐ UNDER 18	07. DATE OF OCCUR. A.	B.	
08. LOCATION OF INCIDENT (NO. STREET) (INTERSECTION-ALPHA ORDER)	APT.	09. DISPATCH TIME ☐ A ☐ P	10. TIME OF OCCUR ☐ A ☐ P A.	B.	☐ A ☐ P
11. VICTIM-COMP (LAST, FIRST, MI)		12. PHONE	13. SEX ☐ M ☐ F	14. RACE	15. MARITAL STATUS ☐ MARRIED ☐ UNMARRIED
16. ADDRESS (NO., STREET, CITY AND STATE	APT.	OCCUPATION	17. AGE	18. D.O.B.	
19. PERSON REPORTING (IF DIFFERENT THAN ABOVE)	20. ADDRESS		APT.	21. PHONE	

22. WAS THERE A WITNESS TO THE CRIME

PERSON INTERVIEWED	AGE	LOCATION OF INTERVIEW	APT. NO.	HOME ADDRESS	APT.	TEL RES / BUS	
						TEL RES / BUS	A ☐ YES ☐ NO
						TEL RES / BUS	

23. NUMBER OF PERPETRATORS | CAN SUSPECT BE IDENTIFIED AT THIS TIME. B ☐ YES ☐ NO

PERSONS

24. ☐ ARREST ☐ WARRANT ☐ MISSING ☐ SUMMONS ☐ SUSPECT	25. NAME (LAST, FIRST, MI)	26. S.S. NO.	27. BOOKING NO.	28. PHOTO NO.	29. ALIAS		
30. WARRANT NO.	31. ADDRESS		32. SEX ☐ M ☐ F	33. RACE	34. AGE	35. HEIGHT	36. D.O.B.
37. SPECIAL CHARACTERISTICS (INCLUDING CLOTHING)			38. WEIGHT	39. BUILD	40. HAIR	41. EYES	

42. CAN SUSPECT VEHICLE BE DESCRIBED C ☐ YES ☐ NO

VEHICLES

43. ☐ STOLEN ☐ RECOV ☐ LV SCENE ☐ ABAND. ☐ IN CUST. ☐ TOWED ☐ USED IN CRIME ☐ OTHER	44. REG. STATE NO.	45. PLATE TYPE YEAR (EXP.)	46. MODEL	
47. VEHICLE MAKE-YEAR	48. VEHICLE NO.	49. STYLE	50. COLOR (TOP-BOTTOM)	
51. OPERATOR'S NAME	52. LICENSE NO.	53. OPERATOR'S ADDRESS		
54. OWNER'S NAME	55. OWNER'S ADDRESS			

56. CAN PROPERTY BE IDENTIFIED D ☐ YES ☐ NO

PROPERTY

57. TYPE OF PROPERTY	58. SERIAL OR I-DENTI-GUARD NO.	59. BRAND NAME-DESCRIPTION	60. MODEL	61. VALUE	62. UCR	63. RECOV.

E ☐ YES ☐ NO

64. IS THERE A SIGNIFICANT M.O.

M.O.

65. TYPE OF WEAPON-TOOL	66. NEIGHBORHOOD	67. TYPE OF BUILDING	68. PLACE OF ENTRY
69. WEATHER	70. LIGHTING	71. TRANSPORTATION OF SUSPECT (CAR, FOOT, MBTA, ETC.)	72. VICTIM'S ACTIVITY
73. UNUSUAL ACTIONS AND STATEMENTS OF PERPETRATOR		RELATIONSHIP TO VICTIM	

YES NO

74. IS THERE ANY PHYSICAL EVIDENCE (DESCRIPTION AND DISPOSITION IN NARRATIVE) F ☐ ☐

75. IS THERE ANY OTHER REASON FOR FURTHER INVESTIGATION (REASON BELOW) G ☐ ☐

BLOCK NO. 76. NARRATIVE AND ADDITIONAL INFORMATION YES NO

SOLVABILITY FACTOR

77. UNIT ASSIGNED	78. TOUR OF DUTY	79. REPORTING OFFICER'S SIGNATURE	80. REPORTING OFFICER'S ID	81. PARTNER'S ID	F.I. ☐ YES ☐ NO
82. DATE OF REPORT	83. SPECIAL UNITS NOTIFIED (REPORTING)				TELETYPE NO.
84. TIME COMPLETED ☐ A ☐ P	85. SIGNATURE OF PATROL SUPERVISOR	86. PAT. SUP ID	87. SIGNATURE DUTY SUPERVISOR		88. DUTY SUP ID

A Synopsis of the Laws Protecting Our Cultural Heritage

Marilyn Phelan*

TABLE OF CONTENTS

I. Introduction 64
II. Protection of Historical Sites and Monuments 66
A. Antiquities Act of 1906 66
B. Historic Sites, Buildings and Antiquities Act of 1935 68
C. National Trust for Historical Preservation (1949) 69
D. Reservoir Act of 1960 70
E. National Historic Preservation Act of 1966 70
F. National Environmental Policy Act of 1969 73
G. Archaeological Resources Protection Act of 1979 75
H. State Preservation Laws 76
I. Architectural Works Copyright Protection Act of 1990 ... 78
J. Commission for the Preservation of America's Heritage Abroad (1985) 79
K. Limitations of Historical Preservation Laws 79
III. Preservation of Sunken Treasures 79
A. Antiquities Acts and the Law of Finds 82
B. Abandoned Shipwreck Act of 1987 84
IV. Conservation and Repatriation of Native American Artifacts. 87
A. American Indian Religious Freedom Act of 1978 87
B. Archaeological Resources Protection Act of 1979 88
C. Native American Graves Protection and Repatriation Act of 1991 89
V. Support and Protection for the Arts 90
A. Berne Convention Implementation Act of 1988 91
B. Visual Artists Rights Act of 1990 92
C. National Film Preservation Act of 1988 and 1992 93
VI. Preservation of International Treasures 94
A. Pre-Columbian Art Act of 1972 96
B. National Stolen Properties Act 96
C. Convention on Cultural Property Implementation Act of 1983 98
D. Stolen Artifacts 99

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E. Arts and Artifacts Indemnity Act of 1975 106
VII. Conclusion 107

I. INTRODUCTION

There has been widespread concern in recent years that the heritage of the various cultures may become obliterated. This concern has led to legislation in various countries to protect artistic, archaeological, and anthropological resources. The United States has been somewhat tardy in its efforts to preserve objects and monuments of artistic, historical, literary, and anthropological interest. As one court alleged, the United States has had a "short cultural memory."[1] Still, although initially dilatory in attempts to protect these treasures, in recent years Congress and state legislatures have recognized the importance of identifying and preserving our cultural heritage and have enacted legislation to initiate and promote such an endeavor. These statutes have resulted from the recognition that our cultural treasures are in jeopardy, that many have been destroyed without consideration of their values, and that not only do they "represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today."[2] As the Supreme Court acknowledged, the problem is "basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people."[3]

Following an apathetic posture toward the identification and preservation of cultural and historical objects, Congress finally, at the turn of the twentieth century, began to recognize the importance of certain historical structures and enacted the Antiquities Act[4] in 1906 to provide a means to protect such structures. Although limited in its application, the act marked the beginning of a collective venture to safeguard historical sites and monuments within the United States. This early and limited historical preservation movement gradually developed into a partnership with the states and the private sector.[5]

Because the Antiquities Act was limited in scope and because of a growing, intensified interest among the populace in protecting historical properties, Congress later adopted a series of supplementary statutes that gave impetus to the present historical preservation program. The first of these statutes which Congress enacted was the Historic Sites, Buildings

1. Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 297 (7th Cir. 1990). *See infra* notes 257-64 and accompanying text.

2. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 108 (1978). *See infra* notes 94-101 and accompanying text.

3. *Penn Cent. Transp. Co.*, 438 U.S. at 108.

4. Ch. 3060, § 2, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-33m (1988)); *see infra* notes 25-39 and accompanying text.

5. *See* H.R. REP. No. 1457, 96th Cong., 2d Sess. 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6378, 6380.

and Antiquities Act[6] in 1935. Congress then established the National Trust for Historical Preservation[7] in 1949, and enacted the National Historic Preservation Act[8] in 1966, and the Archaeological Resources Protection Act[9] in 1979. Finally, Congress stipulated that historical and cultural resources are environmental concerns when it specified the objectives of the Reservoir Act[10] of 1960 and the National Environmental Policy Act[11] of 1969.

Congress has only recently granted protection to special works and artistic expressions. It recognized that architectural designs have national historical significance and provided for their protection with the enactment of the Architectural Works Copyright Protection Act[12] in 1990. It also adopted the Visual Artists Rights Act[13] in 1990 to grant special protection to certain visual artists. Congress concluded that motion pictures are an enduring part of the nation's cultural heritage and enacted the National Film Preservation Act[14] of 1988 and of 1992[15] to recognize certain designated films as significant American art forms deserving of protection. Congress decided that admiralty law principles were not well-suited for the preservation of historic shipwrecks and adopted the Abandoned Shipwreck Act[16] in 1987 for the protection of sunken treasures. It recently granted recognition and protection to the historical culture and heritage of the Native American by enacting the

6. Ch. 593, 49 Stat. 666 (1935) (codified as amended at 16 U.S.C. §§ 461-67 (1988 & Supp. I 1989)); *see infra* notes 40-47 and accompanying text.

7. Ch. 755, § 1, 63 Stat. 927 (1949) (codified as amended at 16 U.S.C. §§ 468-68d (1988)); *see infra* notes 48-52 and accompanying text.

8. Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470a to 470w-6 (1988 & Supp. III 1991)); *see infra* notes 57-69 and accompanying text.

9. Pub. L. No. 96-95, § 2, 93 Stat. 721 (1979) (codified at 16 U.S.C. §§ 470aa-70mm (1988)); *see infra* notes 87-90 and 170-71 and accompanying text.

10. Pub. L. No. 86-523, § 1, 74 Stat. 220 (1960) (codified as amended at 16 U.S.C. §§ 469 to 469c-1 (1988)); *see infra* notes 53-56 and accompanying text.

11. Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-70a (1988 & Supp. III 1991)); *see infra* notes 70-83 and accompanying text.

12. Pub. L. No. 101-650, § 701, 703, 104 Stat. 5128, 5133 (1990) (codified at 17 U.S.C. §§ 101(5), 102(a)(8) (Supp. II 1990)). The act was an amendment to the Copyright Act. *See infra* notes 102-06 and accompanying text.

13. Pub. L. No. 101-650, § 603(a), 104 Stat. 5128 (1990) (codified at 17 U.S.C. § 106A (Supp. II 1990)). This act was also an amendment to the Copyright Act. *See infra* notes 198-207 and accompanying text.

14. Pub. L. No. 100-446, § 1, 102 Stat. 1782 (1988) (codified at 2 U.S.C. §§ 178-78l (1988)) (*repealed by* Pub. L. No. 102-307, § 214, 106 Stat. 272 (Supp. IV 1992)).

15. Pub. L. No. 102-307, § 202, 106 Stat. 267 (1992) (codified at 2 U.S.C. §§ 179-79k (Supp. IV 1992)). The 1992 Act is an amendment to the Copyright Act and repeals the 1988 Act. *See infra* notes 208-12 and accompanying text.

16. Pub. L. No. 100-298, § 2, 102 Stat. 432 (1988) (codified at 43 U.S.C. §§ 2101-06 (1988)); *see infra* notes 140-53 and accompanying text.

Native American Graves Protection and Repatriation Act[17] in 1991. The United States has assumed a limited role in the protection of international treasures. It adopted the Pre-Columbian Art Act[18] in 1972 and implemented the Convention on Cultural Property[19] into domestic law in 1983.

Some courts have made significant contributions to protect cultural and historical properties and artifacts. For example, the United States Supreme Court gave vitality to the historical preservation movement when it ruled, in *Penn Central Transportation Co. v. City of New York*,[20] that preservation laws relate to the promotion of the general welfare.[21] The highest court in New York recently conceded[22] that international treasures are a part of our cultural heritage and must be protected when it acknowledged that New York should not become a haven for stolen art.[23]

This article reviews the statutes enacted to protect our cultural heritage and the court decisions interpreting such legislation. Its purpose is to assemble and summarize the laws currently in existence that serve to secure and preserve those special elements that comprise our cultural heritage.[24]

II. Protection of Historical Sites and Monuments

A. *The Antiquities Act of 1906*

The United States has been concerned principally with the protection of historical sites and monuments within the United States, rather than art works or international treasures, and, as to historical sites and monu-

17. Pub. L. No. 101-601, § 2, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-13 (Supp. III 1991)); *see infra* notes 173-78 and accompanying text.

18. Pub. L. No. 92-587, § 201, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091-95 (1988)); *see infra* notes 226-28 and accompanying text.

19. Pub. L. No. 97-446, § 302, 96 Stat. 2351 (1983) (codified as amended at 19 U.S.C. §§ 2601-13 (1988)); *see infra* notes 217-18, 223-25, 240-46 and accompanying text.

20. 438 U.S. 104 (1978). *See infra* notes 94-101 and accompanying text.

21. *Penn Cent. Transp. Co.*, 438 U.S. at 135-36. The Supreme Court decided that a state is not required to pay a property owner because a preservation law causes a diminution in the value of significant historical property by placing restrictions on the owner's use of such property. *Id.*

22. Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991); *see infra* notes 275-85 and accompanying text.

23. *Solomon R. Guggenheim Found.*, 569 N.E.2d at 430-31. The New York Court of Appeals placed the burden of investigating the provenance of a work of art on the potential purchaser rather than on the original owner. *Id.*

24. I have taken information enumerated in this article from a treatise I authored as well as from a lecture on these statutes in a museum law class. Those portions of the article taken from the treatise are reprinted with permission from 2 Nonprofit Enterprises: Law and Taxation ch. 16 (1991), published by Clark Boardman Callaghan.

ments, only since the turn of the twentieth century. Although a small movement was started in the United States during the nineteenth century to save a few historic treasures, the Antiquities Act of 1906[25] was Congress's first attempt to protect historic ruins. The act was passed in response to vandalism at the Casa Grande ruins in Arizona, but it also represented an attempt to preserve Mount Vernon in Virginia.[26]

The Antiquities Act authorizes the President to set aside historic landmarks and structures as national monuments.[27] It provides penalties for destroying or damaging any historic ruins on public lands. The act further provides that any person who excavates, appropriates, injures, or destroys any historic or prehistoric ruin or monument, or any object of antiquity on lands owned or controlled by the federal government, without permission from the federal government department having jurisdiction over the lands, shall be fined and may be subject to imprisonment.[28]

The Antiquities Act is limited in its application because it subjects a person to penalties for the appropriation of any "ruin," "monument," or "object of antiquity."[29] The definition of these terms is not clear. In *United States v. Diaz*,[30] an individual was convicted in a federal district court under the Antiquities Act for appropriating objects of antiquity from government land. Upon appeal, the appellate court reversed the conviction stating that the act was too vague regarding the definition of "ruin," "monument," or "object of antiquity."[31] The defendant in *Diaz* had appropriated face masks found in a cave on the San Carlos Indian Reservation. These masks were identified by a San Carlos medicine man as having been made in 1969 or 1970 by another medicine man and were used by the Apache Indians in religious ceremonies.[32] After the religious ceremonies, the artifacts were traditionally deposited in remote places on the reservation for religious reasons and were never allowed to leave the reservation. According to a professor of anthropology who testified in the case, an "object of antiquity" could include something that was made "just yesterday" if it related to long standing religious or social tradition.[33] The appellate court disagreed, explaining that a person must be able to know with reasonable certainty those objects that may not be taken. The

25. Ch. 3060, § 2, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-33m (1988)).

26. *See* H.R. REP. No. 1457, 96th Cong., 2d Sess. 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6378, 6380.

27. 16 U.S.C. § 431 (1988).

28. *Id.* § 433. Under the Antiquities Act, permits are required to excavate upon federal property. These permits are granted by the Secretaries of the Interior, Agriculture, and Army, and are issued only to reputable institutions for scientific or historic preservation purposes. *Id.* § 432.

29. *Id.* § 433.

30. 499 F.2d 113 (9th Cir. 1974).

31. *Id.* at 114.

32. *Id.*

33. *Id.*

court noted that the word "antiquity" can refer not only to the age of an object but also to the use for which the object was made and to which it was put, subjects which the court thought were not likely to be of common knowledge.[34]

In *United States v. Smyer*,[35] the Tenth Circuit Court of Appeals distinguished *Diaz* and upheld a conviction for a violation of the Antiquities Act. The defendants in *Smyer* excavated a prehistoric Mimbres ruin at an archaeological site which was inhabited about A.D. 1000-1250.[36] The defendants alleged that the Antiquities Act was vague and, thus, unconstitutional, citing *Diaz* as authority.[37] The court, however, pointed out that *Diaz* involved newly created artifacts. The *Smyer* Court decided that a person of ordinary intelligence should know it is illegal to excavate a prehistoric Indian burial ground and appropriate artifacts that are 800-900 years old.[38] The court ruled that the Antiquities Act, as applied to the prosecution of defendants for taking artifacts from ancient sites, was not unconstitutionally vague.[39]

B. *The Historic Sites, Buildings and Antiquities Act of 1935*

The Antiquities Act became more effective when Congress passed the Historic Sites, Buildings and Antiquities Act (Historic Sites Act) in 1935.[40] The Historic Sites Act declared it a national policy "to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States."[41] The Secretary of the Interior was authorized to restore, reconstruct, and maintain historic sites and properties and to establish and maintain museums for these purposes.[42] The act authorized the Secretary to contract and enter into cooperative agreements with the states, municipal subdivisions, and private organizations and individuals, to protect, preserve, maintain, or

34. *Id.*

35. 596 F.2d 939 (10th Cir.), *cert. denied*, 444 U.S. 843 (1979).

36. *Id.* at 940.

37. *Id.* at 940-41.

38. *Id.* at 941.

39. *Id.* In United States v. Jones, 607 F.2d 269 (9th Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980), individuals who were observed digging on Indian lands and removing artifacts, consisting of clay pots, bone awls, stone metal, and human skeletal remains, were indicted under 18 U.S.C. §§ 641, 1361, the general theft and malicious mischief statutes. *Id.* at 270-71. These statutes provide greater penalties than does the Antiquities Act. The Ninth Circuit ruled that when certain conduct is proscribed by more than one statute, the government may elect to prosecute under either statute unless the congressional history indicates that Congress intended to disallow the more general statutes. *Id.* at 271. The court found no indication that Congress, in passing the Antiquities Act, intended to limit the applicability of the general theft statutes. *Id.* at 273.

40. Ch. 593, 49 Stat. 666 (1935) (codified as amended at 16 U.S.C. §§ 461-67 (1988 & Supp. I 1989)).

41. 16 U.S.C. § 461 (1988 & Supp. I 1989).

42. *Id.* § 462(f).

operate any historic or archaeologic building, site, object, or property connected with a public use.[43]

Pursuant to the Historic Sites Act, the Secretary of the Interior determined, in 1936, that certain land in the City of St. Louis, Missouri, possessed exceptional value as an historic site, and through the City of St. Louis, instituted condemnation proceedings to acquire the land.[44] This action was challenged in *Barnidge v. United States*,[45] based upon an allegation that the Historic Sites Act did not authorize the condemnation of property. The Eighth Circuit Court of Appeals decided that the federal government did have condemnation power to acquire real estate for public use.[46] Further, because the Historic Sites Act authorized the Secretary of the Interior to acquire property for purposes of the act, the court ruled that the federal government could acquire by eminent domain, or otherwise, sites of national historic significance to preserve them "to commemorate and illustrate the nation's history."[47]

C. *The National Trust for Historical Preservation in the United States*

The National Trust for Historical Preservation in the United States, (National Trust), was chartered in 1949 as a private, nonprofit organization.[48] The National Trust "receive[s] donations of sites, buildings, and objects significant in [United States] history and culture, [and] preserve[s] and administer[s] them for the public benefit."[49]

In *Landmarks Preservation Council of Illinois v. City of Chicago*,[50] the Supreme Court of Illinois ruled that the National Trust had standing to challenge the destruction of private buildings, which the National Trust viewed as having national historic significance, even though the buildings had not been officially declared to be "national landmarks."[51] The court reasoned that, in order for the National Trust to perform its congressio-

43. *Id.* § 462(e).

44. *See* Barnidge v. United States, 101 F.2d 295, 296 (8th Cir. 1939).

45. 101 F.2d 295 (8th Cir. 1939).

46. *Id.* at 297; *see* 40 U.S.C. § 257 (1988). In United States v. 16.92 Acres of Land, 670 F.2d 1369 (7th Cir.), *cert. denied*, 459 U.S. 824 (1982), the Seventh Circuit ruled that 40 U.S.C. § 257 grants the federal government condemnation powers under other federal statutes. *Id.* at 1371. The court ruled that a federal statute need not specifically include condemnation as a permissible method of property acquisition. *Id.* Unless a statute excludes condemnation as a method of property acquisition, the federal government has such a right. *Id.*

47. *Barnidge*, 101 F.2d at 299.

48. Ch. 755, § 1, 63 Stat. 927 (1949) (codified as amended at 16 U.S.C. §§ 468-68d (1988)).

49. 16 U.S.C. § 468 (1988). The activities of the National Trust fall under the direction of a board of trustees composed of the Attorney General of the United States, the Secretary of the Interior, the director of the National Gallery of Art (Smithsonian Institution), and six United States citizens. *Id.* § 468b.

50. 531 N.E.2d 9 (Ill. 1988).

51. *Id.* at 14.

nally mandated functions, it was essential that the organization be permitted to maintain suits in state courts to prevent the unlawful destruction of buildings that have national historic significance.[52]

D. *Reservoir Act of 1960*

The Reservoir Act[53] was passed in 1960 to provide for the preservation of historical and archaeological data that might otherwise be lost or destroyed as a result of flooding or other alterations of the terrain caused by a federal construction project or a federally licensed activity or program.[54] "Whenever any Federal agency finds, or is notified in writing by an appropriate historical or archaeological authority, that its activities in connection with any Federal construction project or federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific [or] prehistorical . . . data," the agency must provide such information to the Secretary of the Interior.[55] The Secretary is required to investigate the areas affected.[56]

E. *The National Historic Preservation Act of 1966*

The National Historic Preservation Act[57] was passed in 1966[58] to provide for the maintenance and expansion of a National Register of districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, and culture, and to provide matching grants-in-aid to the National Trust for Historic Preservation in the United States for the purpose of preserving historical properties for the public benefit.[59] Pursuant to the National Historic Preservation Act, the head of

52. *Id.* The Supreme Court of Illinois concluded that Congress intended the National Trust to have standing to maintain such actions and that standing was necessary to enable the National Trust to fulfill the functions Congress intended it to have. *Id.*

53. Pub. L. No. 86-523, § 1, 74 Stat. 220 (1960) (codified at 16 U.S.C. §§ 469 to 469c-1 (1988)).

54. 16 U.S.C. § 469 (1988).

55. *Id.* § 469a-1.

56. *Id.*

57. Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470a to 470w-6 (1988 & Supp. III 1991)).

58. The small movement at the turn of the twentieth century to save a few historic treasures had grown immensely. Under the Historic Preservation Act, a partnership developed among the federal government, the several states, and the private sector to protect the nation's historic resources. *See* National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 1980 U.S.C.C.A.N. (94 Stat.) 6380.

59. 16 U.S.C. §§ 470a-70d (1988). The National Historic Preservation Act was amended in 1980 to provide better guidance for the national historic preservation program at the federal, state, and local levels. The 1980 act provided for a loan insurance program to establish a national museum of the building arts, and for procedures for implementing the World Heritage Convention. *See id.* §§ 470a-1, 470d, 470w-5. The insured loan program was added to stimulate private investments in the preservation of properties included in the National Register. *Id.* § 470d. Historic properties are often viewed as a high-risk investment, and non-profit organizations interested in

any federal agency having direct or indirect jurisdiction over a proposed federal, or federally assisted, undertaking in any state must consider the effect of the undertaking on any district, site, building, structure, or object included, or eligible to be included, in the National Register, prior to approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license.[60]

The National Historic Preservation Act compels the Secretary of the Interior to direct and coordinate United States participation in the Convention Concerning the Protection of the World Cultural and Natural

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saving historic structures would often have difficulty qualifying for loans. Most of the loans that can be insured under this act would be for acquisition and development projects.

To obtain a listing in the National Register, nominations are made on National Register Nomination Form NPS 10-900 with accompanying continuation sheets. The form must be completed in accord with the requirements and guidance listed in the NPS publication, "How to Complete National Register Forms." *See* 36 C.F.R. § 60.3(i) (1992). Forms are obtained from the State Historic Preservation office. The criteria applied to evaluate property for the National Register are set out in 36 C.F.R. § 60.4 (1992). Qualifying property includes buildings, sites, and objects:

> that are associated with events that have made a significant contribution to the broad patterns of [United States] history; that are associated with the lives of persons significant in [that history]; or that embody the distinctive characteristics of a type, period, or method of construction . . . that represent the work of a master . . . that possess high artistic values, that represent a significant and distinguishable entity whose components may lack individual distinction, or that have yielded, or may be likely to yield, information important in prehistory or history.

Id.

60. 16 U.S.C. § 470f (1988). The Advisory Council on Historic Preservation has adopted procedures concerning an agency's commenting responsibility. If a federal agency complies with this procedure, it may adopt any course of action it believes to be appropriate. 36 C.F.R. § 60.2 (1992).

One court recently concluded that the National Historic Preservation Act is limited in scope. In Lee v. Thornburgh, 877 F.2d 1053 (D.C. Cir. 1989), the Court of Appeals for the District of Columbia decided that the National Historic Preservation Act imposes obligations only on federal agencies and ruled that Congress and the District of Columbia are excluded from the act. *Id.* at 1056. The court explained that the act imposes no obligations on state governments and that the District of Columbia was included in the act's definition of a "state." *Id.*; *see also* 16 U.S.C. § 470w(2). The court asserted that the National Historic Preservation Act is "a narrow statute." *Lee*, 877 F.2d. at 1058. The court commented that "the main thrust [of the act] is to encourage preservation of historic sites and buildings rather than to mandate it." *Id.* It acknowledged that federal agencies are commanded to value preservation and are subject to requirements under the act, which are in relation to projects or programs the agencies either initiate or control through funding or approvals. *Id.* The court opined that the act imposes obligations only when a project is undertaken either by a federal agency or through the auspices of agency funding or approval. *Id.* "An agency having authority to license an undertaking may not issue such a license without fulfilling these obligations. Likewise, an agency with jurisdiction over a federal or federally-assisted project must comply with the act before approving funds for it." *Id.* at 1056. The court held that the act imposed obligations on federal agencies only in these limited circumstances. *Id.*

Heritage.[61] The Secretary of the Interior is directed to nominate periodically properties that are of international significance to the World Heritage Committee on behalf of the United States.[62]

In *Boyd v. Roland*,[63] the Fifth Circuit Court of Appeals recognized that the National Historic Preservation Act "require[s] federal agencies to take into account the effect of federally assisted undertakings on property 'included in, or eligible for inclusion in, the National Register.'"[64] Eligible property is that property that meets the National Register criteria.[65] The Fifth Circuit held "that eligible property is not restricted to property that had been officially determined to be eligible for inclusion in the National Register."[66]

Courts have ruled that a private right of action against a federal agency exists under the National Historic Preservation Act.[67] In *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*,[68] the Vieux Carre sought to arrest the construction of a riverfront park being erected in the historical district of New Orleans. The Fifth Circuit held that the Vieux Carre was within the zone of interests sought to be protected by the National Historic Preservation Act.[69]

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61. 16 U.S.C. §§ 470a-1(a) (1988). The Secretary of the Interior acts in cooperation with the Secretary of State, the Smithsonian Institution, and the Advisory Council on Historic Preservation. *Id.*

62. *Id.* § 470a-1(b). The Secretary of the Interior nominates properties of international significance to the World Heritage Committee for inclusion on the World Heritage List. Property cannot be nominated "unless it has previously been determined to be of national significance." *Id.*

63. 789 F.2d 347 (5th Cir. 1986).

64. *Id.* at 349 (emphasis omitted) (quoting 16 U.S.C.A. § 470(f) (West 1985)).

65. *See* 36 C.F.R. § 800.2(e) (1992).

66. *Boyd*, 789 F.2d at 349 (emphasis omitted).

67. 16 U.S.C. §§ 470 to 470ll (1988 & Supp. IV 1992). *See, e.g.*, Boarhead Corp. v. Erikson, 923 F.2d 1011, 1017 (3d Cir. 1991). In *Boarhead*, the owner of a farm whose title was traced from a grant to William Penn, and which had been used as the burial grounds of Native Americans, complained that the Environmental Protection Agency had decided to conduct cleaning activities on the farm without complying with National Historic Preservation Act. *Id.* at 1013-15.

The National Historic Preservation Act permits a court to award attorney's fees and other costs to a plaintiff if the plaintiff substantially prevails in the action. 16 U.S.C. § 470w-4.

68. 875 F.2d 453 (5th Cir. 1989), *cert denied*, 493 U.S. 1020 (1990).

69. *Id.* at 459. The Fifth Circuit cited Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 105 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970), which ruled that an interest in widely shared aesthetic and environmental concerns falls within the zone of interest to be protected by the National Environmental Protection Act. *Id.* Still, the *Vieux Carre* Court decided that the local project was only subject to a federal permit and, thus, a historical impact review under the National Historical Preservation Act was not required. *Vieux Carre*, 875 F.2d at 465. The court held that nationwide permits authorizing "truly inconsequential projects" were not "triggering 'licenses'" under 16 U.S.C. § 470f and, thus, such activities escaped the historical review requirements of the National Historic Preservation Act. *Id.* at 466.

F. *The National Environmental Policy Act of 1969*

The National Environmental Policy Act[70] added the requirement that environmental and cultural values be considered along with economic and technological values when proposed federal projects are assessed.[71] The act provides that the federal government must use all practicable means to improve and coordinate federal plans, functions, programs, and resources "to the end that the nation may preserve important historic, cultural, and natural aspects of the national heritage."[72] If proposed major federal action "significantly affect[s] the quality of the human environment," the appropriate governmental agency must prepare an environmental impact statement.[73]

The interrelationship between the National Environmental Protection Act and the National Historic Preservation Act on federally funded projects that impact upon historic structures can become an issue. In *Committee to Save the Fox Building v. Birmingham Branch of Federal Reserve Bank of Atlanta*,[74] the court considered the effect of the two acts on a challenged action of a federal agency. The court ruled that the demolition of a building listed in the National Register may be viewed as a "major" federal action.[75] Still, the court decided that "this consideration is interwoven with the requirement that the challenged action must significantly affect the quality of the human environment."[76] Because the court concluded that the impact on the physical environment of the demolition of an historic building is a social concern, it ruled that the Environmental Policy Act was not applicable.[77]

In *Preservation Coalition, Inc. v. Pierce*,[78] the Ninth Circuit Court of Appeals recognized that the National Environment Policy Act "requires Federal agencies to make detailed reports on major federal actions significantly affecting the quality of human environment,"[79] but decided

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In Landmarks Preservation Council of Illinois v. City of Chicago, 531 N.E.2d 9 (Ill. 1988), the Supreme Court of Illinois held that a local preservation organization did not have standing to challenge a city ordinance rescinding the landmark status of a building. *Id.* at 13. The court noted that the local organization's only interest was the ability of its members to view the property from a public street—none of the members were owners of the private property or of adjoining property and neither federal funds nor a federal agency were involved in the project. The court ruled that the National Trust had standing to maintain the suit. *Id.* at 14.

70. Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-70a (1988 & Supp. III 1991)).

71. 42 U.S.C. §§ 4331-32 (1988 & Supp. III 1991).

72. *Id.* § 4331(b)(4).

73. *Id.* § 4332(C).

74. 497 F. Supp. 504 (N.D. Ala. 1980).

75. *Id.* at 511.

76. *Id.*

77. *Id.*

78. 667 F.2d 851 (9th Cir. 1982).

79. *Id.* at 855.

that the federal action in the disputed transaction was not major.[80] Thus, the court ruled that there was no requirement that an environmental impact statement be created for the project.[81] The court noted that the National Environmental Policy Act "requires federal agencies to preserve important historic and cultural aspects of the nation's heritage."[82] It also decided that compliance with the National Historic Preservation Act does not assure compliance with the National Environmental Policy Act.[83] As the court explained, "each [act] mandates separate and distinct procedures, both of which must be complied with when historic buildings are affected."[84] The court pointed out that, while there are similarities between the demands and the goals of the two acts, each act must be taken on its own terms.[85] According to the court, both acts essentially create obligations that are chiefly procedural in nature and both have the goal of generating information about the impact of federal actions on the environment. As the court stated, both are designed to insure that the federal agency "stop, look, and listen" before moving ahead.[86]

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80. *Id.*

81. *Id.* at 859-60.

82. *Id.* at 858.

83. *Id.* at 859.

84. *Id.*

85. *Id.*

86. *Id.* In Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985), the court held that the Corps of Engineers violated both the National Historic Preservation Act and the Environmental Policy Act. According to the court, the Corps had issued a permit for the placement of riprap (large boulders to stabilize the shore banks from erosion) without taking required measures to protect the cultural and archaeological resources of the area. *Id.* at 1427. The court pointed out that the National Environmental Policy Act requires that a federal agency prepare an environmental impact statement if the proposed project will degrade some environmental factor. *Id.* at 1429-30 ("'If substantial questions are raised whether a project [will] have a significant effect on the human environment, a [statement] *must* be prepared.'") (quoting Foundation for N. Am. Wild Sheep v. Department of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982)). If an agency determines that the statement need not be prepared, a court may review the reasonableness of the agency's determination. *Id.* If the determination is found unreasonable, the court will order that an environmental impact statement be prepared. *Id.* The court noted that the defendant's contention that no major federal action occurred had been a threshold question for some courts in ascertaining the reasonableness of the agency's determination that an environmental impact statement need not be prepared. *Id.* at 1430-31. The court recognized that the courts are split on whether the action must be "major." *Id.* at 1431. For example, the court in *Colorado River Indian Tribes* looked at the reasonableness of the agency's determination without considering whether "major" federal action occurred. *Id.* The court ruled that federal agencies must examine the effects of their actions on property eligible to be included in the National Register. *Id.* at 1434. According to the court, eligible property is not limited to property that was formally determined to be eligible. *Id.* at 1435, 1437.

G. *Archaeological Resources Protection Act of 1979*

The Archaeological Resources Protection Act,[87] which enlarges upon the Antiquities Act of 1906, was passed in 1979 to protect archaeological resources and sites located on public and Indian lands.[88] The act prohibits the sale, purchase, transport, exchange, or receipt of any archaeological resources removed without permission from public or Indian land.[89] Thus, a museum could become liable under the act for receiving and/or purchasing historical objects taken from public or Indian lands.

The Archaeological Resources Protection Act is more explicit as to its coverage than is the Antiquities Act. For example, unlike the Antiquities Act, which does not define "ruin" or "object of antiquity," the Archaeological Resources Protection Act specifically defines an "archaeological resource" that is protected by the act. An "archaeological resource" is any material remains of past human life or activities that are of archaeological interest and which are at least 100 years of age.[90]

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87. Pub. L. No. 96-95, § 2, 93 Stat. 721 (1979) (codified at 16 U.S.C. §§ 470aa-70mm (1988)).

88. 16 U.S.C. § 470aa(b) (1988). The purpose of the Archaeological Resources Protection Act "is to secure for the present and future benefit of the American people, the protection of archaeological resources and sites located on public and Indian lands." *Id.* It also was intended "to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources . . . obtained before October 31, 1979." *Id.* In United States v. Austin, 902 F.2d 743 (9th Cir.), *cert. denied*, 498 U.S. 874 (1990), defendants indicted under the Archaeological Resources Protection Act for excavating a Native American archaeological site alleged that the act was unconstitutionally overbroad and vague. *Id.* at 743-44. The court ruled that the act was not unconstitutional. *Id.* at 745.

89. 16 U.S.C. § 470ee(a). The Archaeological Resources Protection Act also prohibits the excavation, removal, damage, or alteration of any archaeological resource. *Id.* § 470ee(b). The act provides for the issuance of permits to excavate upon public or Indian lands. *Id.* § 470cc. Persons receiving permits under the Archaeological Resources Protection Act need not also obtain permits under the Antiquities Act. *Id.* § 470cc(h). Native American tribes or their members need not obtain a permit under the Archaeological Resources Protection Act, or under the Antiquities Act, for the excavation or removal of any archaeological resource located on their lands if tribal law regulates the excavation and removal of archaeological resources. *Id.* § 470cc(g).

Under the Archaeological Resources Protection Act, "[t]he Secretary of the Interior may promulgate regulations providing for (1) the exchange between suitable universities, museums, or other scientific or educational institutions of archaeological resources removed from public lands and Indian lands, and (2) the ultimate disposition of resources removed pursuant to the [Antiquities Act]." *Id.* § 470dd. Any exchange of resources removed from Indian lands is subject to the consent of the Indian tribe which has jurisdiction over the land. *Id.*

90. 16 U.S.C. § 470bb(1). A violator is subject to a fine of $10,000 and/or imprisonment of not more than one year or, if the value of the object is more than $500, to a fine of $20,000 and/or imprisonment of not more than two years. *Id.* § 470ee(d). A second violation causes the penalty to be a fine of as much as $100,000 and/or imprisonment for as long as five years. *Id.* Penalties and prohibitions under the act are not

H. *State Preservation Laws*

Most historical preservation is accomplished through the states in cooperation with the federal government. Numerous state preservation programs were commenced in the past decade with each state now having established some form of state preservation agency.[91] Laws enacted by the states to encourage or require the preservation of buildings and areas with historic or aesthetic importance have been precipitated by two concerns. One was the "recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways."[92] The second concern was the "widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all."[93]

An impediment to state historic preservation is the concern that once a structure is designated as having historic significance, it may not be altered or destroyed. In *Penn Central Transportation Co. v. City of New York*,[94] the Supreme Court likened the Landmarks Preservation Law of the City of New York to zoning laws that substantially relate to the promo-

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applicable to a person having lawful possession of an archaeological resource prior to October 31, 1979. *Id.* § 470ee(f).

91. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 41-861 to 41-866 (1991); CAL. PUB. RES. CODE §§ 5020-29 (West 1984 & Supp. 1993); CONN. GEN. STAT. ANN. §§ 7-147a to 7-147y, §§ 10-321 to 10-321cc (West 1989 & Supp. 1993); FLA. STAT. ANN. §§ 266.0001-.0068 (West Supp. 1993); ILL. ANN. STAT. ch. 105, ¶ 533a, ch. 127, ¶ 133d (Smith-Hurd 1987); MASS. ANN. LAWS, ch. 9, §§ 26-28 (Law. Co-op. 1988 & Supp. 1993); ME. REV. STAT. ANN. tit. 27, §§ 501-09 (West 1988 & Supp. 1992); N.Y. PARKS, REC. & HIST. PRESERV. LAW §§ 3.01-.23 (McKinney 1984); PA. STAT. ANN. tit. 37, §§ 101-906 (1993).

92. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 108 (1978).

93. *Id.* The State of Florida has declared that the "rich and unique heritage of historic properties in [the] state, representing more than 10,000 years of human presence, is an important legacy to be valued and conserved for present and future generations." FLA. STAT. ANN. § 267.061(1)(a) (West 1991). This statute states that the "destruction of these nonrenewable historical resources will engender a significant loss of the state's quality of life, economy, and cultural environment." *Id.*

In Maine, the Maine Historic Preservation Commission was established to implement the policy of the state "to preserve the architectural, historic and environmental heritage of the people of the State and to develop and promote the cultural, educational, and economic benefits of these resources." ME. REV. STAT. ANN. tit. 27, § 501 (West 1988).

In Pennsylvania, the legislature made a finding that "[t]he irreplaceable historical, architectural, archaeological and cultural heritage of [the] Commonwealth should be preserved and protected for the benefit of all the people, including future generations." PA. STAT. ANN. tit. 37, § 102(3) (1993). The Pennsylvania statute provides that the preservation and protection of historic resources was deemed to promote the public health, prosperity, and general welfare. *Id.* § 102(4). It states that "[t]he rapid social and economic development of . . . contemporary society threatens to destroy the remaining vestiges of our historic heritage." *Id.* § 102(5).

94. 438 U.S. 104 (1978).

tion of the general welfare but require no payment to the property owner due to a diminution in property value brought about by the application of the law to the owner's property.[95] In *Mayes v. City of Dallas*,[96] the Fifth Circuit held that a property owner of a home within an historic preservation district could not change the property's exterior features without prior approval from city authorities.[97] The court held that a municipality had "the constitutional power to regulate the use of private property in the interest of historic preservation."[98] In *St. Bartholomew's Church v. City of New York*,[99] the Second Circuit ruled that a city's landmarks law did not violate a church's free exercise and takings claim.[100] The court decided

95. *Id.* at 135-36. Penn Central Transportation Company owned a building called the Terminal, which had been designated as one of New York City's most famous buildings. *Id.* at 115. Penn Central wanted to tear down a portion of the Terminal and construct an office building on its top. *Id.* at 115-16. The City of New York refused to grant permission and Penn Central brought suit, alleging that restrictions placed upon its property by the City of New York constituted a "taking" of its property without due process of law. *Id.* at 116-19. The United States Supreme Court decided that the New York law did not interfere in any manner with present uses of the Terminal. *Id.* at 136. According to the Court, the Terminal's designation as a landmark not only permitted the owner to continue to use the property but assumed that the owner would do so precisely as it had for the past 65 years—the building would remain a railroad terminal containing office space and concessions. *Id.* The Court ruled that Penn Central was not entitled to compensation for the law's restriction in its use of the Terminal. *Id.* at 136-37.

96. 747 F.2d 323 (5th Cir. 1984).

97. *Id.* at 326. The property owner was "denied permission to paint his brick home and to construct a walkway with pylons across his front lawn." *Id.* at 323. A city preservation regulation required prior approval for any exterior changes. *Id.* at 324.

98. *Id.* (citing *Penn Cent. Transp. Co.*, 438 U.S. at 132-34). The *Mayes* Court determined that the city ordinance satisfied due process criteria. *Id.*

In Board of Regents v. Walker County Historical Comm'n, 608 S.W.2d 252 (Tex. Ct. App. 1980), the board of regents of a university system commissioned architects to restore Sam Houston's Woodland home, a building under its control. *Id.* at 252. The county historical commission objected to the manner in which the restoration was to be performed. *Id.* The Texas Court of Appeals noted that section 191.131 of the Texas Antiquities Code required that a permit be obtained before any operations could be conducted on landmarks. *Id.* at 253. However, the court ruled that because the home had never been designated as a state landmark, the Antiquities Committee was neither authorized nor required to issue a permit. *Id.*

The Texas Antiquities Code was amended in 1981 to require a permit to alter, salvage, or excavate any property that is an historic site under section 191.092 of the Code or any sunken vessels or treasure imbedded in the earth as defined in section 191.091 of the Code. TEX. NAT. RES. CODE ANN. § 191.093 (West 1993).

99. 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

100. *Id.* at 351. The church contended that the city's denial of its application to erect a commercial office tower on its property impaired its ability to operate and expand its ministerial and charitable activities. *Id.* at 353. The appellate court agreed with the district court that the church had failed to prove that it could not continue its religious practices in its existing facilities. *Id.* at 357.

But see First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992), in which the Supreme Court of Washington ruled that a city's landmarks preservation

that although a landmarks law might "freeze" church property in its existing use and prevent a church from expanding or altering its activities, the Supreme Court's decision in *Penn Central* explicitly permitted such restrictions.[101]

I. *Architectural Works Copyright Protection Act of 1990*

The Architectural Works Copyright Protection Act[102] was instituted in 1990 as a "result of United States adherence to the Berne Convention for the Protection of Literary and Artistic Works."[103] In adopting the act, Congress determined that architecture is a form of artistic expression that "performs a significant societal purpose, domestically and internationally."[104] The act provides protection through the Copyright Act for "works of architecture," i.e., "the constructed design of buildings."[105] An architectural work that is now protected by the Copyright Act is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings.[106]

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ordinance violated a church's right to free exercise of religion under the First Amendment. *Id.* at 177. It distinguished *St. Bartholomew's Church* because St. Bartholomew's Church sought an exception for an adjacent building, not for its house of worship, and because the court did not consider the constitutionality of a liturgy-based religious exemption. *Id.* at 181. The *First Covenant Church* Court noted that St. Bartholomew's Church had accepted designation as a landmark without objection, whereas the First Covenant Church had continuously objected to such designation. *Id.* Further, the First Covenant Church claimed that the landmark designation reduced the value of its principal asset by almost one-half. *Id.* at 183.

101. *St. Bartholomew's Church*, 914 F.2d at 356.

102. Pub. L. No. 101-650, §§ 701, 703, 104 Stat. 5128, 5133 (1990) (codified at 17 U.S.C. §§ 101(5), 102(a)(8) (Supp. II 1990)). The act was an amendment to the Copyright Act and provided copyright protection for works of architecture. *Id.*

103. H.R. Rep. No. 735, 101st Cong., 2d Sess. 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6941. See discussion of Berne Convention, *infra* notes 188-96 and accompanying text.

104. Pub. L. No. 101-650, 1990 U.S.C.C.A.N. (101 Stat.) 6936.

105. *Id.* at 6942.

106. 17 U.S.C. § 101(5) (Supp. II 1990). Section 120(a) of Title 17 permits the unauthorized "making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or is ordinarily visible from a public place." *Id.* The section thus provides a limitation on the copyright owner's right to prepare derivative works. *Cf.* 17 U.S.C. § 106(2). Section 120(b) permits the owner of a building embodying a protected architectural work to "make or authorize the making of alterations to [the] building" and to "destroy or authorize the destruction of [the] building" without the copyright owner's consent. *Id.* § 120(b). Section 301(b)(4) of Title 17 provides that "State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected" by 17 U.S.C. § 102(a)(8) are not preempted by the Copyright Act. *Id.*

J. *Commission for the Preservation of America's Heritage Abroad*

In 1985, Congress established the Commission for the Preservation of America's Heritage Abroad[107] in order to preserve and protect cemeteries, monuments, and historic buildings associated with the foreign heritage of United States citizens.[108] The Commission was charged with the duty of identifying and publishing a list of those cemeteries, monuments, and historic buildings located abroad that are associated with the foreign heritage of United States citizens from eastern and central Europe, and encouraging the preservation and protection of such structures.[109] In cooperation with the Department of State, the Commission is to obtain assurances from foreign governments that the cemeteries, monuments, and buildings it identified will be preserved and protected.[110]

K. *Limitations of Historical Preservation Laws*

Although legislation to protect historic sites and structures was slow in developing, the current preservation laws did initiate and advance a momentous national historical preservation movement. Still, the widespread protection such legislation has assigned to historical sites and monuments has not been conferred upon other cultural treasures. In addition, there have been other special problems not addressed by preservation laws. For example, because admiralty principles determine ownership of sunken vessels, the historical preservation laws have not protected sunken treasures. Further, historical preservation laws have not guaranteed Native Americans the preservation of their individual culture and heritage. In addition, historical preservation laws have not provided protection for the nation's artistic treasures or for international cultural and historical treasures. Congress has only recently enacted special legislation to address these issues.

III. Preservation of Sunken Treasures

The issue of title to sunken ships and to the artifacts found on these vessels has surfaced in recent years. There have been many excavations of sunken crafts since individuals and governments have acquired the means to locate and excavate these vessels. Technological advances have made access to shipwrecks in deep waters much less difficult. Currently, cameras can transmit a video presence of ship artifacts, and robotics devices can permit archaeologists to study and analyze sunken objects prior to excavation. The sea is able to preserve antiquities and provide society with considerable knowledge about ancient civilizations. Both the federal

107. Pub. L. No. 99-83, § 1303, 99 Stat. 280 (1985) (codified at 16 U.S.C. § 469j (1988 & Supp. IV 1992)).
108. 16 U.S.C. § 469j (1988 & Supp. IV 1992).
109. *Id.* § 469j(c).
110. *Id.*

government and the states have enacted legislation, in their roles as trustees of the public interest, to ensure protection of the historical and archaeological significance of these shipwrecks.[111]

There has been complex litigation involving the issue of ownership of shipwrecks. As the Supreme Judicial Court of Massachusetts noted, in *Commonwealth v. Maritime Underwater Surveys, Inc.*,[112] the public originally encouraged the "hardy and adventurous mariner" to engage in "laborious and sometimes dangerous enterprises" to locate and excavate these wrecks.[113] Ownership of such vessels was determined by the law of admiralty. Courts decided questions of title to sunken and abandoned shipwrecks by applying the law of finds and the law of salvage.[114] The law of finds, which "developed originally at common law and [was] then incorporated into admiralty, gives legal force to the venerable maxim 'finders-keepers.'"[115] The law of finds designates the finder, who takes possession of lost and abandoned property and who exercises dominion and control over the property, as the owner of such property. The application of admiralty law to a claim regarding derelict property "'would lead to an award either of outright ownership of the recovered goods (applying the law of finds) or of entitlement to an appropriate salvage award.'"[116]

The law of salvage is an ancient maritime doctrine, "meant to encourage the rescue of imperiled or derelict marine property by providing a liberal reward to those who recover property on or in navigable waters."[117] Admiralty courts do not view compensation as salvage merely as

111. *See, e.g.*, 43 U.S.C. §§ 2101-06 (1988) (*see* discussion *infra* notes 140-53 and accompanying text); CAL. PUB. RES. CODE § 6309 (West 1988 & Supp. 1993); GA. CODE ANN. § 12-3-80 (1992); ILL. REV. ANN. STAT. ch. 127, ¶ 133c.02 (Smith-Hurd 1992); IND. CODE ANN. § 14-3-3.3.1 (West 1990); LA. REV. STAT. ANN. § 41:1604 (West 1990); MD. CODE ANN. NAT. RES. ACT § 2-309 (1988); MASS. GEN. L. ch. 6,.§§ 179, 180 (1990); MICH. COMP. LAWS § 299.54c (1993); MISS. CODE. ANN. § 39-7-9 (1992); S.C. CODE ANN. §§ 54-7-610 to 54-7-850 (Law. Co-op. 1992 & Supp. 1993) (*see* discussion *infra* at notes 155-59 and accompanying text); TEX. NAT. RES. CODE ANN. § 191.091 (West 1993).

112. 531 N.E.2d 549 (Mass. 1988). Maritime claimed title to the pirate ship WHYDAH, which capsized in 1717 during a storm off the Cape Cod coast. *Id.* at 549-50. The ship was "laden with plundered cargo." *Id.* at 549.

113. *Id.* at 551 (quoting The Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869)).

114. *See, e.g., id.*; Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978).

115. Zych v. Unidentified, Wrecked & Abandoned Vessel, 941 F.2d 525, 527 (7th Cir. 1991).

116. *Maritime Underwater Surveys*, 531 N.E.2d at 551 (quoting Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186, 188 (S.D. Fla. 1981)).

117. *Id.* In Klein v. Unidentified Wrecked & Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985), the Eleventh Circuit explained that a salvor is entitled to a salvage award if three conditions are met: (1) a maritime peril existed from which the ship could not have been rescued without the salvor's assistance; (2) the salvor's act was voluntary; and (3) the act was successful in saving or helping to save at least part of the property at risk. *Id.* at 1515. In Martha's Vineyard Scuba Headquarters, Inc. v.

pay but as a reward given for perilous services and as an inducement to search for such wrecks.[118] The law of salvage "assumes that the property is owned and has not been abandoned."[119] The law of finds, on the other hand, determines title to abandoned property.[120]

American courts have applied the law of finds, rather than the law of salvage, in cases involving ancient shipwrecks where no owner is likely to come forward.[121] Title to recovered treasure vests either in the sovereign or in the finder. "The English common law approach to the law of finds is that title to abandoned property found on the seas is the prerogative of the crown."[122] The "American rule is that title to recovered property or treasure rests in the finder absent a legislative exercise of the sovereign prerogative."[123]

Unidentified, Wrecked & Abandoned Steam Vessel, 833 F.2d 1059 (1st Cir. 1987), the First Circuit observed that, to maintain a salvor's franchise to the exclusion of the efforts of other salvors, the salvage operation must be "(1) undertaken with due diligence, (2) ongoing, and (3) clothed with some prospect of success." *Id.* at 1061.

In Columbus-America Discovery v. Atlantic Mut. Ins., 974 F.2d 450 (4th Cir. 1992), the Fourth Circuit noted six "main ingredients" admiralty courts use when fixing an award for salvage:

> (1) The labor expended by the sailors in rendering the salvage service. (2) The promptitude, skill, and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued.

Id. at 468.

118. *Maritime Underwater Surveys,* 531 N.E.2d at 551 (quoting The Blackwall, 77 U.S. (10 Wall.) 1, 14 (1869)).

119. *Id.*

120. *Id.*

121. *See, e.g., Maritime Underwater Surveys,* 531 N.E.2d 549; Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel, 569 F.2d 330 (5th Cir. 1978).

The Fourth Circuit in *Columbus-America Discovery* concluded that the "finds law is applied to previously owned sunken property *only* when that property has been abandoned by its previous owners." *Columbus American Discovery,* 974 F.2d at 461 (emphasis added). It decided that only a handful of cases have applied the law of finds, and that all of them fit into two categories. *Id.* First, it noted those cases "where owners expressly and publicly abandoned their property." *Id.* The second category of cases, according to the court, involves instances where items are recovered from ancient shipwrecks and no owner appears in court to claim them. *Id.* The court ruled that the evidence was insufficient to conclude that underwriters abandoned their interest in a sunken treasure and held that the trial court erred when it applied the law of finds. *Id.* at 468. On remand, it instructed the trial court to apply the law of salvage. *Id.* The dissent, however, disagreed with the majority's decision to apply the law of salvage. *Id.* at 476 (Widener, J., dissenting). The dissent concluded that, in the context of long lost wrecks, courts have almost without exception applied the law of finds. *Id.* (Widener, J., dissenting).

122. *Maritime Underwater Surveys,* 531 N.E.2d at 551.

123. *Id.*

Congress eventually decided that admiralty principles are "not well-suited to the preservation of historic and other shipwrecks" which may have considerable cultural value.[124] In addition, many states have recognized that historic shipwrecks are cultural resources needing greater protection and have enacted legislation to protect these resources for the public.[125]

A. *Antiquities Acts and the Law of Finds*

The federal government has used the Antiquities Act of 1906 and the Archaeological Protection Act of 1979, albeit with limited success, to assert title to ancient vessels that had sunk near the United States coast. For example, in *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*,[126] the United States asserted title under the Antiquities Act to a Spanish galleon, the NUESTRA SENORA DE ATOCHA, that sunk off the coast of Florida in 1622.[127] The Fifth Circuit Court of Appeals, however, noted that by its terms the Antiquities Act applied only to lands owned or controlled by the federal government.[128] Because the wreck of the vessel rested on the continental shelf, it was outside the territorial waters of the United States.[129] The court applied the law of finds to award title to the

124. H.R. Rep. No. 514(II), 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 377.

125. *Id.* at 366. See also *supra* note 111 for citations to selected state statutes.

126. 569 F.2d 330 (5th Cir. 1978).

127. *Id.* at 335. See discussion of the Antiquities Act, *supra* notes 25-39 and accompanying text.

128. *Id.* at 337.

129. *Id.* at 337-38.

> The continental shelf is . . . the seabed and subsoil of the marine areas adjacent to the coast . . . but outside the area of the territorial sea. . . . The territorial sea of the United States includes those waters lying not more than three miles . . . from the baseline (the artificial coastline). All parts of the sea not included in the territorial or internal waters of a nation constitute the high seas.

Id. at 338 n.14.

The Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1988), vests title in the United States to the lands and natural resources under the navigable waters extending three miles from a coastal state's respective coastline, but it also recognizes the coastal states' title to and ownership of the lands and navigable waters in the offshore seabed. The act transfers title and development rights in natural resources to the states without disturbing the sovereignty of the federal government over the marginal sea. *See* Commonwealth v. Maritime Underwater Surveys, Inc., 531 N.E.2d 549 (Mass. 1988). In United States v. Maine, 420 U.S. 515 (1975), the Supreme Court held that the Submerged Lands Act grants the United States paramount rights to the seabed located beyond the three mile limit. *Id.* at 526.

The Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56 (1988), demonstrates Congressional intent to extend the jurisdiction and control of the United States to the outer continental shelf. *Treasure Salvors*, 569 F.2d at 339 n.18. "Nations maintain limited jurisdiction over waters lying not more than twelve miles from the baseline, in order to prevent or punish infringement of customs, fiscal, immigration

vessel to Treasure Salvors.[130] In *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*,[131] the United States asserted title under the Antiquities Act and the Archaeological Protection Act to an eighteenth century English ship, the FOWEY, that was shipwrecked off the coast from a national park system known as Biscayne National Monument.[132] In *Klein*, the court

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or sanitary regulations within their territory or territorial sea. This belt of limited control is the contiguous zone." *Id.* at 338.

130. *Treasure Salvors*, 569 F.2d at 337. Treasure Salvors located the wreck site in 1971 near a shoal west of the Marquesas Keys. *Id.* at 333. Both the United States and the State of Florida claimed title to the vessel and to the artifacts found on the ship. *Id.* at 333; *see also* Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 676 (1982); Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560, 563 (5th Cir. 1981).

In Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983), the State of Texas enjoined Platoro from removing some of the treasures from a Spanish galleon, ESPIRITU SANTO, that sank in 1555 in a storm and was resting in Texas's territorial gulf waters. *Id.* at 897. Platoro located the wreck in 1967 and removed some of its treasures. *Id.* The district court noted that, in Texas, the finder of lost property is the keeper. Platoro Ltd., Inc. v. Unidentified Remains of a Vessel, 518 F. Supp. 816, 819 n.1 (D.C. Tex. 1981). While some jurisdictions except from the law of finds property embedded in the soil, Texas does not. *Id.* On appeal, the Fifth Circuit noted that the Texas Antiquities Code, TEX. NAT. RES. CODE ANN. § 191.091, which designates as state archaeological landmarks sunken or abandoned pre-twentieth century ships and wrecks of vessels embedded in lands belonging to the State of Texas, was passed later, in 1969. *Platoro Ltd.*, 695 F.2d at 902 n.11. Thus, the district court held that the State of Texas could not claim ownership of the vessel. *Platoro Ltd., Inc.*, 518 F. Supp. at 823. Consequently, it ordered that the state either relinquish title to the ship to Platoro or pay it damages for its salvage efforts. *Id.* The appellate court vacated the district court's award of the res and remanded the case for a determination of the salvage award. *Platoro Ltd., Inc.*, 695 F.2d at 907. The court ruled that the salvage award should not exceed the value of the res. *Id.*

In Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel, 577 F. Supp. 597 (D.C. Md. 1983), a salvage company brought an action seeking title to three abandoned vessels believed to the be the SANTA ROSELEA, the ROYAL GEORGE, and the SAN LORENZO DE ESCORAL that sank in the Atlantic Ocean approximately 200 years ago. *Id.* at 600. The vessels had been seized by the United States Marshall for Maryland. *Id.* The district court found that the vessels were within Maryland's territorial jurisdiction. *Id.* at 608. Under Maryland's Natural Resources Act, MD. NAT. RES. CODE ANN. § 2-309, "[a]ny object or material of historical or archaeological value or interest found on an archaeological site or land owned or controlled by the State is the property of the State." *Id.* The court decided that the Antiquities Act of 1906 did not apply to state submerged lands; thus, the United States did not have an interest in the vessels. *Id.* at 610. The court ruled that the State of Maryland had a colorable claim of possession to the vessels and that the court lacked jurisdiction over the action against the state because of the Eleventh Amendment. *Id.* at 614.

131. 758 F.2d 1511 (11th Cir. 1985).

132. *Id.* at 1512. The remains of the FOWEY were within government territory. *Id.* at 1513. Klein discovered the vessel in 1978 while he was sport diving. *Id.* at 1512. After he removed several artifacts from the vessel, the government obtained an injunction to prevent any further salvage efforts on his part. *Id.* at 1512-13.

held that the United States had title to the ship.[133] The court explained that, while the law of finds applied, there were two exceptions to the rule that a finder acquires title over the owner of the land on which the property was found.[134] The court declared that the owner of the land is awarded title to abandoned property if the property is embedded in the soil, or if the owner of the land has constructive possession because the property is not considered to be lost.[135] The court decided that the United States had title under both exceptions.[136] The vessel was embedded in the soil, and it was not considered to be lost.[137] An assessment of Biscayne National Monument, prepared for the Park Service, had listed the eighteenth century wreck.[138] Because the shipwreck had already been inventoried, the court held that it was not lost.[139]

B. *Abandoned Shipwreck Act of 1987*

To eliminate the confusion over the ownership of, and the responsibility for, historic shipwrecks in state waters, Congress enacted the Abandoned Shipwreck Act[140] to protect underwater archaeological treasures in state waters.[141] Congress noted that when it adopted the Submerged Lands Act,[142] and thereby transferred ownership to the states of all natural resources and submerged lands out to a distance of three miles,[143] it had not specified whether the states also owned non-natural objects such as shipwrecks that rested on or within submerged lands.[144] Congress explained that notwithstanding this lack of clarity, numerous states had enacted legislation that pertained to the management of abandoned or historic shipwrecks in state waters.[145] Still, state courts had only limited

133. *Id.* at 1515.
134. *Id.* at 1514.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* The court did not grant Klein a salvage award because, according to the court, his "unauthorized disturbance of one of the oldest shipwrecks in the Park and his unscientific removal of the artifacts did more to create a marine peril than to prevent one." *Id.* at 1515.
139. *Id.*
140. Pub. L. No. 100-298, § 2, 102 Stat. 432 (1988) (codified at 43 U.S.C. §§ 2101-06 (1988)).
141. H.R. Rep No. 514 (II), 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 370, 371.
142. Ch. 65, § 2, 67 Stat. 29 (1953) (codified as amended at 43 U.S.C. §§ 1301-15 (1988)).
143. 43 U.S.C. § 1311(a) (1988). This is the case except in Texas, Puerto Rico, and the west coast of Florida, where it is three marine leagues or nine statute miles. *Id.* § 1301(b).
144. H.R. Rep. No. 514 (II), 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 371.
145. *Id.* "It [was] estimated that the total number of shipwrecks in State waters [was] more than 50,000, of which some 5-10 percent might be of historical significance." *Id.*

success in enforcing these statutes, and some courts held that state regulation was preempted by admiralty principles.[146] These courts applied either the law of finds or the law of salvage to adjudicate the disputes before them.[147] The Abandoned Shipwreck Act was Congress's answer to the problem. To protect these archaeological resources, the act claims federal ownership of certain shipwrecks and simultaneously transfers title to these wrecks to the states for administration, management, and regulation.[148] It recognizes that "[h]istoric shipwrecks that contain both historic information and tangible artifacts are subject to salvage operations, with resultant loss of historical information and artifacts to the public."[149]

The Abandoned Shipwreck Act provides states with "the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands,"[150] including "abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights."[151] The act awards the United States title to any abandoned shipwreck that is embedded in a state's submerged lands, but the United States then transfers title to the state.[152] The act specifies that the law of salvage and the law of finds do not apply to those abandoned shipwrecks embedded in a state's submerged lands.[153]

Although the Abandoned Shipwreck Act represents a beginning, at least, of a needed program to protect underwater archaeological treasures, the act does not adequately resolve the conflicting interests of the government in seeking to preserve shipwrecks for the public, and of the salvors in their expenditure of time and resources in locating subter-

146. *See, e.g.*, Cobb Coin Co., Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981).

147. See Zych v. Unidentified, Wrecked & Abandoned Vessel, 941 F.2d 525, 529 (7th Cir. 1991), for a discussion of the law of finds.

148. *Id.* The Abandoned Shipwreck Act is an exercise of the federal government's "recognized sovereign prerogative to assert title to abandoned shipwrecks that lie within the waters of the United States" and "is also consistent with the recognized exception from the law of finds for shipwrecks embedded in submerged lands of a state." H.R. Rep. No. 514 (II), 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 375-76.

149. H.R. Rep. No. 514 (II), 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 365, 366.

150. 43 U.S.C. § 2101(a) (1988).

151. *Id.* § 2101(b).

152. *Id.* § 2105. However, the act provides that "[a]ny abandoned shipwreck in or on the public lands of the United States is the property of the United States Government. Any abandoned shipwreck in or on any Indian lands is the property of the Indian tribe owning such lands." *Id.* § 2105(d).

153. *Id.* § 2106(a). The act specifically states that it does not change the law relating to shipwrecks other than to those embedded in submerged lands of a state or embedded in coralline formations protected by a state on submerged lands of a state. *Id.* § 2106(b).

ranean vessels.[154] Further, the act is limited in that it applies only to shipwrecks embedded in submerged state lands.

Some states have enacted recent legislation pursuant to the Abandoned Shipwreck Act to recognize their role in preserving sunken treasures. For example, South Carolina has attempted to resolve the conflict between encouraging and rewarding appropriate and beneficial endeavors of salvors with the state's concern that historic treasures from sunken ships may be lost as a result of some salvage operations. The South Carolina Underwater Antiquities Act[155] provides that the state has title to all submerged antiquities.[156] The South Carolina Institute of Archaeology and Anthropology is designated as the custodian of all archaeological materials.[157] A person requesting to conduct operations in the course of which submerged antiquities may be removed must apply to the Institute for a license.[158] However, the disposition of recovered submerged historic property includes a division with the licensee, i.e., the salvor.[159]

Although the Abandoned Shipwreck Act may be limited in scope, the act, as well as state legislation enacted to protect archaeological shipwrecks, represents the commencement of a governmental program to preserve underwater archaeological resources.

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154. Zych v. Unidentified, Wrecked & Abandoned Vessel, 941 F.2d 525 (7th Cir. 1991), detailed the act's limitations. In *Zych*, a salvor found the SEABIRD, which sank in Lake Michigan in 1868, and sought either title to the ship under the law of finds or an award under the law of salvage. *Id.* at 526-27. The State of Illinois claimed title to the ship under the Abandoned Shipwreck Act. *Id.* at 527. The Seventh Circuit commented that the Abandoned Shipwreck Act is limited in scope because it applies only to wrecks that are embedded in the land. *Id.* The court decided that an embedded wreck is one that is at least partially buried. *Id.* at 529. Consequently, the court remanded the case to the district court for a determination of whether the shipwreck was "embedded," noting that embeddedness is a factual question to be established by evidence. *Id.* at 534. The court noted that the Abandoned Shipwreck Act does not apply to any legal proceedings brought prior to its enactment. *Id.* at 531. It also expressed some concern as to the constitutionality of the act. *Id.* at 531-32. Article III, Section 2 of the Constitution extends judicial power to all cases of admiralty and maritime jurisdiction. U.S. CONST. art. III, § 2. As the court noted, Congress, in implementing the grant of jurisdiction, made it exclusive. *Zych*, 941 F.2d at 530. The district court had decided that while the Abandoned Shipwreck Act changed the substantive law, it did not alter jurisdiction. *Id.* at 531.

In Marx v. Government of Guam, 866 F.2d 294 (9th Cir. 1989), Marx found two shipwrecks, believed to be the NUESTRA SENORA DEL BIEN VIAJE and the NUESTRA SENORA DEL PILAR, within three miles of the coast of Guam. *Id.* at 295. The Ninth Circuit noted that the Abandoned Shipwreck Act was inapplicable to the case. *Id.* at 300.

155. S.C. CODE ANN. §§ 54-7-610 to 54-7-850 (Law Co-op. 1992 & Supp. 1993).

156. *Id.* § 54-7-630.

157. *Id.* § 54-7-640.

158. *Id.* § 54-7-650.

159. *Id.* § 54-7-770(6). A licensed salvor "must receive at least fifty percent of the artifacts . . . in value or in-kind." *Id.*

IV. Conservation and Repatriation of Native American Artifacts

Native Americans view their culture as being separate and unique and insist that their special heritage should be identified and set apart from the historical heritage of the United States generally. Native Americans have asserted an ownership in, and have demanded repatriation of, Native American artifacts. Still, many proponents of the national historical preservation movement have not endorsed attempts to recognize a special Native American culture and, in that context, to repatriate Native American artifacts.

Native Americans have contended that various historical preservation laws and laws protecting the environment have interfered significantly with their culture and religion.[160] One problem has been the interference with their religious events. If votive offerings were newly made and left at religious shrines, they were often pilfered and sometimes taken out of the country without any interference from customs officials. Because the articles were newly made, the Antiquities Act of 1906 did not protect the Indian tribes from the public's removal of such objects.[161] Problems of this nature have served as the catalyst for the Native Americans' contention that their heritage should be identified and acknowledged as a separate and distinctive culture and that museums should repatriate Native American artifacts in their collections.[162] While this view may have merit, it has not been well received by supporters of the historical preservation movement.

A. *American Indian Religious Freedom Act of 1978*

Native Americans have cited the American Indian Religious Freedom Act,[163] passed by Congress in 1978, as authority for their right to retain their native cultural resources.[164] Native Americans have asserted that the act authorizes them to obtain a return of various Indian religious artifacts that are a part of museum collections.[165] The act, however, does not

160. *See* Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources,* 14 N.Y.U. Rev. Law & Soc. Change 437 (1986).

161. The court's decision in United States v. Diaz, 499 F.2d 113 (9th Cir. 1974), is an example. In *Diaz,* the Ninth Circuit ruled that religious Native American artifacts of recent origin were not subject to protection under the Antiquities Act. *Id.* at 114. *See supra* notes 30-34 and accompanying text.

162. *See* Echo-Hawk, *supra* note 160, at 451.

163. Pub. L. No. 95-341, § 1, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1988)).

164. *See* Bowen Blair, *Indian Rights: Native Americans Versus American Museums—A Battle For Artifacts,* 7 Am. Indian L. Rev. 125 (1979).

165. *Id.* The Zuni had negotiated with the Smithsonian Institution to return certain of their artifacts which they alleged were stolen from their reservation at the turn of the century. Native Americans believed the Smithsonian had an obligation to return such artifacts because the Smithsonian is completely federally subsidized. They

include a provision that museums return religious artifacts belonging to Indian tribes. In addition, the act only has application to federal agencies.[166] Courts have ruled that the act is merely a statement of the federal government's policy that it will recognize the religious beliefs of Native Americans as well as of others.[167]

The American Indian Religious Freedom Act provides that the federal government will protect and preserve for Native Americans their inherent right of freedom to believe in and exercise their traditional religions.[168] Various federal departments, agencies, and other instrumentalities responsible for administering relevant laws, are to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices.[169]

B. *Archaeological Resources Protection Act of 1979*

The Archaeological Resources Protection Act of 1979[170] provides some protection to Native American tribes in their attempts to preserve their cultural treasures. The act requires that a permit to excavate on Indian lands can be secured only by the consent of the Native American tribe.[171] Although archaeological resources are artifacts that are at least 100 years of age, and thus, would not include religious objects of recent origin, the requirement of a permit from the Native American tribe to excavate upon Indian land has undoubtedly halted much of the taking of Native American artifacts and religious objects from Indian lands.[172]

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have contended those museums that are partially financed by the federal government and those that have tax-exempt status should also return Native American artifacts.

There is now established within the Smithsonian a National Museum of the American Indian which will "collect, preserve, and exhibit Native American objects of artistic, historical, literary, anthropological, and scientific interest [and will] provide for Native American research and study programs. . . ." 20 U.S.C. § 80q-1 (1988).

166. *See* American Indian Religious Freedom Act, Pub. L. No. 95-341, 1978 U.S.C.C.A.N. (95 Stat.) 1262, 1262-65.

167. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); United States v. Top Sky, 547 F.2d 483 (9th Cir. 1976); Crow v. Gullett, 541 F. Supp. 785 (D.C. S.D. 1982), *aff'd* 706 F.2d 856 (8th Cir. 1983).

168. 42 U.S.C. § 1996 (1988).

169. American Indian Religious Freedom Act, Pub. L. No. 95-341, 1978 U.S.C.C.A.N. (95 Stat.) 1262, 1265.

170. Pub. L. No. 96-95, § 2, 93 Stat. 721 (1979) (codified at 16 U.S.C. §§ 470aa-70mm (1988)); *see supra* Part II (G).

171. 16 U.S.C. § 470cc(c), (g) (1988). See *supra* notes 87-90 and accompanying text for a discussion of the act.

172. In addition, a person who willfully steals or converts for personal use or for the use of another, any property belonging to, or in the custody of, an Indian tribal organization is subject to criminal prosecution under 18 U.S.C. § 1163 (1988).

C. *Native American Graves Protection and Repatriation Act of 1991*

Native Americans recently obtained the legislation they have long judged necessary to secure their religious and funerary objects. The Native American Graves Protection and Repatriation Act[173] was passed in 1991 to require federal agencies and all museums that have possession or control over holdings or collections of Native American human remains and associated funerary objects to compile an inventory of such items and, to the extent possible, based on information possessed by such entities, to identify the geographical and cultural affiliation of such items.[174] The inventories must be completed in consultation with tribal governments and Native Hawaiian organization officials and traditional religious leaders within a five year period from the act's enactment.[175] Museums must supply documentation of existing records for the "purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding [the] acquisition and accession of Native American human remains and associated funerary objects."[176] Those museums that fail to comply with the act may be subject to civil penalties.[177] If a cultural affiliation of Native American human remains and associated funerary objects is established with a particular tribe, then, upon the request of a known lineal descendant of the Native American or the tribe, the federal agency or museum must expeditiously return such remains and associated funerary objects.[178]

Through its enactment of the Native American Graves and Protection Act, Congress has, in effect, recognized a distinct Native American culture. Congress has agreed with Native Americans that museums should repatriate Native American artifacts in their collections so that such artifacts will become a part of a special Native American heritage. Although there are significant misgivings about Congress's recent stance, a regard for the sensibilities of Native Americans should lead to a recognition of their separate heritage and an understanding of their need to preserve for themselves their unique and individual culture. Indeed, a recognition and preservation of a distinct Native American culture should

173. Pub. L. No. 101-601, § 2, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-13 (Supp. III 1991)).

174. 25 U.S.C. § 3003(a) (Supp. III 1991).

175. *Id.* § 3003(b). The Native American Graves Protection and Repatriation Act provides that the intentional removal or excavation of Native American cultural items from federal or tribal lands for purposes of discovery, study, or removal, is permitted only if such items are excavated or removed pursuant to a permit under the Archaeological Resources Protection Act. *Id.* § 3002(e).

176. *Id.* § 3003(b).

177. *Id.* § 3007.

178. *Id.* § 3005(a)(1). The Native American Graves Protection and Repatriation Act provides that a museum will not be liable for claims from an aggrieved party for claims for breach of fiduciary duty or good faith if it repatriates in good faith. *Id.* § 3005(f).

broaden the public's understanding and appreciation of the historical heritage of the United States generally, a heritage that includes and encompasses a special and distinctive Native American history.

V. Support and Protection for the Arts

Congress was slow to provide protection for the arts. In 1965, Congress recognized what it termed as a "serious imbalance between federal support for natural or the pure sciences and for humanistic research and studies."[179] In establishing the National Foundation on the Arts and the Humanities,[180] Congress found and declared that the arts and the humanities belong to "all the people of the United States."[181] It recognized that:

> an advanced civilization must not limit its efforts to science and technology alone, but must give full value and support to the other great branches of scholarly and cultural activity in order to achieve a better understanding of the past, a better analysis of the present, and a better view of the future.[182]

In creating the National Foundation on the Arts and the Humanities, Congress declared that "[d]emocracy demands wisdom and vision in its citizens."[183] It explained that "world leadership which has come to the United States cannot rest solely upon superior power, wealth, and technology, but must be solidly founded upon worldwide respect and admiration for the Nation's high qualities as a leader in the realm of ideas and the spirit."[184] Congress maintained that the federal government, "in order to fulfill its educational mission, achieve an orderly continuation of free society, and provide models of excellence to the American people [must] make widely available the greatest achievements of art."[185] With that mission having been finally identified, Congress has recently enacted legislation that would provide additional support and protection for the nation's artists and artistic expressions.

The concept of literary and artistic rights involves two elements—one is a personal right, called a moral right; the other is a property right.[186] In the United States, the property right of an author and, very recently,

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179. *See* H.R. Rep. No. 618, 89th Cong., 1st Sess. 2 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3186, 3189.

180. Pub. L. No. 89-209, § 2, 79 Stat. 845 (1965) (codified as amended at 20 U.S.C. §§ 951-68 (1988 & Supp. IV 1992)).

181. 20 U.S.C. § 951(1) (1988 & Supp. IV 1992).

182. *Id.* § 951(3).

183. *Id.* § 951(4).

184. *Id.* § 951(8).

185. *Id.* § 951(11).

186. 2 Melville B. Nimmer & David Nimmer, Nimmer On Copyrights §§ 8.21-.22 (1992).

the moral right of some visual artists, are protected through the copyright law.[187]

A. *Berne Convention Implementation Act of 1988*

The Berne Convention, which symbolizes international protection for authors and artists, was formed about 100 years ago.[188] The Berne Convention attempts to reconcile the policies of the various nations regarding international copyright protection. Countries that adhere to the Berne Convention have long recognized a personal or moral right of an artist.[189] Article 6bis of the Berne Convention provides for two elements of a moral right—the right of paternity and the right of integrity of a work.[190]

The right of paternity is the artist's right to be known to the public as the creator of a work and the right to prevent others from usurping the work by naming another person as the creator.[191] It also prevents others from wrongfully attributing to the artist a work the artist did not create. The right gives the author the right to claim authorship after the transfer of any copyright in the work. The right of integrity in a work is the right of an artist to prevent distortions of the work.[192] It gives an artist the right to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, his or her work.[193]

When delegates from the United States met with copyright experts from several Berne Convention nations in Geneva in 1987 to discuss the United States joining the Berne Convention, the consensus was that adoption of a moral right in artists was not necessary for compliance with Berne standards.[194] The United States joined the Berne Convention in 1988, but it did not, at that time, amend the Copyright Act to include a moral right in artists.[195] The Berne Convention Implementation Act did not expand or reduce any right of an artist to claim authorship of his or her work or to object to any distortion, mutilation, or other modification

187. 17 U.S.C. § 106A (Supp. II 1990). Article I, Section 8 of the United States Constitution provides that Congress may promote the arts by providing an artist the exclusive right to his or her works. U.S. CONST. art. I, § 8. Copyright protection applies to "original works of authorship fixed in any tangible medium of expression. . . ." 17 U.S.C. § 102(a) (Supp. II 1990). Works of authorship include pictorial, graphic, or sculptural works and architectural plans. *Id.* § 102(a). Property rights of an artist are protected for the artist's life plus fifty years. *Id.* § 302(a). The moral right of a visual artist is protected for the artist's life. *Id.* § 106A(d).

188. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 1988 U.S.C.C.A.N. (102 Stat.) 3706, 3707.

189. *Id.* at 3714.

190. *Id.*; *see* 17 U.S.C. § 106A (Supp. II 1990).

191. 1988 U.S.C.C.A.N. (102 Stat.) 3706, 3714.

192. *Id.*

193. *Id.* at 3714-15.

194. *See id.* at 3715.

195. *See* 17 U.S.C. § 104(c) (Supp. I 1989).

of, or other derogatory action in relation to, the work that would prejudice the artist's honor or reputation.[196]

Artists continued to lobby Congress and, in 1990, secured an amendment to the Copyright Act to provide for a moral right for some visual artists.[197]

B. *Visual Artists Rights Act of 1990*

The Visual Artists Rights Act was passed in 1990[198] as an amendment to the Copyright Act to provide for a moral right for visual artists. The right provides visual artists with a paternity right and a right of integrity.[199] The right will endure for the life of the artist.[200]

In enacting the Visual Artists Rights Act, Congress declared that the act was of "the utmost importance to professional artists who build their future on the integrity and authenticity of . . . [art] in public and private collections and to the public in preserving its cultural legacy . . . ."[201] It noted that the act would prevent distortions of works that "cheat the public of an accurate account of the culture of our time."[202] Congress reflected that the act would mitigate against destruction of these creations and protect their historical legacy.[203]

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196. *Id.*

197. See 17 U.S.C. § 106A (Supp. II 1990), which was added to the Copyright Act as a result of the Visual Artists Rights Act of 1990.

198. Pub. L. No. 101-650, § 603(a), 104 Stat. 5128 (1990) (codified at 17 U.S.C. § 106A (Supp. II 1990)); *see also* 1990 U.S.C.C.A.N. (104 Stat.) 5128.

199. 1990 U.S.C.C.A.N. (104 Stat.) 6915. *See* 17 U.S.C. § 106A (Supp. II 1990).

When a work of visual art has been incorporated into or made a part of a building in a way that removing the work from the building would cause its destruction, distortion, or mutilation, the rights conferred by the Visual Artists Rights Act may apply unless the artist and the owner of the building have signed a written agreement to the contrary. 17 U.S.C. § 113(d)(1)(A)-(B). The owner of a building who wishes to remove a work of visual art that is part of the building must make a good faith attempt to notify the artist of the owner's intended action. *Id.* An owner has made a diligent, good faith attempt to locate the artist if the owner has sent notice by registered mail to the artist at the artist's most recent address that was recorded in the Register of Copyrights. *Id.* § 113(d)(2)(B). If the artist does not respond within ninety days to remove the work or to pay for its removal, the owner may remove the work.

With respect to architectural works now protected by the copyright laws, the owners of a building embodying an architectural work may, without the consent of the copyright owner of the architectural work, authorize the making of alterations to the building and may destroy the building. *Id.* § 120(b)

200. 17 U.S.C. § 106A(d) (Supp. II 1990). A work of visual art is a painting, drawing, print, or sculpture existing in a single copy or a limited edition of 200 copies that are signed and consecutively numbered by the artist. *Id.* § 101.

201. 1990 U.S.C.C.A.N. (104 Stat.) 6915, 6916.

202. *Id.*

203. *Id.*

The federal government has preempted the field in the recognition of a moral right for visual artists.[204] Thus, those state statutes that grant moral rights to visual artists are no longer valid.[205]

With its enactment of the Visual Arts Rights Act of 1990, Congress acknowledged that artists build their future on the integrity and authenticity of art in public and private collections and that the public has an interest in mitigating against destruction of artistic creations.[206] By enacting legislation to protect the historical legacy represented by artworks, Congress has established that the arts are an integral element of our civilization, are fundamental to our national character, and are among the greatest of our national treasures.[207] The Visual Artists Rights Act of 1990 represents a first step in Congress's creation of a built-in mechanism to protect and perpetuate the arts.

C. *National Film Preservation Act of 1988 and 1992*

Although Congress did not recognize a moral right for film producers in motion pictures, it recently acknowledged that motion pictures "are an indigenous American art form that has been emulated through the world . . . [that] certain motion pictures represent an enduring part of our Nation's historical and cultural heritage," and that certain films should be included as a part of the national cultural heritage.[208] It determined that it was appropriate and necessary for the government to recognize motion pictures as significant American art forms deserving of protection and, consequently, it sought to preserve certain designated films through its adoption of the National Film Preservation Act of 1988[209] and of 1992.[210]

The National Film Preservation Act establishes a National Film Registry for the purpose of maintaining and preserving films that are cultur-

204. *See* 17 U.S.C. § 301 (Supp. II 1990). For preemption to occur under section 301, the rights must be fixed in a tangible medium of expression and fall within the subject of copyright. The federal law will not preempt state causes of action that are not covered by the Copyright Act. *See* 1990 U.S.C.C.A.N. (104 Stat.) 6915, 6931; *see also* 17 U.S.C. § 301(f) (Supp. II 1990).

205. 17 U.S.C. § 301(f). The preemption would extend for the life of the artist. *Id.* The state statutes include CAL. CIV. CODE § 987 (West 1982 & Supp. 1993); ME. REV. STAT. ANN. tit. 27, § 303 (West 1988); N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1984 & Supp. 1993).

206. 1990 U.S.C.C.A.N. (104 Stat.) 6915, 6916.

207. *Id.*

208. 2 U.S.C. § 178 (1988 & Supp. IV 1992) (The 1988 Act was repealed in 1992 and reenacted as an amendment to the Copyright Act).

209. 2 U.S.C. § 178-178l (1988 & Supp. IV 1992). This section was repealed in 1992 by the National Film Preservation Act of 1992, Pub. L. No. 102-307, 102 Stat. 307 (1992).

210. Pub. L. No. 102-307, 102 Stat. 307 (1992). This act amended the Copyright Act and repealed the 1988 act.

ally, historically, or aesthetically significant.[211] The Librarian of Congress provides these films with a seal to indicate that they have been included in the National Film Registry.[212]

VI. Preservation of International Treasures

The cultural heritage of foreign nations has recently become a national concern. As the populace becomes aware and acknowledges that the cultural heritage of each country is bound with and includes the cultural treasures of other nations, a concern for the preservation of international treasures evolves. Cultural nationalism embraces the theory that all cultural property should remain in the country of its origin.[213] The theory maintains that a society learns of itself by studying its artistic treasures and that a nation's artistic treasures can be better investigated and understood in their original setting.[214] The principle demands the protection of international sites and artifacts.

Unfortunately, the United States has accorded only limited recognition to the concept that protection of a nation's cultural heritage includes appreciation and preservation of the cultural heritage of other nations. Congress has acceded to some international agreements, but has enacted only limited legislation curtailing the importation of cultural properties into the United States.[215]

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)[216] was the first significant international agreement to protect national cultural property. The 1954 Hague Convention protects cultural property during wartime; prohibits the destruction or seizure of cultural property during armed conflict, whether international or civil in nature, and during a period of belligerent occupation;[217] and applies to peacetime international trafficking in cultural property unlawfully seized during an armed conflict.[218] The second international agreement, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of

211. 2 U.S.C. § 203 (1988). The National Film Preservation Board reviews nominations of films submitted to it for inclusion in the National Film Registry. *Id.* § 205.

212. *Id.* § 203.

213. *See* John Merryman, *Thinking About the Elgin Marbles,* 83 Mich. L. Rev. 1881 (1985). Merryman maintains that cultural property is "important to the cultural definition and expression of a country, to shared identity and community. They tell people who they are and where they came from. In helping to preserve the identity of specific cultures, they help the world preserve texture and diversity." *Id.* at 1913. According to Merryman, a "people deprived of its artifacts is culturally impoverished." *Id.*

214. *Id.*

215. *See infra* text accompanying note 225.

216. May 14, 1954, 249 U.N.T.S. 215 (1956).

217. *See* Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Arts, Inc., 917 F.2d 278, 296 (7th Cir. 1990). *See infra* notes 257-64 and accompanying text.

218. *Autocephalous Greek-Orthodox Church,* 917 F.2d at 296.

Ownership of Cultural Property [the UNESCO (United Nations Educational, Scientific, and Cultural Organization) Convention],[219] focuses on private conduct, primarily during peacetime.[220] These acts reflect an international policy to protect the world's cultural properties and a general philosophy of the international community that "unique remnants" of earlier artistic periods "belong to their homeland."[221] As a justice once reflected, the "greed and callous disregard for the property, history, and culture of others cannot be countenanced by the world community" nor should it be sanctioned by the courts.[222]

The international community became concerned in the 1960s about the importation into various countries of artifacts unlawfully obtained from the country of origin. This concern led to the drafting in 1970 of an international agreement by the General Conference of UNESCO, wherein the parties to the convention agreed to oppose all illicit import, export, and transfer of ownership of cultural property with whatever means were at their disposal.[223] At the meeting of the General Conference in Paris in 1970, the several nations in attendance recognized that the illicit trade in cultural property of various nations had become a primary cause of the impoverishment of the cultural heritage of originating countries. It concluded that international cooperation constituted one of the most efficient means of protecting each country's cultural property against the dangers resulting from the illicit transfer of such properties.[224]

The United States did not implement the Convention on Cultural Property into domestic law until 1982.[225] Indeed, the United States currently has only two statutes, the Pre-Columbian Art Act and the Convention on Cultural Property Implementation Act, regulating or prohibiting the importation of artifacts.

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219. Nov. 14, 1970, 823 U.N.T.S. 231 (1972).

220. *See Autocephalous Greek-Orthodox Church*, 917 F.2d at 295-96.

221. *Id.* at 297.

222. *Id.* at 296 (Cudahy, J., concurring).

223. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972).

224. Tariff Schedule, Pub. L. No. 97-446, 1982 U.S.C.C.A.N. (96 Stat.) 4098, 4100, 4101, 4106. Art objects had been stolen in increasing quantities from churches, museums, and collections. *Id.* at 4099-100. The governments of the victimized nations became disturbed at the outflow of their artifacts to foreign lands and organized the convention to combat the increasing illegal international trade in national art treasures, which in some countries had led to wholesale pillaging. *Id.* at 4100. To this end, the parties to the convention undertook to protect their own cultural heritage and to establish an export certificate for cultural property designated by each country as being of importance. *Id.* The parties further agreed to take what measures they could, consistent with existing national legislation, to prevent museums and similar institutions within their territory from acquiring cultural property originating in another country that had been illegally exported. *Id.* at 4101.

225. *See infra* notes 240-46 and accompanying text.

A. *Pre-Columbian Art Act of 1972*

The Pre-Columbian Art Act[226] was adopted in 1972 to provide that no pre-Columbian monumental or architectural sculpture or mural could be imported into the United States unless the government of the country of origin of the sculpture or mural issued a certificate that the artifact's exportation from that country did not violate any of its domestic laws.[227] A pre-Columbian monumental or architectural sculpture or mural is any stone carving or wall art, or any fragment or part thereof, that is the product of the pre-Columbian Indian cultures of Mexico, Central America, South America, or the Caribbean Islands.[228]

The Pre-Columbian Art Act has not provided a meaningful deterrent to the pillage of pre-Columbian sites. Procedures available under the act can be extremely expensive and time consuming. In addition, the act covers objects imported from all Latin American countries. These countries may have acted differently to protect their cultural heritage, some by declaring national ownership and others merely by enacting stringent export restrictions.[229] Further, the act provides only for the civil penalty of forfeiture of the imported artifacts.

B. *National Stolen Properties Act*

Because the Pre-Columbian Art Act covers artifacts from a large number of countries and because penalties under the act only provide for forfeiture of the artifacts, some courts have interpreted the act as a recognition that additional deterrents were needed.[230] The National Stolen Property Act[231] can be employed to punish encroachments upon legiti-

226. Pub. L. No. 92-587, § 201, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091-95 (1988)).

227. 19 U.S.C. § 2092(a) (1988).

228. *Id.* § 2095(3). It is an immobile monument or architectural structure or part of such monument or structure, and is subject to export control by the country of origin. Any pre-Columbian monumental or architectural sculpture or mural imported into the United States in violation of the act is to be seized and is subject to forfeiture under the customs laws. *Id.* § 2093. A pre-Columbian monumental or architectural sculpture or mural will be permitted entry into the United States if, at the time of making entry, a certificate, issued by the government of the country of origin, certifying that such exportation is not in violation of the laws of that country, is filed with the district director of customs, or if satisfactory evidence is presented to the district director that the sculpture or mural was exported from the country of origin on or before June 1, 1973. 19 C.F.R. § 12.107 (1992). If such a certificate or similar evidence cannot be produced at the time of making entry, the district director will store the sculpture or mural and permit the importer ninety days to produce such a certificate or evidence. *Id.* § 12.108. Otherwise, any such sculpture or mural will be forfeited to the United States. *Id.* If the country of origin presents a request in writing, the sculpture or mural will be returned to that country. *Id.* § 12.109.

229. *See* United States v. McClain, 593 F.2d 658 (5th Cir. 1979).

230. *Id.*

231. 18 U.S.C. §§ 2314-15 (1988 & Supp. II 1990).

mate and clear ownership rights to imported artifacts. If a foreign country asserts legal title to artifacts located within its boundaries, the courts may apply the National Stolen Property Act to the illegal importation of such artifacts even though the artifacts may never have been physically possessed by agents of that nation. The National Stolen Property Act provides that it is a felony to knowingly sell or receive stolen goods in interstate or foreign commerce.[232]

In *United States v. McClain*,[233] the Fifth Circuit Court of Appeals upheld the conviction, under the National Stolen Property Act, of certain individuals who sold pre-Columbian artifacts in Texas.[234] Although there was evidence in the case that the artifacts had been illegally imported, there was no evidence as to the time or manner of importation.[235] Still, it was clear that the defendants knew their activity was illegal under Mexican law and that the government of Mexico might claim ownership of the artifacts.[236] The defendants were convicted in the trial court under the National Stolen Property Act. On appeal, the government successfully asserted that ownership of pre-Columbian antiquities had, by statute, been vested in the Mexican government.[237] Thus, the appellate court agreed with the government that the artifacts were stolen within the meaning of the National Stolen Property Act. The court rejected the defendants' contention that the Pre-Columbian Art Act had the effect of narrowing the National Stolen Property Act so as to make it inapplicable to artifacts declared to be property of another country.[238]

The *McClain* decision is important in that it advanced a method by which the courts may more adequately address the illicit importation of cultural treasures into the United States, i.e., via the National Stolen Property Act. For example, the Republic of Turkey recently claimed ownership to nearly two thousand ancient Greek and Lycian silver coins that were being sold to collectors in the United States; it contended that the sales violated the National Stolen Property Act.[239]

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232. *Id.* § 2315.

233. 545 F.2d 988 (5th Cir. 1977); *see also McClain*, 593 F.2d 658 (5th Cir. 1979).

234. *McClain*, 545 F.2d at 992.

235. *Id.* at 992-93.

236. *Id.* at 993.

237. *Id.* at 1000; *see also McClain*, 593 F.2d at 671-72.

238. *McClain*, 593 F.2d at 663-65. The Pre-Columbian Art Act only provided for seizure of the artifacts and a civil penalty; the National Stolen Property Act made the importation a felony offense carrying a fine of as much as $10,000 and imprisonment for up to ten years. *See* 18 U.S.C. § 2315 (1988 & Supp. II 1990).

239. Republic of Turkey v. OKS Partners, 797 F. Supp. 64 (D. Mass. 1992). The Republic of Turkey alleged that the coins were unearthed in Turkey in 1984 and that under Turkish law all such artifacts within Turkey's borders are Turkish property even before they are discovered. *Id.* at 65. The Republic of Turkey insisted that since as early as 1906 Turkish law had been unequivocal in claiming outright ownership of artifacts within its borders. *Id.* at 66. The Republic of Turkey sued possessors of the coins under the Racketeering Influenced and Corrupt Organizations Act (RICO), al-

C. *Convention on Cultural Property Implementation Act of 1983*

Congress implemented the Convention on Cultural Property Implementation Act[240] into domestic law in 1983. At that time, members of Congress noted that the demand for cultural artifacts had resulted in the irremediable destruction of archaeological sites and objects, and, thus, was depriving situs countries of their cultural patrimony and the world of important knowledge of the past.[241] Members of Congress finally recognized that the United States had become a principal market for articles of archaeological or ethnological interest and of art objects and that the discovery of stolen or illegally exported artifacts had in some cases severely strained the United States' relations with the countries of origin, some of which were close allies of the United States.[242]

The Convention on Cultural Property Implementation Act provides that when a participating nation makes a request to the United States for import restrictions on cultural property from that nation, because the requesting nation contends the cultural patrimony of the nation is in jeopardy from the pillage of its cultural properties, the President may enter into a bilateral agreement with that nation to apply import restrictions.[243] Such import restrictions would provide that no designated archaeological or ethnological material exported from the requesting nation could be imported into the United States unless the requesting nation issued a certificate that exportation was not in violation of that nation's laws.[244] The term "archaeological material" refers to an object of cultural significance that is at least 250 years old and has been normally discovered as a result of scientific excavation, clandestine or accidental digging, or exploration on land or under water.[245] The term "object of ethnological interest" refers to an object that is the product of a tribal or nonindustrial society and is important to the cultural heritage

leging as a "pattern of racketeering activity" the sale of such coins and that the sales could be in violation of the National Stolen Property Act. *Id.* at 67.

240. Pub. L. No. 97-446, § 302, 96 Stat. 2351 (1983) (codified at 19 U.S.C. §§ 2601-13 (1988)).

241. *See* 1982 U.S.C.C.A.N. (96 Stat.) 4098, 4100.

242. *Id. See generally* Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982) (noting that stolen and mutilated art from the jungles of Central America have been traced into some of the United States' most respectable museums. The author refers to the highly publicized scandals involving major museums, including Boston's Museum of Fine Arts and its Raphael and New York's Metropolitan Museum of Art and its Calyx or Krater).

243. 19 U.S.C. § 2602 (1988).

244. *Id.* § 2606. No article of cultural property documented as appertaining to the inventory of a museum, or a religious or secular public monument in any nation, that has been stolen from such nation or from an institution, can be imported into the United States. *Id.* § 2607. Any designated archaeological or ethnological material or article of cultural property that is imported into the United States is subject to seizure and forfeiture. *Id.* § 2609.

245. *Id.* § 2601.

of a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origin, development, or history of that people.[246]

D. *Stolen Artifacts*

Requests for repatriation of cultural treasures illicitly brought into the United States continually surface. Such requests, and the subsequent litigation they create, present difficult and challenging problems. Resolution of these issues centers around the question of title to such artifacts. For example, the purchase of art treasures from a seller who has defective title will present title problems for the purchaser. Because artifacts are personalty, the Commercial Codes of the various states govern the sales and purchases of such objects. Still, the question of who has title to stolen artifacts is not specifically addressed by the Uniform Commercial Code.[247] Once property has been stolen, a subsequent purchaser generally cannot obtain good title to the property. This is because, under the common law, one who purchases title from a thief, no matter how innocently, acquires no title in the property; title remains with the owner.[248]

A New York court first applied the common law rule to a good faith purchase of a valuable painting that was stolen by members of Hitler's government in World War II.[249] In *Menzel v. List*,[250] the New York court

246. *Id.*

247. The Uniform Commercial Code provides that a purchaser of "goods" acquires all the title which the transferor had or had power to transfer. U.C.C. § 2-403 (1990). This provision does not permit a mere possessor to pass title, but does permit a person with voidable title to transfer good title to a good faith purchaser for value in certain circumstances. See 2 ANDERSON, UNIFORM COMMERCIAL CODE § 2-403:2 (3d ed. 1981).

248. *See* Menzel v. List, 246 N.E.2d 742 (N.Y. 1969).

249. Menzel v. List, 267 N.Y.S.2d 804 (1966). The court ruled that the taking of the property by the Germans was not subject to the Act of State Doctrine, which would have precluded any inquiry into the validity of the acts of the Germans. *Id.* at 813-20. The court noted that the Act of State Doctrine:

> rests upon a confluence of four factors: (a) the taking must be by a foreign sovereign government; (b) the taking must be within the territorial limitations of the government; (c) the foreign government must be extant and recognized by this country at the time of the suit; and (d) the taking must not be violative of a treaty obligation.

Id. at 813. The court found that the painting was not seized "by a foreign sovereign government but rather by the 'Center for National Socialist Ideological and Educational Research,' an organ of the Nazi party." *Id.* at 815. Further, the location of the property was not within the jurisdiction of the German government, and the Third Reich was not recognized by the United States at the time of the trial. *Id.* at 815-16. The court also ruled that the taking of the paintings was "pillage" or "plunder" so that the title of the original owner was not extinguished. *Id.* at 810-11. "Pillage, or plunder, is the taking of private property not necessary for the immediate prosecution of the war effort. . . . Taking under these circumstances is illegal, and the original owner's title is not extinguished." *Id.* at 811. "Booty" is "property necessary and indis-

stated that "the principle has been basic in the law that a thief conveys no title as against the true owner."[251]

In *O'Keefe v. Snyder*,[252] the New Jersey Supreme Court recognized that a thief "could not transfer good title to others regardless of their good faith and ignorance of the theft."[253] Still, the court was concerned with protecting an innocent purchaser when an owner "sleeps on his rights."[254] It held that the statute of limitations on a suit to recover stolen paintings would begin to run when the true owner knew "or reasonably should know of his cause of action and the identity of the possessor of the chattel."[255]

Most states have a discovery rule, as delineated in *O'Keefe*, causing the statute of limitation on replevin actions to begin running from the time the true owner discovered or should have discovered the whereabouts of a stolen work of art.[256] In *Autocephalous Greek-Orthodox Church v. Goldberg*

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pensable for the conduct of war, such as food, means of transportation, and means of communication; its taking is lawful." *Id.* at 810.

250. 267 N.Y.S.2d 804 (1966); *see also* Menzel v. List, 246 N.E.2d 742 (N.Y. 1969).

251. *Menzel*, 267 N.Y.S.2d at 819. The court commented that the law "stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors." *Id.* at 820.

252. 416 A.2d 862 (N.J. 1980).

253. *Id.* at 867.

254. *Id.* at 875.

255. *Id.* at 874. The New Jersey statute of limitations, N.J. STAT. ANN. § 2A:14-1, provided that a suit for replevin of goods or chattels must be commenced within six years after the cause of action accrues. According to the *O'Keefe* Court, this discovery rule avoids the harsh result of a mechanical application of the limitations statute. *Id.* at 869. "The discovery rule provides that . . . a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action." *Id.*

The United States Supreme Court, in Wood v. Carpenter, 101 U.S. 135 (1897), articulated the discovery rule with respect to an alleged fraudulent transfer of property. *Id.* at 141. The Court acknowledged that if a fraud was concealed, the statute of limitations would not begin until it was discovered. *Id.* The Court ruled that the fraud must be one that is secret, not one that is patent or known, and that concealment by mere silence is not sufficient. *Id.* There must be some trick or contrivance intended to exclude suspicion and to prevent inquiry. *Id.* at 143. According to the Court, "[w]hen a person has sufficient information to lead him to a fact, [the person] shall be deemed conversant of [that fact]." *Id.* at 141. If the party affected by any fraudulent transaction could, with ordinary care and attention, have reasonably detected the fact, the party acted with knowledge of it. *Id.* The party seeking to avoid a limitations bar because of fraud must aver and prove that diligence was used to detect the fraud. *Id.* "The circumstances of the discovery must be fully stated and proved, and the delay which occurred must be shown to be consistent with the requisite diligence." *Id.* at 143.

256. See DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987), wherein the court noted that jurisdictions other than New York "have adopted limitation rules that encourage property owners to search for their missing goods." *Id.* at 109; *see* RESTATEMENT (SECOND) OF TORTS § 229 (1966); *see also supra* note 255.

& Feldman Fine Arts, Inc.,[257] the court applied Indiana law to determine the right of possession of four Byzantine mosaics created in the early sixth century, as between the Church of Cyprus, the Republic of Cyprus, and the purchaser of the mosaics.[258] Under Indiana law, a thief also obtains no title or right to possession of stolen items.[259] Thus, a thief cannot pass any right of ownership of stolen items to subsequent purchasers. The court determined that because the mosaics were stolen from the rightful owner (the Church of Cyprus), the purchaser of the mosaics never obtained title to, or right of possession of, the mosaics.[260] The court disagreed with the purchaser that the statute of limitations had run on the owners' claim. The court ruled that the owners' cause of action did not accrue until the owners, using due diligence, knew, or were on reasonable notice of, the identity of the possessor of the mosaics.[261] The court referred to *O'Keefe*, wherein the New Jersey Supreme Court held that, apart from the discovery rule, the statute of limitations in replevin actions ordinarily runs against the owner of lost or stolen property from the time of the wrongful taking.[262] However, the court noted that the court in *O'Keefe* explained that the rule applied "'absent fraud or concealment.'"[263] The court referred to the New Jersey Supreme Court's decla-

257. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

258. *Id.* at 1394.

259. *Id.* at 1398.

260. *Id.* at 1397. The four Kanakaria mosaics, consisting of small chips of colored glass, were originally affixed to the apse of the Church of the Panagia Kanakaria in the village of Lythrankomi, Cyprus, in A.D. 530. *Id.* at 1377. During and after a Turkish invasion in 1974, the Republic of Cyprus and the Church of Cyprus were denied access to occupied northern Cyprus. *Id.* at 1379. During the invasion, there was much looting of churches; many mosaics, frescoes, and icons in the churches and national monuments were stolen or destroyed. *Id.* The mosaics were removed from the apse of the church sometime between 1976 and 1979. *Id.* Neither the Church of Cyprus nor the Republic of Cyprus had ever authorized the removal or sale of the Kanakaria mosaics. *Id.* Immediately upon learning that the mosaics were missing, the Republic of Cyprus notified UNESCO, informing it of the significance of the lost art and seeking its assistance. *Id.* at 1380. The Republic of Cyprus notified the International Council of Museums, the organization that coordinates and develops measures and security for museums throughout the world. *Id.* It also notified the International Council of Museums and Sites, an organization that works with restorers and specialists in the preservation of ancient monuments. *Id.* Finally, the Republic of Cyprus sent the Europa Nostra a resolution which it believed would give wide publicity to the problem. *Id.* Cyprus's ambassador and permanent delegate to the United Nations assisted in contacting organizations and the Republic of Cyprus also contacted both European and American museums about the missing mosaics. *Id.* at 1380. The purchaser, who bought the mosaics in Switzerland for $1 million, attempted to sell them by contacting an art dealer and the Getty Museum in California. *Id.* at 1383-84. An official with the Getty Museum contacted the Republic of Cyprus. *Id.* at 1384.

261. *Id.* at 1386.

262. See *supra* notes 252-55 for a discussion of O'Keefe v. Snyder, 416 A.2d 862 (N.J. 1980).

263. *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1391 (quoting O'Keefe v. Snyder, 416 A.2d 862, 872 (N.J. 1980)).

ration in *O'Keefe* that where a chattel is fraudulently concealed, the general rule is that the statute is tolled. Thus, the court ruled that the statute of limitations was not a bar to the action and ordered the mosaics returned to the Church of Cyprus and the Republic of Cyprus.[264]

In New York, limitation on the time during which suit may be brought to recover stolen property does not begin until the rightful owner asserts a claim to the property and the possessor refuses to return the property.[265] In *Menzel v. List*,[266] the purchaser of a Chagall painting was forced to return the painting to its rightful owner.[267] In *Mucha v. King*,[268] the Seventh Circuit Court of Appeals ruled that the statute of limitations did not bar a suit by the original owner to recover a painting

264. *Id.* at 1391-92. The court also decided that the purchaser of the mosaics was not a bona fide purchaser. *Id.* at 1404. It noted that the purchaser had failed to take reasonable steps to resolve doubts concerning whether the seller had the capacity to sell the mosaics. *Id.*

In Republic of Turkey v. OKS Partners, 797 F. Supp. 64 (D. Mass. 1992), the court ruled that a claim by the Republic of Turkey to nearly two thousand ancient Greek and Lycian silver coins allegedly unearthed in Turkey in 1984 and imported illegally into the United States, was not barred by the statute of limitations. *Id.* The court found that, while the statute of limitations for replevin actions in Massachusetts was three years, such claims were subject to the "discovery rule" under which a cause of action based on "an inherently unknowable wrong" only accrues "'when the injured person knows, or in the exercise of reasonable diligence should know of the facts giving rise to the cause of action.'" *Id.* at 69 (quoting Dinsky v. Framingham, 438 N.E.2d 51, 52 (Mass. 1982)). The court held that Massachusetts law was in accord with the Seventh's Circuit's analysis in *Autocephalous Greek-Orthodox Church*. *Id.*

265. *See* Hoelzer v. City of Stamford, Conn., 933 F.2d 1131 (2d Cir. 1991); Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991). In Solomon R. Guggenheim Found. v. Lubell, 153 A.2d 143 (N.Y. App. Div. 1990), the New York Appellate Division recognized that, under New York law, the statute of limitations did not begin to run as against a good faith purchaser until demand for a return of the property was made and refused. *Id.* at 619. The court agreed that absent a demand for the property, there is no cause of action against a bona fide purchaser and absent a cause of action, the statute of limitation does not begin to run. *Id.* at 620. The court pointed out that the requirement that a demand be made upon a good faith purchaser is a substantive element of the cause of action, not a procedural condition precedent to suit. *Id.*

266. 246 N.E.2d 742 (N.Y. 1969).

267. *Id.* at 743. The painting was purchased for $4,000 from a New York art gallery; the gallery had purchased the painting from a Parisian art gallery. However, the painting had been purchased by the Menzels in 1932 at an auction in Belgium. *Id.* When the Germans invaded Belgium, the Menzels fled, leaving their possessions, including the Chagall painting, in their apartment. *Id.* When they returned six years later, the painting was gone; it had been removed by the German authorities and a receipt for it had been left. *Id.* The Menzels later learned that the painting was in List's possession from an art book which carried a reproduction of the painting and a statement that it was in List's possession. *Id.* The Menzels sued List for a return of the painting, and the court ordered its return to the Menzels. *Id.*

268. 792 F.2d 602 (7th Cir. 1986).

from a bona fide purchaser and awarded the painting to the original owner.[269]

In *DeWeerth v. Baldinger*,[270] the Second Circuit Court of Appeals, in applying New York law, ruled that when demand and refusal are necessary to start a limitations period, the demand may not be unreasonably delayed.[271] The court decided that New York law governing limitations

269. Jiri Mucha, son of Alphonse Mucha, brought suit to recover a painting, called the "Quo Vadis," that had been created by his father in 1904 and was believed to be lost. *Id.* at 603. King, who had possession of the painting, contended that the statute of limitations had run on the cause of action. *Id.* at 604. Alphonse Mucha had consigned the "Quo Vadis," along with 20 other paintings, to Newcomb-Macklin Gallery in 1920. *Id.* at 606. Mucha later returned to his home country Czechoslovakia. *Id.* In 1939, Czechoslovakia passed under Nazi yoke and Mucha was arrested and later died. *Id.* at 609-10. His son was unaware of the consignment of the paintings until he was commissioned in the 1960s to write a book about his father. *Id.* at 611. The Newcomb-Macklin Gallery was closed in 1979; an individual who purchased some articles at its final sale acquired some rolled-up paintings in the basement, without paying for them. *Id.* at 612. One of the paintings was the "Quo Vadis." The individual later sold the "Quo Vadis" for $150 to a Chicago art dealer, who in turn sold it to King for $35,000. *Id.* The court noted that the individual did not obtain Mucha's title to the painting and, thus, title could not be conveyed to either the Chicago dealer or King. *Id.*

The Seventh Circuit acknowledged that under the Uniform Commercial Code, § 2-403(2), entrusting the possession of goods to a merchant who deals in those goods gives the merchant power to transfer title to a buyer in the ordinary course of business. *Id.* (citing U.C.C. § 2-403(2)). The court in *Mucha* pointed out that a purchaser of the painting from the Newcomb-Macklin Gallery might have obtained good title to the painting. *Id.* On the other hand, the individual who picked up the painting from Newcomb-Macklin basement was not a buyer in the ordinary course of business from a bailee. *Id.*

In Porter v. Wertz, 421 N.E.2d 500 (N.Y. 1981), a Utrillo painting, entrusted by Porter, its owner, to Von Maker, an art merchant, was sold by Wertz, an acquaintance of Von Maker, to Feigen Gallery. Upon suit by the owner to regain possession of the painting, the court held that the purchaser had not acquired good title. *Id.* at 501. The court noted that section 2-403 of the Uniform Commercial Code was not applicable because the seller of the painting was not the merchant to whom the owner had entrusted the painting. *Id.* at 502.

270. 836 F.2d 103 (2d Cir. 1987), *cert denied*, 486 U.S. 1056 (1988).

271. *Id.* at 108. In *DeWeerth*, a West German citizen, who owned a Monet from 1922 until 1943 when the painting disappeared from Germany during World War II, brought suit against an American citizen who purchased the painting in New York in 1957. *Id.* at 104-05. The purchaser bought the painting in good faith and without knowledge of any adverse claim. *Id.* at 105. The Second Circuit noted that the New York statute of limitations governing actions for recovery of property required that suit be brought within three years of the time the action accrued. *Id.* at 106. Where the owner proceeds against one who innocently purchased the property in good faith, the limitations period begins to run only when the owner demands return of the property and the possessor refuses. *Id.* Although suit was brought within three years after the date the original owner made demand for return of the Monet and the purchaser refused to return it, the court ruled the statute of limitations barred the suit. *Id.* at 112. The court was concerned that a plaintiff could delay the action simply by postponing demand. *Id.* at 109. Thus, the court ruled that when demand and

of actions also weighed in favor of a duty to attempt to locate stolen property.[272] The court explained that a rule requiring reasonable diligence in attempting to locate stolen property was especially appropriate with respect to stolen art. Because the Second Circuit decided that valuable works of art tend to be easily remembered by those who have seen them, it concluded that the owner of stolen art has a better opportunity than most owners of stolen property in tracking down stolen works.[273] The court recognized that "[i]n virtually every state except New York, an action for conversion accrues when a good-faith purchaser acquires stolen property; demand and refusal are unnecessary."[274]

The New York courts disagreed with the Second Circuit's decision in *DeWeerth* concerning its interpretation of New York law. In *Solomon R. Guggenheim v. Lubell*,[275] a museum brought an action in replevin to recover a Chagall gouache that was stolen from the museum in the late 1960s.[276] The museum learned of the purchaser's possession of the painting in 1985; it made a demand in 1986 that the purchaser return the painting.[277] The possessor contended that the three year statute of limitations was a bar to the suit.[278] The New York Court of Appeals decided that the imposition of a reasonable diligence requirement on the museum would be an unwise extension of the case law.[279] The court declared that the Second Circuit, in *DeWeerth*, was incorrect in imposing a duty of reasonable diligence on owners of stolen art for purposes of the statute of limitations.[280]

The New York court, in *Guggenheim*, decided that the demand and refusal rule affords the most protection to true owners of stolen property. It stated that the rule is a "straight forward protection of true owners by

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refusal are necessary to start a limitations period, as in New York, the demand cannot be unreasonably delayed. *Id.* at 110.

272. *Id.*

273. *Id.* at 109.

274. *Id.* The *DeWeerth* Court referred to the *O'Keefe* decision, wherein the New Jersey Supreme Court imposed a duty of reasonable investigation. *See supra* text accompanying notes 252-55. The court in *DeWeerth* concluded that under New York law, an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property. *Id.* at 110. It decided that the plaintiff's efforts were minimal, noting that DeWeerth failed to take advantage of several mechanisms specifically created to locate art lost during World War II. *Id.* She also did not publicize her loss of the Monet in several available listings designed to keep museums, galleries, and collectors vigilant for stolen art. *Id.* at 111. Further, she did not conduct any search for 24 years, from 1957 until 1981. *Id.* at 112. The court stated that her failure to consult the Catalogue Raisonne was "particularly inexcusable." *Id.*

275. 569 N.E.2d 426 (N.Y. 1991).

276. *Id.* at 427.

277. *Id.* at 428.

278. *Id.*

279. *Id.* at 429-30.

280. *Id.*

creating a duty of reasonable diligence."[281] The New York court referred to the discovery rule in other states in which the statute of limitations on replevin actions begins to run from the time the true owner discovers or should have discovered the whereabouts of a stolen work of art.[282] It explained that New York rejected the discovery rule because New York courts had decided that the rule did not provide a reasonable opportunity for individuals of foreign governments to receive notice of a possessor's acquisition of artwork and sufficient time to take action to recover a work.[283] The court was concerned that New York would become a "haven for cultural property stolen abroad" because such works would be immune from recovery under limited time periods.[284] The court decided it was inappropriate to shift the burden onto the wronged owner. It concluded that "the better rule gives the owner relatively greater protection and places the burden of investigating the provenance of a work of art on the potential purchaser."[285]

The Second Circuit later recognized that it erroneously applied New York law in *DeWeerth.* In *Hoelzer v. City of Stamford, Connecticut,*[286] the Second Circuit acknowledged that New York law does not have a requirement that a true owner of stolen property exercise due diligence in making a demand for the return of the stolen property.[287] In *Republic of Turkey v. Metropolitan Museum of Art,*[288] a district court held that the "un-

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 431. The *Guggenheim* Court did recognize that an owner's failure to exercise reasonable diligence would be considered in the context of a laches defense. *Id.*

In investigating the provenance of artwork, a potential purchaser should contact certain organizations such as the Federal Bureau of Investigation, which maintains a central archive of stolen art in the United States, the International Criminal Police Organization, which is a group of police agencies that computerize information on stolen art, the International Foundation for Art Research, which monitors trafficking in stolen art, and the Art Dealers' Association of America.

286. 933 F.2d 1131 (2d Cir. 1991).

287. *Id.* at 1138. In DeWeerth v. Baldinger, 804 F. Supp. 539 (S.D.N.Y. 1992), DeWeerth moved for relief from judgment after the Second Circuit's opinion in *Hoelzer. Id.* at 548. The district court granted DeWeerth's petition for relief. *Id.* After the decision of the New York Court of Appeals in *Solomon R. Guggenheim Found., supra* note 265, DeWeerth moved before the Second Circuit for a recall of its earlier mandate, "arguing that since the New York Court of Appeals had held the *DeWeerth* decision to have been incorrect, the Second Circuit was required to withdraw its mandate, vacate its judgment, and affirm the judgment" of the district court. The district court had rendered judgment for DeWeerth. *See* DeWeerth v. Baldinger, 658 F. Supp. 688 (S.D.N.Y.), *rev'd,* 836 F.2d 103 (2d Cir. 1987), *cert. denied,* 486 U.S. 1056 (1987). The Second Circuit denied the motion without opinion. *See DeWeerth,* 804 F. Supp. at 544.

288. 762 F. Supp. 44 (S.D.N.Y. 1990).

reasonable delay" requirement set out in *DeWeerth* applies only to the equitable defense of laches and not to a statute of limitations defense.[289]

E. *Arts and Artifacts Indemnity Act of 1975*

The sharing of art through loans or travelling exhibits is a means of increasing knowledge and goodwill among the various countries involved as it provides the means to make international cultural treasures available to the world populace. The international loan of artistic treasures has been hindered in the past by the cost of insuring such exhibitions. To solve the problem of funds to acquire international exhibitions on loan, Congress passed the Arts and Artifacts Indemnity Act in 1975.[290] This act provides indemnification by the federal government for museum exhibitions of works of art, including tapestries, paintings, sculptures, folk art, graphics, and craft acts; manuscripts, rare documents and books; photographs, motion pictures, audio and video tapes; and other objects or artifacts that are of educational, cultural, or scientific value and that are certified by the Secretary of State as being in the national interest.[291]

An indemnity agreement under the act covers all eligible items while they are on exhibition in the United States when the display is part of an exchange of exhibitions.[292] Any person, nonprofit agency, institution, or government can apply for an indemnity agreement.[293] Since its enactment in 1975, the Arts and Artifacts Indemnity program has provided indemnity coverage for several hundred exhibits.[294] The program has

289. *Id.* at 46-47. The Republic of Turkey sought recovery of artifacts in possession of the Metropolitan Museum of Art. *Id.* at 45. The Republic of Turkey contended that "the artifacts were excavated from burial grounds in the Ushak region of Turkey and exported to the United States in contravention of Turkish law." *Id.* It also claimed that all artifacts found in Turkey belong to the Republic of Turkey. *Id.* The court held that the statute of limitations had not run against the Republic of Turkey. *Id.* at 46-47.

290. Pub. L. No. 94-158, § 2, 89 Stat. 844 (1975) (codified at 20 U.S.C. §§ 971-77 (1988 & Supp. IV 1992)).

291. 20 U.S.C. § 972(a) (1988 & Supp. IV 1992).

292. *Id.* § 972(b)(1). The Arts and Indemnity Act is administered by the Federal Council on the Arts and Humanities, and any applications for indemnity are submitted to this council. *Id.* § 971. Indemnification is limited to $300 million for a single exhibition. *Id.* § 974(c). No more than $3 billion of indemnity can be outstanding at any one time. *Id.* § 974 (b).

293. *Id.* § 973(a). The application must describe each item to be covered by the agreement, including an estimated value of the item, and set forth policies, procedures, techniques, and methods with respect to the preparation for, and conduct of, exhibition of the items. *Id.* If the Council approves, an agreement is made between the Council and the applicant pledging the full faith and credit of the United States to pay any amount for which the Council becomes liable under the agreement. *Id.* § 973(b)-(c).

294. *See* Arts, Humanities and Museums Amendments of 1985, Pub. L. No. 99-194, 1985 U.S.C.C.A.N. (1332 Stat.) 1055, 1074-75. The number of exhibits covered in 1985 was approximately 200. *Id.* The program is operated by the National Endowment for the Arts.

fostered international cooperation and goodwill through the sharing of cultural treasures.

Each country must strive to protect the cultural heritage of other nations. Most countries have realized that a sharing of each state's cultural treasures is feasible and represents a vital alternative to the tacit approval given in the past to powerful nations looting and pilfering the artifacts of smaller, weaker countries. The Arts and Artifacts Indemnity Act provides the means to accomplish the objective of permitting United States citizens to share in the cultural treasures of the world.

VII. CONCLUSION

Although the United States' concern about the protection and preservation of its cultural property was long overdue, the efforts of the federal government and the various states in recent years have demonstrated a shared recognition that the government is a trustee of the public interest and that, as such, it must give full value and support to the great branches of cultural activity to provide a model of excellence for its people. Legislation passed by both the states and the federal government, even though frequently limited in scope, has served as an affirmative directive for the initiation of programs to conserve artistic, archaeological, and anthropological treasures. Congress has recognized that as a democracy demands "wisdom and vision in its citizens,"[295] it acquires these values when its people "achieve a better understanding of the past, a better analysis of the present, and a better view of the future."[296] An understanding and appreciation of a nation's cultural origins and heritage and a study of a country's cultural resources are mandatory elements of the process because, in reality, the culturally impoverished nation is sterile.[297] Legislation to provide protection and preservation of cultural resources is imperative for the United States to realize its goal of fostering conditions under which modern society and prehistoric and historic resources "can exist in productive harmony and fulfill the social, economic and other requirements of past and future generations."[298]

A principal objective of legislation enacted to protect our cultural heritage often is to provide a stimulus and leadership for local and private sector activity. The private sector's role in assuring that the nations' cultural treasures are preserved and protected includes an awareness and understanding of the existing legislation and a perception of its effectiveness in conveying a "spirit of stewardship for the inspiration and benefit of present and future generations."[299] A compilation of the legislation and the court decisions interpreting such legislation is a starting point in

295. 20 U.S.C. § 951(4) (1988); *see supra* notes 180-85 and accompanying text.
296. 20 U.S.C § 952(3).
297. *See* Merryman, *supra* note 213, at 1913.
298. *See* 16 U.S.C. § 470-1(1).
299. *Id.* § 470-1(3).

the process. This paper summarizes the laws protecting our cultural heritage hopefully to provide for some that starting point.

COMMENTS

A Case Frozen in Time: Does Title VII's 1991 Amendment Strip *United States v. Burke* of Its Precedential Value?

I. INTRODUCTION

Title VII of the Civil Rights Act of 1964[1] attempts to make retribution[2] to parties who are the victims of employment discrimination based on their "race, color, religion, sex, or national origin."[3] The United States Supreme Court in *United States v. Burke*[4] addressed the issue of the taxability of back pay awards received under Title VII,[5] holding that such awards are taxable as gross income under § 61(a) of the Internal Revenue Code (the Code)[6] and are not to be excluded from taxation under § 104(a)(2) of the Code.[7] In so holding, the Supreme Court overturned the Sixth Circuit's ruling[8] that such claims were excludable from gross income as

1. Pub. L. No. 88-352, § 701, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e-h (1988)) [hereinafter Title VII]. This act was further amended by The Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 104, 109(a), 105 Stat. 1074, 1077 (1991) (codified at 42 U.S.C. § 2000e (Supp. III 1991)) [hereinafter the Amendment]. United States v. Burke, 112 S. Ct. 1867 (1992) and this Comment focus on the pre-amendment version of Title VII, except when referring to the Amendment.

2. 42 U.S.C. § 2000e-5(g).

3. *Id.* § 2000e-2(a):

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

4. 112 S. Ct. 1867 (1992), *rev'g* 929 F.2d 1119 (6th Cir. 1991).

5. *Burke*, 112 S. Ct. at 1868.

6. *Id.* at 1874; I.R.C. § 61(a)(1) (1988).

7. *Burke*, 112 S. Ct. at 1874; I.R.C. § 104(a)(2) (1988 & Supp. I 1989). "Gross income does not include— (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." *Id.*

8. Burke v. United States, 929 F.2d 1119, 1123 (6th Cir. 1991), *rev'd*, 112 S. Ct. 1867 (1992).

damages received as a result of "personal injury,"[9] and settled the split of authority which had come to exist among the Circuit Courts of Appeal.[10]

In *Burke,* the Supreme Court focused on the concept that the legal basis of the claim, in this case Title VII, needed to redress a "tort-like personal injury"[11] to be excludable from gross income under the Code.[12] Since the version of Title VII of the Civil Rights Act of 1964 under which *Burke* was decided did not include compensatory or punitive damages as potential remedies,[13] which the Court viewed as key to being designated as recompensing for a "tort-like personal injury,"[14] the Court held that although "employment discrimination causes harm to individuals [that] does not automatically imply . . . that there exists a tort-like 'personal injury' for" federal income tax purposes.[15] Justice Scalia concurred in the decision, emphasizing that the award must result from personal injuries to physical or mental health to be excludable,[16] while Justice Souter concurred, emphasizing that Title VII provides back pay awards so similar to contract law that the general rule requiring that exclusions from gross income be narrowly construed could not be overridden.[17] In contrast, the dissent argued that "[t]he purpose and operation of Title VII are closely analogous to those of tort law, and that similarity should determine excludability" for tax purposes.[18]

Congress passed an amendment to Title VII with the Civil Rights Act of 1991[19] which provides for the availability of a jury trial[20] as well as compensatory and punitive damages.[21] This is in marked contrast to the version of Title VII of the Civil Rights Act of 1964 under which *Burke* was

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9. I.R.C. § 104(a)(2) (1988 & Supp. I 1989); *see supra* note 7.

10. *See infra* notes 39-84 and accompanying text. *See* Metzger v. Commissioner, 88 T.C. 834 (1987), *aff'd without opinion,* 845 F.2d 1013 (3d Cir. 1988) (Title VII awards are partially taxable); Sparrow v. Commissioner, 949 F.2d 434 (D.C. Cir 1991) (Title VII awards are completely taxable); Thompson v. Commissioner, 866 F.2d 709 (4th Cir. 1989) (Title VII awards are completely taxable); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565 (5th Cir. 1989), *cert. denied,* 493 U.S. 1010 (1990) (Title VII awards are completely taxable).

11. United States v. Burke, 112 S. Ct. 1867, 1872 (1992), *rev'g* 929 F.2d. 1119 (6th Cir. 1991). The Court emphasized the need for recovery from "intangible elements of injury." *Id.* at 1871.

12. I.R.C. § 104(a)(2) (1988 & Supp. I 1989).

13. 42 U.S.C. § 2000e-h. *See supra* note 1.

14. *Burke,* 112 S. Ct. at 1872-73.

15. *Id.* at 1873. The Court also noted that unlike traditional tort claims which are free from taxation, Title VII claimants are not eligible for jury trials. *Id.* at 1872.

16. *Id.* at 1875-76 (Scalia, J., concurring).

17. *Id.* at 1877-78 (Souter, J., concurring) (relying on United States v. Centennial Sav. Bank, 111 S. Ct. 1512, 1519 (1991); Commissioner v. Jacobson, 336 U.S. 28, 49 (1949)).

18. *Id.* at 1878 (O'Connor, J., dissenting).

19. Pub. L. No. 102-166, 105 Stat. 1074 (codified at 42 U.S.C. § 2000e (Supp. III 1991)). This amendment became effective Nov. 21, 1991. 105 Stat. at 1099, 1100.

20. *Id.* at 1073.

21. *Id.* at 1072-73.

decided.[22] The Court, in *Burke,* confined its analysis and holding to the pre-Amendment Title VII.[23] Consequently, the question of the taxability of awards or settlements under the amended Title VII remains open. Taken at face value, the Court's reasoning seems to indicate that although punitive damage awards would be taxable, both compensatory damages and back pay awards would escape taxation because of the changed nature of amended Title VII.[24] In light of the changes brought about by the Amendment to Title VII, *Burke* is now a case frozen in time because it provides us with precedent for circumstances that will not arise again.

This Comment examines the taxability of Title VII claims both before and after the 1991 Amendment. The history and background of the taxability of pre-Amendment claims is discussed in Part II, including what comprises gross income[25] and the split of authority among the Circuit Courts of Appeal prior to *Burke.*[26] Part III examines the Sixth Circuit's decision in *Burke v. United States*[27] and the Supreme Court's response.[28] The 1991 Amendment to the Civil Rights Act of 1964 is discussed in Part IV,[29] followed by concluding remarks in Part V.[30]

II. History and Background

A. *What Must Be Included in Gross Income*

Internal Revenue Code § 61(a) provides that gross income includes "all income from whatever source derived"[31] unless specifically excluded from gross income by another provision of the Code.[32] The question of what may or may not be included in § 61(a) gross income was addressed by the Supreme Court in *Commissioner v. Glenshaw Glass Company,*[33] where the Court developed a three-part test. To be gross income, the ques-

22. United States v. Burke, 112 S. Ct. 1867, 1874 n.12 (1992) *rev'g* 929 F.2d 1119 (6th Cir. 1991).

23. *Id.* at 1872, n.8. The Tax Court, also confining its analysis to the pre-Amendment version, acknowledged that the 1991 Amendment changed "Title VII in a number of significant respects." Harris v. Commissioner, 64 T.C.M. (CCH) 518 n.3 (1992).

24. *See infra* notes 210-18 and accompanying text.

25. *See infra* notes 31-38 and accompanying text.

26. *See infra* notes 39-84 and accompanying text.

27. 929 F.2d 1119 (6th Cir. 1991), *rev'd,* 112 S. Ct. 1867 (1992); *see infra* notes 85-109 and accompanying text.

28. United States v. Burke, 112 S. Ct. 1867 (1992), *rev'g* 929 F.2d 1119 (6th Cir. 1991); *see infra* notes 110-51 and accompanying text.

29. Pub. L. No. 102-166, § § 104, 109(a), 105 Stat. 1074, 1077 (1991) (codified at 42 U.S.C. § 2000e (Supp. III 1991)); *see infra* notes 152-209 and accompanying text.

30. *See infra* notes 210-18 and accompanying text.

31. I.R.C. § 61(a) (1988).

32. *Id.* "Except as otherwise provided . . . gross income means all income from whatever source derived." *Id.*

33. 348 U.S. 426, 427 (1955).

tioned item or amount must be (1) an "undeniable accession[ ] to wealth, [(2) which was] clearly realized, and [(3)] over which the taxpayer[ ] had complete dominion."[34] With this in mind it is fairly clear that an award or settlement under Title VII of the Civil Rights Act of 1964[35] would fulfill the tripartite test enunciated in *Glenshaw Glass;* a monetary award would be an accession to wealth, which would be clearly realized when received by the taxpayer, and over which the taxpayer would have complete control once paid to him or her.

Once the *Glenshaw Glass* definition of gross income is satisfied, the next step is to search for a section of the Code under which the item of gross income may be specifically excluded.[36] The most likely choice for exclusion of a Title VII claim would be § 104(a)(2), which allows the exclusion of "damages received on account of personal injuries."[37] The issue then becomes whether awards and settlements, received for the various forms of discrimination covered by Title VII, fall under the umbrella of "personal injuries" within § 104(a)(2) and thus escape taxation.[38]

B. *The Circuit Courts' Decisions Prior to Burke*

In *Metzger v. Commissioner*[39] the Third Circuit affirmed without opinion a United States Tax Court decision which held that one-half of a Title VII settlement was excludable from gross income under § 104(a)(2),[40] since at least that much was received for personal injury claims relating to discrimination on account of sex and national origin.[41] In *Metzger,* the petitioner received a settlement which the parties arbitrarily split "for tax purposes only" between wage claims and all other personal injury claims.[42] The Tax Court noted that the Code does not explain what must be shown for damages to be considered to have been received "on ac-

34. *Id.* at 431.

35. 42 U.S.C. § 2000e-h. *See supra* note 1.

36. Examples of exclusions include: certain death benefits (I.R.C. § 101 (1988)); gifts and inheritances (I.R.C. § 102 (1988)); interest on state and local bonds (I.R.C. § 103 (1988 & Supp. II 1990)); compensation for injuries or sickness (I.R.C. § 104 (1988 & Supp. I 1989)); amounts received under accident and health plans (I.R.C. § 105 (1988 & Supp. II 1990)); income from the discharge of indebtedness (I.R.C. § 108 (1988 & Supp. II 1990)); qualified scholarships (I.R.C. § 117 (1988 & Supp. II 1990)); meals and lodging furnished for the convenience of the employer (I.R.C. § 119 (1988 & Supp. II 1990)); one-time exclusion of gain from sale of principal residence by individual who has attained age 55 (I.R.C. § 121 (1988)); educational assistance programs (I.R.C. § 127 (1988 & Supp. II 1990)); certain fringe benefits (I.R.C. § 132 (1988 & Supp. II 1990)).

37. I.R.C. § 104(a)(2) (1988 & Supp. I 1989).

38. *Id.*

39. 88 T.C. 834 (1987), *aff'd without opinion,* 845 F.2d 1013 (3d Cir. 1988).

40. *Id.* at 858; I.R.C. § 104(a)(2)(1954).

41. *Metzger,* 88 T.C. at 851.

42. *Id.* at 842.

count of personal injuries,"[43] but went on to examine the Income Tax Regulations which emphasize the need for the legal suit or settlement to be based on "tort or tort-type rights" for the result to be free from taxation.[44] Relying on *Church v. Commissioner*,[45] the Tax Court surmised that it was not necessary for the damages to be the result of "physical trauma,"[46] but instead emphasized that it must be compensating for a "tort or tort-type right" to be tax exempt.[47] With a settlement payment, taxability depends not on the validity of the underlying claim,[48] but on the nature of that claim with "the proper inquiry being in lieu of what were [the] damages awarded."[49] Where a settlement agreement lacks an expressed statement as to whether a payment was or was not made on account of personal injury, the key factor is "the intent of the payor" in making the payment.[50]

Finally, the Tax Court turned to *Bent v. Commissioner*[51] which stated that:

> Section 104(a)(2) extends . . . to those suits or actions which involve a legal right that is more analogous to a tort-type right than to any other legal category of rights. The Supreme Court has declared that [42 U.S.C.] sec. 1983 "was intended to '[create] a species of tort liability'"[52]

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43. *Id.* at 847 (citing Seay v. Commissioner, 58 T.C. 32, 36 (1972)).

44. *Id.* (quoting Treas. Reg. § 1.104-1(c)). Section 1.104-1(c) explains I.R.C. § 104(a)(2) by stating that "[t]he term 'damages received (whether by suit or agreement)' means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort[-]type rights, or through a settlement agreement entered into in lieu of such prosecution." Treas. Reg. § 1.104-1(c).

45. 80 T.C. 1104, 1106 (1983) (compensatory damages received due to personal libel are free from taxation under § 104(a)(2), even though no physical harm was done to the taxpayer). "Damages received on account of personal injuries or sickness are not limited to physical trauma but include mental pain and suffering." *Id.* (citations omitted).

46. Metzger v. Commissioner, 88 T.C. 834, 847 (1987), *aff'd without opinion*, 845 F.2d 1013 (3d Cir. 1988).

47. *Id.*

48. *Id.* (citing Seay v. Commissioner, 80 T.C. 32, 37 (1972)).

49. *Id.* (citing Church v. Commissioner, 80 T.C. 1104, 1107 (1983)).

50. *Id.* at 847-48 (citing Knuckles v. Commissioner, 349 F.2d 610 (10th Cir. 1965), *aff'g* T.C. Memo. 1964-33 (payments intended to fulfill employment contract liability with no intent to recompense for any tort claim for personal injury are taxable); Fono v. Commissioner, 79 T.C. 680, 694 (1982), *aff'd without published opinion*, 749 F.2d 37 (9th Cir. 1984) (payments intended for termination of employment and assignment agreements with no intent to reimburse for emotional distress are taxable); Glynn v. Commissioner, 76 T.C. 116, 120 (1981), *aff'd without published opinion*, 676 F.2d 682 (1st Cir. 1982) (payments intended to recompense for doctoral advantages surrendered and not for personal injuries are taxable)).

51. 87 T.C. 236 (1986), *aff'd*, 835 F.2d 67 (3d Cir. 1987).

52. Metzger v. Commissioner, 88 T.C. 834, 851 (1987) (quoting *Bent*, 87 T.C. at 248-49 (quoting Carey v. Piphus, 435 U.S. 247, 253 (1978)) (citations omitted)), *aff'd without opinion*, 845 F.2d 1013 (3d Cir. 1988).

and has held "that § 1983 claims are best characterized as personal injury actions."[53]

The *Metzger* Court concluded that the decision in *Bent* was analogous to the case then at bar because both inquiries involved a 42 U.S.C. § 1983 claim,[54] and that since the damages received from the § 1983 claim in *Bent* were excludable under § 104(a)(2), the award in the instant case should be similarly excludable.[55] Thus, the portion of the settlement flowing from personal injury claims under Title VII was excludable from gross income under § 104(a)(2).[56]

The Fifth Circuit took a different approach and held Title VII claims to be fully taxable in *Johnston v. Harris County Flood Control District.*[57] At issue in *Johnston* were both a Title VII claim and a § 1983 claim.[58] The court determined that the distinction between these two types of claims was important for federal income tax purposes,[59] stating that the § 1983[60] award was tax exempt because by its nature it was based on a "tort or tort-type" right.[61] This was in clear contrast to the Title VII award for back pay which was not tax exempt because of its nature as back pay (which would normally be taxed).[62] The Fifth Circuit went on to say that it was

53. *Id.* (quoting *Bent,* 87 T.C. at 248-49 (quoting Wilson v. Garcia, 471 U.S. 261, 280 (1985) (citations omitted))); 42 U.S.C. § 1983 (1988), ("Every person who, under color of any statute . . . causes . . . any citizen . . . or person . . . to be depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .").

54. 42 U.S.C. § 1983 (1988). The claim in *Bent* involved a violation of the First Amendment right to free speech. *Metzger,* 88 T.C. at 851. *See generally* Bent v. Commissioner, 87 T.C. 236 (1986), *aff'd,* 835 F.2d 67 (3d Cir. 1987).

55. *Metzger,* 88 T.C. at 851. The *Metzger* Tax Court stated "that gross income does not include damages received under a 42 U.S.C. sec. 1983 claim based on a violation of . . . constitutional rights, or [a violation of] statutory rights [under Title VII], to be free from discrimination on the basis of sex or national origin." *Id.* The claim involved violations of both the Thirteenth and Fourteenth Amendments as well as a violation of statutory rights. *Id.*

It should be noted that § 1983 serves as a "blanket" statute which provides that violation of a federal statute makes the violator liable to the injured party. 42 U.S.C. § 1983 (1988). Thus, although it is a somewhat different approach to include § 1983 in the analysis of the Title VII claim in *Metzger,* it leads to the same result. *See also supra* note 53.

56. *Metzger,* 88 T.C. 834, 851; I.R.C. § 104(a)(2) (1988 & Supp. I 1989).

57. 869 F.2d 1565 (5th Cir. 1989), *cert. denied,* 493 U.S. 1010 (1990).

58. *Johnston,* 869 F.2d at 1579.

59. *Id.*

60. 42 U.S.C. § 1983 (1988).

61. *Johnston,* 869 F.2d at 1579-80 (citing Bent v. Commissioner, 835 F.2d 67, 70 (3d Cir. 1987) (citing Metzger v. Commissioner, 88 T.C. 834, *aff'd without opinion,* 845 F.2d 1013 (3d Cir. 1988))).

62. *Johnston,* 869 F.2d at 1580 (citing Hodge v. Commissioner, 64 T.C. 616 (1975)).

acceptable for the effect of tax liability to be taken into account when calculating awards.[63]

The Fourth Circuit held Title VII back pay awards, under a sex discrimination claim, to be taxable in *Thompson v. Commissioner*.[64] The court reasoned that back pay awards constituted a recovery for earned, but unpaid wages, which are more similar to contractual claims for accrued wages than to tort claims.[65] If the back pay award was not subject to taxation, the party would have actually been placed in a better position than male counterparts who would have paid income tax on their wages when received.[66] The court determined that under Title VII the plaintiff "received compensation for services rendered [while] . . . a tort plaintiff receives compensation for the inability to earn an income due to a tortious act of the defendant."[67] Thus Title VII awards were held not to be excludable from gross income since they were the reimbursement of back pay and non-tortious in nature.[68]

Sparrow v. Commissioner[69] held that a back pay award for racial discrimination under a Title VII claim did not constitute damages, but simply restitution since it put plaintiffs in the same position that they would have been absent discrimination, and therefore amounts awarded should not

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63. *Id.* "The tax-free nature of a damage award determines how and whether a district court should account for tax liability when it computes the award. Because they are tax-free, personal injury awards based on lost earnings 'ideally' should reflect the plaintiff's after-tax wages and benefits." *Id.* (citing Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983)).

> A personal injury award that accounts for the plaintiff's tax liability accurately reflects the amount that the plaintiff actually lost. An award that does not account for tax liability would grant a windfall to the plaintiff. . . . In contrast, the court need not account for federal income tax liability when it fixes back pay awards [because t]he award is not tax-exempt.

Id. (citations omitted). *See also* Sears v. Atchison, Topeka & Santa Fe Railway, 749 F.2d 1451 (10th Cir. 1984) (acceptable for district court to compensate for increased tax liability in Title VII suit), *cert. denied*, 471 U.S. 1099 (1985).

64. 866 F.2d 709, 712 (4th Cir. 1989).

65. *Id.*

66. *Id.* This approach is similar to the reasoning in Justice Souter's concurring opinion in United States v. Burke. *See infra* notes 133-36 and accompanying text.

67. *Thompson*, 866 F.2d at 712 (citing Threlkeld v. Commissioner, 848 F.2d 81 (6th Cir. 1988); Bent v. Commissioner, 835 F.2d 67 (3d Cir. 1987); Roemer v. Commissioner, 716 F.2d 693 (9th Cir. 1983)). The court defined a tort action as "'a direct invasion of some legal right of the individual' independent of contract." *Id.* (quoting BLACK'S LAW DICTIONARY 1335 (5th ed. 1979)). This case also involved a liquidated damage award under the Equal Pay Act, (Fair Labor Standards Act of 1938, § 6(d)(1), current version at 29 U.S.C. § 206(d)(1)) regarding which the court stated that "the right to be free from unreasonable gender discrimination is a personal right." *Id.* (citing Davis v. Passman, 442 U.S. 228, 235 n.10 (1979)). The court went on to say that "sex discrimination actions in general are tort or tort-type actions and damages awarded for violation of that right are damages for personal injuries." *Id.*

68. *Id.* at 712.

69. 949 F.2d 434 (D.C. Cir. 1991).

be excluded from gross income.[70] Since this court reasoned that to come under the § 104(a)(2)[71] exclusion it was first necessary to find damages before inquiring as to the personal injury element, it was not determined whether a claim for racial discrimination under Title VII constituted "personal injuries."[72] The *Sparrow* Court held that to constitute damages, an amount received must fall under the traditional definition of damages, that is amounts recoverable under an action at law.[73] Under Title VII the court determined that the only relief available was equitable in nature,[74] and noted that when Congress enacted the laws allowing a recovery of back pay, it "did not make available the legal remedies of compensatory and punitive damages but instead limited relief to equitable remedies."[75] The lack of a right to a jury trial under Title VII was taken to further emphasize that available remedies were only equitable in nature, with a clear distinction between the "legal remedy of damages and the equitable remedy of restitution."[76]

The *Sparrow* Court recognized the positive precedents of *Thompson v. Commissioner*,[77] *Johnston v. Harris County Flood Control District 2*,[78] and *Sears v. Atchison, Topeka and Santa Fe Railroad*,[79] but severely criticized the Sixth Circuit's holding in *Burke v. United States*[80] as being "irreconcilable with precedent" and a misinterpretation of *Threlkeld v. Commissioner*,[81] a case on which the Sixth Circuit based much of its opinion.[82]

One of the problems with the *Sparrow* decision is that it would lead to the taxation of back pay under Title VII but not under other federal dis-

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70. *Id.* at 441.

71. I.R.C. § 104(a)(2) (1988 & Supp. I 1989). The "two elements to this exclusion [are]: (1) the amount received must be damages and (2) the amount received as damages must result from personal injuries or sickness." *Sparrow*, 949 F.2d at 436.

72. *Sparrow*, 949 F.2d at 441.

73. *Id.* at 437.

74. *Id.* (citing 42 U.S.C. § 2000e-5(g)). A "court may enjoin [a] respondent from engaging in such unlawful employment practice[s], and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate." *Id.* *See also supra* note 3 for a discussion of 42 U.S.C. § 2000e-2(a).

75. *Sparrow*, 949 F.2d at 437. Punitive damages are not excluded from gross income as "damages received on account of personal injuries or sickness" unless the case involved "physical injury or physical sickness." I.R.C. § 104(a) (1988 & Supp. I 1989).

76. *Sparrow*, 949 F.2d at 438.

77. 866 F.2d 709 (4th Cir. 1989); *see supra* notes 64-68.

78. 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *see supra* notes 57-63.

79. 749 F.2d 1451 (10th Cir. 1984) (trial court was proper in including a tax component in a Title VII award).

80. 929 F.2d 1119 (6th Cir. 1991), *rev'd*, 112 S. Ct. 1867 (1992).

81. 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988).

82. Sparrow v. Commissioner, 949 F.2d 434, 438-39 (D.C. Cir. 1991).

crimination statutes.[83] A further problem with this decision is the fact that when § 104(a)(2) was incorporated into the Internal Revenue Code of 1954, the distinction in federal court between actions at law and suits in equity had been abolished long before by the 1938 Federal Rules of Civil Procedure.[84]

III. THE *BURKE* DECISIONS

A. *The Sixth Circuit's Opinion*

Burke v. United States[85] involved a sex discrimination action, filed under Title VII, and based on the Tennessee Valley Authority's alleged acts of increasing pay scales in male-dominated pay schedules but not in female-dominated pay schedules. This resulted in an actual decrease in salaries in certain female-dominated pay schedules.[86] The case before the Sixth Circuit involved a tax refund action requesting that taxes withheld from the settlement awards, when the awards were originally paid to the various taxpayers, be refunded by the Internal Revenue Service (IRS).[87] This request had been denied by the IRS.[88] The taxpayers argued that the awards were excluded from taxation under § 104(a)(2), due to their nature as "personal injuries."[89] The Sixth Circuit limited its inquiry to whether a Title VII sex discrimination violation resulted in "personal injuries" under § 104(a)(2),[90] and held that Title VII awards did result from "personal injuries" and thus were excludable from gross income.[91] The court relied heavily on *Threlkeld v. Commissioner*,[92] emphasizing that:

> [W]hether the damages received are paid on account of "personal injuries" [under § 104(a)(2)] should be the beginning and [the] end of the inquiry. To determine whether the injury complained of is personal, we must look to the origin and character of the claim . . . and not to the consequences that result from the injury.[93]

The consequences flowing from the injury would include loss of wages, but the *Burke* Court chose not to focus on that, and instead emphasized the act or acts that led to the consequences.[94] The court stated that "de-

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83. Brief as Amici Curiae in Support of Respondents at 14 n.5, *Burke*, 112 S. Ct. 1867 (1992) (No. 91-42) [hereinafter Brief in Support of Respondents].

84. *Id.* (citations omitted).

85. 929 F.2d 1119 (6th Cir. 1991), *rev'd*, 112 S. Ct. 1867 (1992).

86. *Id.* at 1120.

87. *Id.*

88. *Id.*

89. *Id.*; *see also* I.R.C. § 104(a)(2) (1988 & Supp. I 1989).

90. *Burke*, 929 F.2d at 1121; I.R.C. § 104(a)(2) (1988 & Supp. I 1989).

91. *Burke*, 929 F.2d at 1123-24.

92. 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988).

93. *Burke*, 929 F.2d at 1121 (quoting *Threlkeld*, 87 T.C. at 1299) (citations omitted).

94. *Id.*

termining whether the § 104(a)(2) exclusion applies requires an examination of the nature of the injury to determine whether the injury and claim are personal and tort-like in nature, and not whether the consequences resulted in an award of compensatory damages or damages for back pay."[95] Therefore, determining whether an injury was "personal and tort-like in nature" should be the entire inquiry.[96] This emphasis was in direct contradiction to the approach taken by the Court of Appeals for the Fifth Circuit in *Johnston v. Harris County Flood Control District*[97] and the Fourth Circuit in *Thompson v. Commissioner*,[98] where both courts emphasized the nature of the awards as back pay.[99] It also varied from the approach by the District of Columbia Court of Appeals in *Sparrow v. Commissioner*[100] which emphasized the nature of the damages available as being determinative.[101]

The Sixth Circuit analogized Title VII claims to cases holding that injuries resulting from age discrimination were personal injuries under § 104(a)(2),[102] and noted that "loss of wages—a substantial nonpersonal consequence of [an] employer's age discrimination—[does] not transform the discrimination into a nonpersonal injury" for § 104(a)(2) purposes.[103] Even though Title VII does not specifically provide for age discrimination suits,[104] back pay under an age discrimination suit results from the same general schemata of unlawfulness, that is negative discrimination resulting in loss of employment, and thus the fact that the two types of suits are brought under different federal statutes should not result in opposite tax consequences.[105]

The Sixth Circuit also emphasized the Third Circuit's holding in *Metzger v. Commissioner*,[106] where one-half of the damages received in a sex

95. *Id.*
96. *Id.*
97. 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1010 (1990).
98. 866 F.2d 709 (4th Cir. 1989).
99. *See supra* notes 57-68 and accompanying text.
100. 949 F.2d 434 (D.C. Cir. 1991).
101. *See supra* notes 69-76 and accompanying text.
102. Burke v. United States, 929 F.2d 1119, 1122 (6th Cir. 1991) (citing *e.g.*, Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990); Rickel v. Commissioner, 900 F.2d 655 (3d Cir. 1990)), *rev'd*, 112 S. Ct. 1867 (1992).
103. *Id.* (quoting *Pistillo*, 912 F.2d at 150). "[T]he successful [age discrimination] plaintiff is being treated no better . . . than the typical tort victim who suffers a physical injury. We see no reason to treat one personal injury victim any differently than another." *Id.*, at 1123 (quoting *Pistillo*, 929 F.2d at 150 (quoting *Rickel*, 900 F.2d at 664)). Title VII provides protection from race, color, religion, sex, and national origin discrimination. 42 U.S.C. § 2000e-2(a) (1988); *see also supra* note 3.
104. 42 U.S.C. § 2000e-2(a); *see also* Title VII, § 2000e-5(g).
105. *Burke*, 929 F.2d at 1123. There is not a "principled way to distinguish the injuries arising from a claim for invidious age discrimination, and the claim for invidious sex discrimination . . . except that these tort claims were brought under different federal statutes." *Id.*
106. 88 T.C. 834 (1987), *aff'd without opinion*, 845 F.2d 1013 (3d Cir. 1988).

and national origin discrimination suit were held to fall under the personal injury umbrella of § 104(a)(2),[107] since at least one-half of the awards received were for personal injury claims.[108] This is directly analogous to *Burke*, which was a case of sex discrimination.[109]

B. *The Supreme Court's Response*

In *United States v. Burke*,[110] the Supreme Court reversed the Sixth Circuit's holding by a seven to two decision,[111] and held that back pay awards received under Title VII were subject to the federal income tax.[112] The Court agreed with the Sixth Circuit that the inquiry should begin by determining the nature of the underlying claim.[113] To exclude the Title VII award for back pay from income, the award must redress a "tort-like personal injury."[114] The Court, however, focused on the relief available for a violation of Title VII, and not on the actual injury to the aggrieved party, in determining whether an award was excludable from taxation.[115] This approach was taken despite the majority's acknowledgement that § "104(a)(2) . . . encompasses a broad range of physical and nonphysical injuries to personal interests."[116]

The Court stated that "[t]he fact that employment discrimination causes harm to individuals does not automatically imply . . . that there

107. *Burke*, 929 F.2d at 1122 (citing Metzger v. Commissioner, 88 T.C. 834, 851 (1987) *aff'd without opinion*, 845 F.2d 1013 (3d Cir. 1988)); *see supra* notes 39-44 and accompanying text.

108. *Metzger*, 88 T.C. at 851 (1987), *aff'd without opinion*, 845 F.2d 1013 (3d Cir. 1988); *see supra* notes 39-44 and accompanying text.

109. *Burke*, 929 F.2d at 1123.

110. 112 S. Ct. 1867 (1992), *rev'g* 929 F.2d 1119 (6th Cir. 1991).

111. *Id.* at 1868. The majority opinion was authored by Justice Blackmun. Chief Justice Rehnquist, Justice White, Justice Stevens, and Justice Kennedy joined in that opinion. Justice Scalia and Justice Souter filed separate opinions concurring in the judgement. Justice O'Connor, joined by Justice Thomas, filed a dissenting opinion.

112. *Id.* at 1874. This holding is a narrow one in that it fails to address the changes to Title VII, effective November 21, 1991, which were brought about by the Civil Rights Act of 1991. *Id.* at 1872 n.8; *see also infra* notes 152-209 and accompanying text. In addition, the Supreme Court expressed no opinion as to whether the claims were subject to the Federal Insurance Contributions Act (FICA) since "neither the parties nor the courts below addressed the distinct analytical question whether back pay received under Title VII constitute[d] 'wages' subject to taxation for FICA purposes." *Burke*, 112 S. Ct. at 1869 n.1 (citing I.R.C. §§ 3101(a), 3121(a) (1988)).

113. *Burke*, 112 S. Ct. at 1872.

114. *Id.*

115. *Id.* at 1873. The Court's approach in *Burke* went against its own precedent where the nature of the claim/injury was relevant, and the nature of the damages themselves irrelevant, when determining the applicability of § 104(a)(2). United States v. Gilmore, 372 U.S. 39, 44 (1963). The Court's approach in *Burke* was similar to that taken by the District of Columbia Court of Appeals in Sparrow v. Commissioner, 989 F.2d 434 (D.C. Cir. 1991); *see also supra* notes 73-76 and accompanying text.

116. *Burke*, 112 S. Ct. at 1871-72 n.6 (1992).

exists a tort-like "'personal injury' for purposes of" § 104(a)(2).[117] The Court found it significant that "Title VII [did] not allow awards for compensatory or punitive damages" but instead limited "remedies to back pay, injunctions, and other equitable relief."[118] The Court noted that Title VII awards focus on "'legal injuries of an economic character,'"[119] and do not attempt to recompense the wronged party for the traditional harms of tort-type personal injury.[120]

The Court recognized that the available remedies under Title VII were in contrast not only to those available under traditional tort law, but also to those remedies available under other federal anti-discrimination statutes.[121] Further, the Court noted that it was completely improper to try to analogize the taxability of Title VII claims to other federal anti-discrimination statutes.[122]

The majority opinion concluded, therefore, that an award under Title VII did not flow from a tort-like personal injury.[123] This was due to the absence of a more complete spectrum of available damage awards under

117. *Id.* at 1873. Personal injury under § 104(a)(2) is not limited to physical injury. *Id.* at 1871 n.6 (citing Roemer v. Commissioner, 716 F.2d 693, 697 (9th Cir. 1983)). The Court noted that "[n]either the text nor the legislative history of § 104(a)(2) offers any explanation of the term 'personal injuries.'" *Burke,* 112 S. Ct. at 1870 n.5 (*see, e.g.*, H.R. REP. No. 1337, 83d Cong., 2d Sess. 15 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 15-16 (1954)). The current version of § 104(a), (following the 1989 amendment, Pub. L. No. 101-239, § 7641(a)-(b), 103 Stat. 2379 (1989), I.R.C. § 104(a) (1988 & Supp. I 1989)), does not allow punitive damages to be excluded from gross income under § 104(a)(2) unless the punitive damages are awarded for physical injury or physical sickness. I.R.C. § 104(a) (1988 & Supp. I 1989). The Court interpreted this to mean that Congress intended other damages, such as compensatory damages, to be excluded under § 104(a)(2) whether the damages resulted from physical or nonphysical injury. *Id.* at 1871 n.6.

118. *Burke,* 112 S. Ct. at 1873; *see also* 42 U.S.C. § 2000e-5(g) (1988).

119. *Burke,* 112 S. Ct. at 1873 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)). *Cf.* R.F.V. HEUSTON & R.A. BUCKLEY, SALMOND AND HEUSTON ON THE LAW OF TORTS § 3(1) (19th ed. 1987) (under the law of torts an injury should not be classified as a tort unless there is an action for damages, which "is an essential characteristic of every true tort").

120. *Burke,* 112 S. Ct. at 1873. Other traditional harms would include compensatory or punitive damages for such things as "pain and suffering, emotional distress, harm to reputation, or other consequential damages." *Id.*

121. *Id.* at 1873-74, citing Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3613(c) (1988) (which allows for jury trials as well as compensatory and punitive damage awards with fair housing violations; 42 U.S.C. § 1981 (1988) (allowing for jury trials as well as equitable and legal relief including compensatory and punitive damage awards for race-based employment discrimination)).

122. *Burke,* 112 S. Ct. at 1874 n.11. *Cf. supra* notes 102-105 and accompanying text (discussion of the Sixth Circuit's use of analogies regarding the taxability of Title VII claims with other federal statutes).

123. *Burke,* 112 S. Ct. at 1874.

Title VII.[124] Consequently, Title VII awards can not be excluded from taxation under § 104(a)(2).[125]

In a concurring opinion, Justice Scalia attempted to disregard the tort-type personal injury analysis, instead focusing on the phrase "personal injuries or sickness" in the contextual sense as it appears in § 104(a)(2).[126] The emphasis then becomes the association between "personal injuries" and "sickness."[127] Since "sickness" "connotes a '[d]iseased condition; illness; [or] ill health,'"[128] then "personal injuries" must "connote injuries to physical (or mental) health" in order to fall under the § 104(a)(2) exclusion.[129] Justice Scalia recognized that psychological harm might be one of the resulting injuries to a victim of race-based or sex-based employment discrimination, but found this immaterial since under Title VII it was not necessary to show such an injury in order to recover back pay.[130] Consequently, any back pay award received under Title VII would not fall under the § 104(a)(2) exclusion since it did not specifically require proof of harm to the victim's physical or mental health in order for back pay to be awarded.[131] If this alone would not be enough, Justice Scalia further reasoned that the general rule of narrowly construing tax exemptions necessarily leads to the conclusion that Title VII claims are taxable.[132]

Justice Souter took yet another approach, viewing back pay as essentially a contractual measure of damages and drawing parallels between Title VII and contract law.[133] Damages received under contract law would not fall under the § 104(a)(2) exclusion regarding personal inju-

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124. *Id.*

125. *Id.*

126. *Id.* at 1874-75 (Scalia, J., concurring).

127. *Id.* at 1875.

128. *Id.* (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2329-30 (2d ed. 1950)).

129. *Id.* at 1875 (Scalia, J., concurring). Justice Scalia emphasized the use of "personal injuries or sickness" throughout the remainder of § 104(a), noting that the three other times the phrase "personal injuries or sickness" is used it is "limited to injuries to physical or mental health." *Id.* at 1876 (citing I.R.C. §§ 104(a)(1) (workmen's compensation); 104(a)(3) (accident and health insurance); 104(a)(4) (pension, annuity, or similar allowance under the Foreign Service Act)). *See* I.R.C. § 104(a) (1988 & Supp. I 1989).

130. *Burke*, 112 S. Ct. at 1876 (Scalia, J., concurring).

131. *Id.* (Scalia, J., concurring).

132. *Id.* (Scalia, J., concurring) (citing United States v. Centennial Sav. Bank, 111 S. Ct. 1512, 1519 (1991)).

133. *Id.* at 1877 (Souter, J., concurring). The guaranteed rights under Title VII are essentially the same as those which are often found under an employment contract, with the rights under Title VII arguably being implied as part of all employment contracts. *Id.* at 1878 (citing Charles A. Shanor & Samuel A. Marcosson, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court*, 1988-89, 6 LAB. LAW. 145, 174 n.118 (1990)).

ries, but would likely be fully taxable under the *Glenshaw Glass* test.[134] Justice Souter also noted the importance of the "default rule of statutory interpretation [which requires] that exclusions from [gross] income must be narrowly construed."[135] When this default rule is combined with the idea of Title VII representing a contractual measure of damages, the conclusion that Title VII awards are fully taxable should become even more apparent.[136]

In the dissenting opinion, Justice O'Connor argued that "[t]he purposes and operation of Title VII are closely analogous to those of tort law, and that similarity should determine excludability of recoveries for personal injury" under § 104(a)(2).[137] The dissent attacked the majority's position that the nature of the injury could be determined simply by what damages were statutorily available, noting that this type of an approach was contrary to previous precedent set by the Court.[138] "[W]hether Title VII suits are based on the same sort of rights as a tort claim must [instead] be answered with reference to the nature of the statute and the type of claim brought under it."[139] Since Title VII creates a cause of action for employment discrimination without regard to the existence of contractual relationships between the employer and the employee, Title VII "operates in the traditional manner of torts [with] courts award[ing] compensation for invasions of a right to be free from certain injury in the workplace."[140] This hopefully serves to encourage employers to eradicate employment discrimination from the workplace, where possible.[141] Therefore it is fundamentally different "from contract liability, which 'is imposed by the law for the protection of a single, limited interest, that of having the promises of others performed.'"[142]

The dissent also noted the inequity in holding that back pay awards must be subject to taxation so as to not put the party discriminated against in a better position, when they are not required to pay federal

134. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955); *see also supra* notes 33-34 and accompanying text.

135. *Burke,* 112 S. Ct. at 1878 (1992) (Souter, J., concurring) (citing United States v. Centennial Sav. Bank, 111 S. Ct. 1512, 1519 (1991)).

136. *Id.* at 1878.

137. *Id.* at 1878 (O'Connor, J., dissenting).

138. *Id.* at 1879. The dissent noted the Court's approach in Wilson v. Garcia, 471 U.S. 261 (1985), where, in determining which state statute of limitations was applicable to a claim under 42 U.S.C. § 1983, the Court looked not to the remedies available to the claimant but concentrated on "'the essence of the claim' and 'the elements of the cause of action.'" *Id.* (quoting *Wilson,* 471 U.S. at 268). *See generally* Goodman v. Lukens Steel Co., 482 U.S. 656 (1986).

139. *Burke,* 112 S. Ct. at 1879 (O'Connor, J., dissenting).

140. *Id.*

141. *Id.* (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (quoting United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973))).

142. *Id.* (O'Connor, J., dissenting) (quoting WILLIAM PROSSER, LAW OF TORTS 5 (4th ed. 1971)).

income tax, than the position of those who were never subject to discrimination but continued to pay taxes on wages received.[143] Monetary damages do not in reality make a person whole.[144] Justice O'Connor instead emphasized that excluding Title VII claims from taxation would more properly put victims of employment discrimination in the same position as others who suffer personal injuries.[145]

The dissent also disagreed with the majority's unexplained suggestion that the lack of an opportunity for a jury trial is relevant in determining whether awards under a statute fall under the § 104(a)(2) exclusion, stating that such an approach goes directly against recent Court precedent.[146] Whether employment discrimination suits under Title VII are actions at law or suits in equity should be irrelevant since IRS regulations define damages as "amount[s] received . . . through prosecution of a legal suit or action based upon tort or tort[-]type rights."[147] Since the IRS does not differentiate between damages flowing from actions at law and suits in equity the Court should not seek that distinction either.[148]

The dissent's final point rejected the majority's idea that Congress intentionally changed the nature of a Title VII suit when it enacted the Civil Rights Act of 1991.[149] Instead, Justice O'Connor argued, Congress enacted the Amendment because it was necessary to provide "additional remedies under Federal law . . . to deter unlawful harassment and intentional discrimination in the workplace."[150] The fact that Congress added new remedies to effectuate the already established goal of Title VII should control the Court's analysis, not the fact that certain remedies were missing prior to the Amendment.[151]

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143. *Id.* at 1880.

144. *Id.*

145. *Id.* The dissent also gave credence to the idea that if a party receives damages for physical injury, "'which almost by definition is personal, the entire award is excluded from income even if all or a part of the recovery is determined with reference to the income lost because of the injury.'" *Id.* (quoting Threlkeld v. Commissioner, 87 T.C. 1294, 1300 (1986)).

146. *Id.* (O'Connor, J., dissenting) (citing Lytle v. Household Mfg., Inc., 494 U.S. 545, 549 n.1 (1990) (the Court expressed no opinion and did not rule on whether the plaintiff under Title VII had any right to a jury trial)).

147. *Id.* at 1880-81 (O'Connor, J., dissenting) (quoting Treas. Reg. § 1.104(c)); *see supra* note 44.

148. *See supra* note 84 and accompanying text.

149. *Burke*, 112 S. Ct. at 1881 (O'Connor, J., dissenting).

150. *Id.* (O'Connor, J., dissenting) (quoting The Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071).

151. *Id.* (O'Connor, J., dissenting).

IV. The 1991 Amendment

The Civil Rights Act of 1991,[152] effective November 21, 1991,[153] provides additional remedies to the victims of employment discrimination.[154] The additional remedies available include both compensatory and punitive damages as well as the expressed right to a jury trial when compensatory or punitive damages are sought.[155] These potential awards are in addition to the awards provided in Title VII of the Civil Rights Act of 1964, which included "such affirmative action as may be appropriate," including back pay and injunctive relief.[156]

The Supreme Court stated that "[n]o doubt discrimination could constitute a 'personal injury' for purposes of § 104(a)(2) if the relevant cause of action evidenced a tort-like conception of injury and remedy."[157] Does the Amendment provide the proper remedies to allow an award or settlement to be considered tort-like?

A. *Punitive Damages*

Under the Amendment, punitive damages are available if it is proven "that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[158] Punitive damages are always included in gross income unless it can be proven that they result from a case "involving physical injury or physical sickness."[159] This provides the courts with a fairly clear-cut result when the issue involves the taxability of punitive damages available under the Amendment. Unless the action involves some type of "physical injury or physical sickness,"[160] any portion awarded as punitive damages will be fully taxable.[161] It is likely that most cases under post-Amendment Title VII will not include "physical injury or physical sickness" and thus punitive damages awarded will be fully taxable.

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152. The Amendment, *supra* note 1.

153. *Id.* § 2.

154. *See* the Amendment, *supra* note 1. As with the preexisting act, this Amendment relates solely to employment discrimination flowing from discrimination due to an "individual's race, color, religion, sex, or national origin." 78 Stat. 253, current version at 42 U.S.C. § 2000e-2(a) (1988).

155. 105 Stat. at 1073, §§ 1977A(b), 1977A(c).

156. Civil Rights Act of 1964 § 706(g), Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e-5(g) (1988)); *see supra* notes 74-75 and accompanying text.

157. United States v. Burke, 112 S. Ct. 1867, 1873 (1992).

158. 105 Stat. at 1073, § 1977A(b)(1).

159. I.R.C. § 104(a) (1988 & Supp. I 1989).

160. *Id.*

161. *Id.*

B. *Compensatory Damages*

The taxability of compensatory damages, however, is not as clear cut. In most instances under the Amendment, compensatory damages are available "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[162] The taxability of compensatory damages will be decided by examining § 104(a)(2) and determining whether the award or settlement is "on account of personal injuries or sickness."[163] This is the point where a return to *United States v. Burke*[164] is appropriate. The majority opinion in *Burke* examined the taxability of back pay awards under pre-Amendment Title VII and determined such payments to be taxable because of the absence of the availability of different categories of awards under pre-Amendment Title VII.[165] The Court noted that pre-Amendment Title VII damages focused on "'legal injuries of an economic'" nature[166] and did not attempt to recompense the wronged party for the traditional harms of tort-type personal injury.[167] An action for damages is viewed by some as an absolute requirement for an act to be classified as a tort.[168] Back pay was not viewed by the Court to be a tort-type damage, but instead was viewed simply as pay which would have been received if the illegal act of discrimination had not taken place.[169] Thus, since it was received in lieu of wages it should be taxed as wages, and did not fall under the § 104(a)(2) exclusion.[170]

The Court referred to compensatory or punitive damages for "pain and suffering, emotional distress, harm to reputation, or other consequential damages" as examples of the more traditional harms which would be required to find pre-Amendment Title VII damages as recompensing for a "tort-type personal injury."[171] Post-Amendment Title VII now includes such compensatory and punitive damages required in the Supreme Court's description of damages necessary to find a "tort-type personal injury."[172]

In addition, the majority noted the absence of the availability of a jury trial in support of its position on the taxability of back pay awards under

162. The Amendment, *supra* note 1, § 1977(A)(b)(3). The Amendment specifically notes that compensatory damages do not include back pay or interest on back pay. *Id.* § 1977A(b)(2).

163. I.R.C. § 104(a)(2) (1988 & Supp. I 1989).

164. 112 S. Ct. 1867 (1992), *rev'g* 929 F.2d 1119 (6th Cir. 1991).

165. *Id.* at 1874; *see supra* notes 115-21 and accompanying text.

166. *Burke,* 112 S. Ct. at 1873 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

167. *Id.*

168. *See supra* note 119 and accompanying text.

169. *Burke,* 112 S. Ct. at 1873.

170. *Id.* at 1874.

171. *Id.* at 1873.

172. The Amendment, *supra* note 1, § 1977 A(b)(3); *see also supra* notes 114-20 and accompanying text.

pre-Amendment Title VII.[173] The Amendment also changes this, making jury trials available at the request of either party to the action.[174] Thus under the majority opinion's analysis in *Burke*,[175] post-Amendment Title VII awards for compensatory damages should fall under the umbrella of § 104(a)(2) and be exempt from taxation since they are in the tradition of tort-type damages. This implied result seems to indicate that although *Burke* is a recent case, its true precedential reach is extremely limited.

C. *Back Pay*

The question remains, however, with regard to the previously available awards under the unamended Title VII: Will back pay now fall under the umbrella of § 104(a)(2) simply because an enlarged, more tort-like schemata of awards is available to a victim of discrimination? If the majority's reasoning in *Burke* can be taken at face value this would be the conclusion.[176] The majority opinion in *Burke* indicated that the key to the type of injury being recompensed was simply the titles put on the remedies and the nature of the remedies available under the statute.[177] Although this seems somewhat simplistic, it is the approach taken by the majority of the Court. It appears from the statements and reasoning of the Court that back pay will not be taxable under post-Amendment Title VII, simply because of the addition of compensatory and punitive damages to the list of available awards.[178] This, however, may not be the case if the Court did not reach a final level of analysis, since the primary hurdle of the presence of compensatory or punitive damages was not fulfilled under the pre-Amendment Title VII. The Court did not indicate that a second level of analysis would be required, but it was not necessarily precluded either. Moving on to a second level analysis might cause back pay to still be taxable under the Amendment because of what it represents. This is uncertain. Unfortunately the majority's opinion provides no clear direction here, but actually works to add to the confusion.

In addition, if compensatory damages will be tax exempt, as previously suggested,[179] it is possible that back pay awards under the Amendment will be viewed more like back pay awards under other federal antidiscrimination statutes and also be tax exempt.[180] This would occur despite the Court's comment that it was improper to compare Title VII to other federal statutes dealing with discrimination.[181]

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173. *Burke*, 112 S. Ct. at 1874 n.12.
174. The Amendment, *supra* note 1, § 1977A(c)(1).
175. *Burke*, 112 S. Ct. at 1874; *see also infra* note 184 and accompanying text.
176. *See supra* notes 115-21 and accompanying text.
177. *See supra* notes 117-20 and accompanying text.
178. *See supra* notes 117-18 and accompanying text.
179. *See supra* notes 171-72 and accompanying text.
180. *See supra* notes 102-05 and accompanying text.
181. *See supra* note 122 and accompanying text.

The other alternative is that back pay awards will continue to be taxable because of what they represent—an item which would have been taxable if received during the normal course of employment.[182] But this same argument would lead to the taxability of back pay awards under age discrimination suits, which are clearly not taxable.[183] No clear direction is yet available on this in the Title VII context.

The majority did indicate that it viewed Congress's action in enacting the Amendment as "signal[ing] a marked change in its conception of the injury redressable by Title VII."[184] This may indicate the majority's willingness to treat back pay under the Amendment as falling under § 104(a)(2). If the injury redressable under the Amendment has changed, then it is easy to argue that the damage award is compensating an injury with a different character and therefore may be tax exempt.

The dissent rejected the majority's analysis of Congressional intent, arguing that Congress enacted this simply to "effectuate the law's settled purposes" because "existing penalties [were] insufficient."[185] The dissent's position seems to be in agreement with the findings stated in the statute that "additional remedies under Federal law [were] needed to deter unlawful harassment and intentional discrimination in the workplace."[186] This would seem to indicate that Congress simply wanted to provide various types of damages in order to more vehemently pursue the discrimination that pre-Amendment Title VII addressed.

The dissent argued that back pay awards should not be taxed under pre-Amendment Title VII,[187] and it would follow that the dissent would continue to argue that back pay awards should not be taxed under the Amendment. By recognizing a change in the nature of the statute and the injuries being compensated with the Amendment, the majority would more likely allow back pay to be tax exempt.[188] Therefore, under either the dissent's or majority's reasoning, it is likely that back pay awards under the Amendment would be tax exempt.

If relied upon here, Justice Scalia's concurring opinion[189] would lead to the taxability of all damages and awards under the Amendment. In his analysis, Justice Scalia noted that the emphasis should be on the association between "personal injuries" and "sickness" in § 104(a)(2),[190] with

182. I.R.C. § 61(a) (1988).

183. *See* Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990); Rickel v. Commissioner, 900 F.2d 655 (3d Cir. 1990).

184. United States v. Burke, 112 S. Ct. 1867, 1874 n.12 (1992).

185. *Id.* at 1881 (O'Connor, J., dissenting).

186. The Amendment, *supra* note 1, § 2.

187. *Burke*, 112 S. Ct. at 1878-80 (O'Connor, J., dissenting); *see also supra* notes 137-51 and accompanying text.

188. *See supra* notes 165-68 and accompanying text.

189. *Burke*, 112 S. Ct. at 1874-77 (Scalia, J., concurring).

190. *Id.* at 1875; *see* I.R.C. § 104(a) (1988 & Supp. I 1989); *see also supra* notes 126-32 and accompanying text.

the result being that a damage or award received would only be tax exempt if the victim was required to prove harm to his or her physical or mental health to receive the award.[191] Since such a proof of injury is not required under either the pre- or post-Amendment Title VII, all amounts received would be fully taxed under this analysis.

Justice Souter took yet another approach when he indicated employment discrimination awards were somewhat analogous to contractual measures of damage.[192] Even though he disagreed with the majority's approach of allowing the tort-like classification to be determined solely by whether the victim "can recover for 'intangible elements of injury,'" Justice Souter agreed that there was some merit in considering that recoveries being limited to back pay might indicate that a tort-like injury did not exist.[193] Justice Souter's approach under the Amendment is unclear since one can not garnish a true feeling for the mix of weight he prescribes between contractual damages and the previous limitation of recoveries to back pay.[194]

The dissent's approach requires that the "nature of the statute and the type of claim brought under it" should determine whether an award is tax exempt.[195] The dissent found a sex-discrimination claim under pre-Amendment Title VII to be tax exempt since it was based on the same sort of right as a tort claim.[196] This approach would flow through to the post-Amendment Title VII, with the dissent obviously holding that both compensatory damages and back pay awards under the Amendment are exempt from taxation under § 104(a)(2).

D. *Policy Reasons*

There are policy reasons for the arguments on both sides of the taxation of back pay awards controversy. On the one hand, exclusions from gross income are to be narrowly construed,[197] thereby attempting to tax at the fullest breadth possible. In this time of governmental financial crisis, a broader tax base is desirable to raise greater revenue. This could possibly be inferred to be the policy argument behind the Supreme Court's decision in *Burke.*

On the other hand, there exists the argument that any awards or settlements flowing from Title VII discrimination cases should be treated the same as other tort cases which compensate "for a right to be free from . . . injury,"[198] because the "purposes and operation of Title VII are

191. *Burke,* 112 S. Ct. at 1876 (Scalia, J., concurring).
192. *Id.* at 1877 (Souter, J., concurring).
193. *Id.* at 1877 (citing *Burke,* 112 S. Ct. at 1871).
194. *Cf. Burke,* 112 S. Ct. at 1877-78.
195. *Id.* at 1879 (O'Connor, J., dissenting).
196. *Id.*
197. United States v. Centennial Sav. Bank, 111 S. Ct. 1512, 1519 (1991).
198. *Burke,* 112 S. Ct. at 1879 (O'Connor, J., dissenting).

closely analogous to those of tort law."[199] "If a taxpayer receives a damage award for a physical injury, which almost by definition is personal, the entire award is excluded from income even if all or a part of the recovery is determined with reference to the income lost because of the injury."[200] In addition, post-Amendment Title VII claimants should be put in a position analogous to other federal antidiscrimination statute claimants with their awards not being subject to taxation.[201]

Some may argue, regarding back pay awards, that if the recipients do not have to pay tax they will actually be placed in a better position than those who were not discriminated against and who paid taxes as their wages were received.[202] It would seem that the trauma and mental anguish resulting from being the victim of negative discrimination would not be overcome by the simple lessening or elimination of a tax burden. Even though attorneys' fees are recoverable under both versions of Title VII,[203] which will help to limit additional financial loss, it is unlikely that award recipients would find themselves in a better position than a person who had not been subjected to discrimination. Further, what did the person lose regarding future employability? Rights may have been lost or diminished regarding pension funds, vesting, or any of a number of benefits that often increase as an employee's time and stature increase within an organization. In addition, a certain stigma may exist with a potential employee if it is known that suit was brought against a former employer.[204] A lessened tax burden will not remove the potential cost of this stigma. With all of this in mind, the employee who has been discriminated against may still be in a lesser financial position, regardless of whether back pay awards are tax exempt.

Also, taxing back pay awards could result in higher award amounts, due to judges and juries taking the tax consequences into account when determining the amount of back pay due to an injured party. This approach has already been approved by at least one court.[205]

Most importantly, the taxation of back pay awards, but not of compensatory damages received under the Amendment, could lead to prolonged negotiation and argument, discouraging settlement between the parties. This could happen when parties fail to agree on the ancillary issue of classification of payment amounts impacting taxation. One party may

199. *Id.* at 1878.

200. *Id.* at 1880 (quoting Threlkeld v. Commissioner, 87 T.C. 1294, 1300 (1986)).

201. *See supra* notes 102-05 and accompanying text.

202. *Burke*, 112 S. Ct. at 1880 (O'Connor, J., dissenting). The dissent did not agree with this position. *Id.*

203. 42 U.S.C. § 2000e-5(k) (1988).

204. It often does not reflect positively in the eyes of a future employer that an employee has brought suit against a former employer, regardless of whether a suit is well-founded or not.

205. Sears v. Atchison, Topeka & Santa Fe R.R., 749 F.2d 1451 (10th Cir. 1984); *see also supra* note 63.

want a percentage of the award to fall under the compensatory damage umbrella so as to be free from taxation, while the other party will not want to admit to guilt of that type and want the amounts to be construed as back pay. In addition, arbitrary awards may be agreed to by the parties which may or may not reflect reality.[206] Where will the IRS draw the line of reasonableness when accepting arbitrary classifications between taxable back pay awards and non-taxable compensatory damages? This could conceivably become an administrative nightmare.

E. *Summary*

Per the foregoing, it is apparent that with the additional remedies of compensatory and punitive damages, as well as the availability of a jury trial when such damages are sought,[207] this Amendment provides the more "tort-like conception of injury and remedy"[208] that the *Burke* majority sought. Consequently, punitive damages will be taxable in accordance with § 104(a) while compensatory damages and back pay awards will escape taxation because of their being "on account of personal injuries or sickness."[209]

V. Conclusion

The Supreme Court resolved the dispute between the Circuit Courts of Appeal,[210] with regard to the taxability of Title VII claims under the Civil Rights Act of 1964 in *United States v. Burke*,[211] holding that pre-Amendment Title VII claims are not excludable from gross income under § 104(a)(2) of the Code.[212] The reasoning of the Court's majority centered on the unavailability of tort or tort-like damage awards under the then-current version of Title VII, which limited awards to back pay, injunctions, and other equitable relief.[213] The Court viewed this limited scope of relief as indicating that a Title VII injury did not fall under the scope of "damages received on account of personal injuries" which were excluded from taxation under § 104(a)(2) of the Code.[214] The dissent argued that it should be the nature and purpose of the statute, with the

206. Brief in Support of Respondents, *supra* note 83, at 18 n.9. If an employer fails to withhold income taxes or FICA taxes from "wages" paid, then the employer becomes personally liable. *Id.* (citing I.R.C. §§ 3102(b) (FICA), 3403 (income tax withholding)); *see also supra* note 42 and accompanying text (where the *Metzger* court split the classification of the settlement "for tax purposes only").

207. *See supra* notes 152-56 and accompanying text.

208. *See supra* notes 117-20 and accompanying text.

209. I.R.C. § 104(a) (1988 & Supp. I 1989).

210. *See supra* note 10 and accompanying text.

211. 112 S. Ct. 1867 (1992), *rev'g* 929 F.2d 1119 (6th Cir. 1991).

212. *Id.* at 1874; I.R.C. § 61(a)(1) (1988).

213. *See supra* notes 117-20 and accompanying text.

214. *See supra* notes 7, 117-20 and accompanying text; I.R.C. § 104(a)(2) (1988 & Supp. I 1988).

type of claim brought under it, not the nature of the relief available, that determines whether something was a "personal injury" within the meaning of § 104(a)(2).[215] The majority's holding in *Burke* was a narrow one in that it expressed no opinion with regard to the effect of the 1991 Amendment on the taxability of Title VII awards.[216] The opinion actually served to provide additional questions as to the taxability of awards under the Amendment when the Court characterized the Amendment as representing a "marked change [by Congress] in its conception of the injury redressable by Title VII" due to the addition of the availability of compensatory and punitive damages, as well as the explicit availability of jury trials in some circumstances.[217] From the majority's own comments it becomes obvious that the precedential value of *Burke* has a very limited application when considering post-Amendment Title VII claims, with *Burke's* real precedential value existing only for pre-Amendment claims. Since the Amendment was effective prior to the decision, *Burke* really is a case frozen in time.[218]

From the foregoing, it is fairly obvious that punitive damages will be taxable and compensatory damages non-taxable. The looming question remains to be the taxability of back pay awards given the broadened spectrum of awards now available under the Amendment. A simplistic reading of the majority opinion in *Burke* leads to the assumption that back pay awards will become non-taxable because of the availability of compensatory and punitive damages under the Amendment. But, is this right? Only the Supreme Court can tell us.

*Jody R. King**

215. *See supra* note 139 and accompanying text; I.R.C. § 104(a)(2) (1988 & Supp. I 1989).

216. United States v. Burke, 112 S. Ct. 1867, 1872 n.8 (1992), *rev'g* 929 F.2d 1119 (6th Cir. 1991).

217. *Id.* at 1874 n.12.

218. *Burke* was decided May 26, 1992. *Burke*, 112 S. Ct. at 1867. The 1991 Amendment became effective November 21, 1991. The Amendment, *supra* note 1, at 1099, 1100.

* This article is dedicated to my dear husband, Stephen, for his endless love and tireless understanding which have helped to make this article and law school a reality; and to my parents, Loren and Shirley, for always being there through the years.

United States v. Goodner Brothers Aircraft, Inc.: Environmental Justice or Disaster?

I. INTRODUCTION

Faced with the difficult challenge of regulating hazardous waste and thereby protecting human health and the environment, Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA).[1] The statute called for the United States Environmental Protection Agency (EPA) to promulgate rules to develop a comprehensive "cradle-to-grave" hazardous waste management program, which seeks to regulate hazardous waste from its point of generation through its treatment, storage, and ultimate disposal.[2]

Fundamental to the application and implementation of the RCRA program is the basic question, what is a hazardous waste?[3] The answer to this question is vital to the determination of what materials fall under RCRA's comprehensive regulatory scheme, and consequently, whether exposure to liability exists for failure to comply with RCRA's provisions.[4]

For the past decade, the EPA has utilized the so-called "mixture rule" as one of its primary methods to determine whether a material is a hazardous waste and thus is required to be handled in accordance with RCRA's provisions.[5] Since the mixture rule's promulgation in 1980, the EPA has initiated numerous environmental enforcement actions against RCRA violators, with the mixture rule serving as the very basic foundation for many of these actions.[6] However in 1991, in *Shell Oil Company v. Envi-*

1. Pub. L. No. 94-580, § 2, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. § 6901-92k (1988 & Supp. III 1991)); *see infra* notes 20-57 and accompanying text for a detailed discussion of the RCRA program.

2. *See* Shell Oil Co. v. Environmental Protection Agency, 950 F.2d 741, 745 (D.C. Cir. 1991) (citing American Mining Congress v. Environmental Protection Agency, 824 F.2d 1177, 1179 (D.C. Cir. 1987); *see also infra* notes 20-57 and accompanying text.

3. EPA, RCRA ORIENTATION MANUAL III-3 (1990) [hereinafter RCRA 1990 MANUAL]; *see infra* notes 36-57 and accompanying text.

4. RCRA 1990 MANUAL, *supra* note 3, at III-3; *see infra* notes 34-57 and accompanying text.

5. 40 C.F.R. § 261.3(a)(2)(iv) (1992); see *infra* notes 56-64 and accompanying text for a detailed discussion of the mixture rule.

6. *See, e.g.*, United States v. Goodner Bros. Aircraft Inc., 966 F.2d 380 (8th Cir. 1992); *In re* Hardin County, No. RCRA-V-W-89-R-29, 1992 LEXIS 23 (July 10, 1992) [hereinafter *Hardin County I*].

ronmental Protection Agency,[7] the Court of Appeals for the District of Columbia vacated the mixture rule because of the EPA's failure to fully comply with the Administrative Procedures Act during the rule's promulgation.[8]

Unfortunately, the *Shell Oil* Court did not definitively rule on whether the mixture rule was vacated retroactively or prospectively.[9] By leaving the retroactivity issue unsettled, the *Shell Oil* Court placed a significant fundamental component of the United States' environmental protection policy into a state of confusion. Each circuit court has now been left with the task of determining whether the mixture rule was vacated retroactively or prospectively. These decisions will determine whether the mixture rule can be used as a definition of hazardous waste and consequently can serve as the foundation of any RCRA environmental enforcement action.[10]

Since the circuit courts must now decide the applicability of the mixture rule on a case-by-case basis, the impact of the *Shell Oil* decision on past and pending RCRA enforcement actions is largely uncertain. Uncertainty in such a fundamental component of such a critical environmental protection program generally weakens the United States' credibility, if not its ability, to effectively protect human health and the environment from the improper handling of dangerous materials.

The Court of Appeals for the Eighth Circuit is the first circuit to address the retroactivity issue of the mixture rule.[11] The result is a widening of the door left open by *Shell Oil* and the creation of even more uncertainty regarding the country's environmental enforcement capabilities.

In *United States v. Goodner Bros. Aircraft*,[12] the Eighth Circuit ruled that the mixture rule vacated by *Shell Oil* was indeed vacated retroactively, thereby invalidating the use of the rule as a basis for a federal enforcement action.[13] In one sense, *Goodner* stands for the proposition that the foundation for many of the RCRA environmental enforcement actions

7. 950 F.2d 741 (D.C. Cir. 1991).

8. *Id.* at 752; see *infra* notes 58-83 and accompanying text for further discussion of the *Shell Oil* decision.

9. 950 F.2d at 752; *see also infra* notes 77-83 and accompanying text.

10. Editor's Corner, *In the Aftermath of Shell*, NAT'L ENVTL. ENFORCEMENT J., 17 (Aug. 1992).

11. United States v. Goodner Bros. Aircraft Inc., 966 F.2d 380 (8th Cir. 1992).

12. *Id.*

13. *Id.* at 385. In *Goodner*, earlier criminal convictions had been based upon the improper handling and disposal of hazardous waste as defined by the mixture rule. *Id.* at 383. Before the defendants' appeal of the convictions had been heard, the court in *Shell Oil* struck down the mixture rule. The *Goodner* Court reasoned that the mixture rule was vacated retroactively. *Id.* at 385. Therefore, the materials improperly disposed of could not be classified as hazardous waste and the convictions were not able to stand. *Id.* at 383-85. See *infra* notes 84-137 and accompanying text for further discussion of the *Goodner* case.

taken over the last decade never existed.[14] In effect, the mixture rule is not dead since the mixture rule was never born.[15]

This Comment focuses on the merits of the *Goodner* decision to vacate the mixture rule retroactively and the impact of such a decision.[16] Part II provides background information necessary to understand the impact of the *Goodner* decision by detailing the RCRA program and focusing upon both the mixture rule and the events leading up to *Goodner*.[17] Part III summarizes the facts, issue, holding, and analysis presented in the *Goodner* case.[18] Part IV contains a detailed analysis of whether the *Goodner* decision to vacate the mixture rule retroactively was correct, and assesses the impact of the decision.[19] Part V contains a summary and conclusion.

II. BACKGROUND

A. *The Resource Conservation and Recovery Act*

In 1976 Congress enacted the Resource Conservation and Recovery Act (RCRA).[20] "The statute consists of two main parts: one governs the management of non-hazardous solid waste, the other, hazardous waste."[21] This Comment focuses on Subtitle C, the hazardous waste component of the RCRA.[22]

Congress has found that if hazardous waste management is not adequately controlled and carefully planned, great risks and danger are posed to human health and the environment.[23]

Consequently, Congress declared the national policy of the United States to be that "wherever feasible, the generation of hazardous waste is to be eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment."[24] The

14. *See infra* notes 209-21 and accompanying text.
15. *See infra* notes 112-15 and accompanying text.
16. *See infra* notes 138-221 and accompanying text.
17. *See infra* notes 20-83 and accompanying text.
18. *See infra* notes 84-137 and accompanying text.
19. *See infra* notes 138-224 and accompanying text.
20. Pub. L. No. 94-580, § 2, 90 Stat. 2796 (1976) (codified as amended at 42 U.S.C. § 6901-92k (1988)).
21. Shell Oil Co. v. Environmental Protection Agency, 950 F.2d 741, 745 (D.C. Cir. 1991) (citing American Mining Congress v. Environmental Protection Agency, 824 F.2d 1177, 1179 (D.C. Cir. 1987)).
22. RCRA 1990 MANUAL, *supra* note 3, at I-6; *see infra* notes 23-208 and accompanying text.
23. 42 U.S.C. § 6901(b)(2) (1988). "The Congress finds with respect to the environment and health, that . . . disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment." *Id.* In addition, Congress found that "the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment." *Id.* § 6901(b)(5).
24. 42 U.S.C. § 6902(b) (1988).

general objective of RCRA is to promote the protection of health and the environment.[25]

The statute itself sets out a framework for how solid waste and hazardous waste are to be managed in the United States.[26] This framework calls for what is commonly referred to as a "cradle-to-grave" system of hazardous waste management;[27] hazardous waste must be tracked and handled in accordance with specific standards from its point of generation, through transportation, to its ultimate treatment, storage, or disposal.[28]

With the enactment of RCRA, Congress defined the country's needs and objectives for a comprehensive hazardous waste management program.[29] The statute, however, only provides the basic framework of how the program should be structured. Congress mandated the EPA to develop the specific regulations and details of the program.[30] The EPA has promulgated these regulations which are designed to carry out the specific objectives and requirements set out in the statute.[31] For example, generators of hazardous waste are required to comply with specific standards found in the Code of Federal Regulations.[32] Similarly, transporters and facilities that treat, store, or dispose of hazardous waste must comply with detailed regulations found in the Code of Federal Regulations.[33]

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25. *Id.* § 6902. The objectives of RCRA are to be met by "assuring that hazardous waste management practices are conducted in a manner which protects human health and the environment." 42 U.S.C. § 6902(a)(4). Further, the RCRA objectives are to be met by "minimizing the generation of hazardous waste and the land disposal of hazardous waste . . . ." § 6902(a)(6).

26. RCRA 1990 MANUAL, *supra* note 3, at I-3.

27. *Id.* at III-1.

28. 42 U.S.C. §§ 6922-24 (1988).

29. *See id.* §§ 6901-02 (1988).

30. *Id.* § 6912(a) (1988). *See, e.g.*, 42 U.S.C. § 6921(b) (1988) ("Not later than eighteen months after Oct. 21, 1976, . . . the [EPA] shall promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes . . . which shall be subject to the provisions of this subchapter."); *see generally* 42 U.S.C. §§ 6901-02(K).

31. 40 C.F.R. §§ 260-81 (1991). The EPA, as the administrating agency of RCRA, has also issued many policy guidance documents concerning interpretations of the RCRA program. Therefore, the RCRA program is really comprised of three entities, the RCRA statute found at 42 U.S.C. §§ 6901-87 (1988), the regulations found at 40 C.F.R. §§ 260-82 (1991), and EPA policy and guidance documents. RCRA 1990 MANUAL, *supra* note 3, at I-2-5.

32. 40 C.F.R. § 262 (1991). A generator must manifest the hazardous waste generated and meet specific record keeping requirements. Generators of hazardous waste must also meet specific pre-transportation requirements calling for packaging, labeling, marking, placarding, and hazardous waste handling and accumulation time procedures. *Id.*

33. 40 C.F.R. §§ 263-64 (1991).

B. *What Is a Hazardous Waste? The Mixture Rule*

The first and most important question that can be asked in the universe of RCRA, if not the whole of environmental law, is, what is a hazardous waste? If a material that has been generated or has been transported, treated, stored, or disposed of is not a hazardous waste, then Subtitle C of RCRA does not apply.[34] Consequently, if this material is generated, transported, treated, stored, or disposed of in violation of RCRA's Subtitle C provisions, RCRA liability does not attach, since RCRA Subtitle C is designed to regulate only hazardous waste.[35]

In the RCRA statute, Congress broadly defined hazardous waste as essentially a solid waste that may cause an increase in mortality or serious illness, or pose a substantial hazard to human health or the environment when improperly managed.[36] Congress required the EPA to develop and promulgate detailed regulations identifying the characteristics of hazardous waste, and to list particular hazardous wastes.[37]

The EPA's promulgated regulations did just that, outlining three criteria by which a solid waste constitutes a hazardous waste.[38] Generally, a solid waste is a hazardous waste if it (1) exhibits any of the defined characteristics of a hazardous waste,[39] (2) is specifically listed in the regulations as a hazardous waste,[40] or (3) is a mixture of a non-hazardous solid waste and any of the listed hazardous wastes.[41]

Therefore, according to EPA's regulations, a solid waste that exhibits any one of the characteristics of ignitability,[42] corrosivity,[43] reactivity,[44] or

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34. RCRA 1990 MANUAL, *supra* note 3, at III-3.

35. *See* 40 C.F.R. § 262.10(a) (1991) ("These regulations establish standards for generators of *hazardous waste*.") (emphasis added); 40 C.F.R. § 263.10(a) (1991) ("These regulations establish standards which apply to persons transporting *hazardous waste* within the United States . . . .") (emphasis added); 40 C.F.R. § 264.1(a) (1991) ("The purpose of this part is to establish minimum national standards which define the acceptable management of *hazardous waste*.") (emphasis added).

36. 42 U.S.C. § 6903(5) (1988).

> The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Id.

37. 42 U.S.C. § 6921(b) (1988).

38. 40 C.F.R. §§ 261.3(a)(2)(i)-(iv) (1991).

39. *Id.* § 261.3(a)(2)(i) (1991).

40. *Id.* § 261.3(a)(2)(ii).

41. *Id.* § 261.3(a)(2)(iv). This regulation is the so-called "mixture rule." United States v. Goodner Bros. Aircraft, Inc., 966 F.2d 380, 384 (8th Cir. 1992).

42. 40 C.F.R. § 261.21.

toxicity[45] is a hazardous waste and must be managed in accordance with RCRA's provisions.[46] Typically, testing is required to determine whether a solid waste exhibits any one of these characteristics.[47]

Further, the EPA regulations developed an extensive listing of solid wastes that are hazardous waste, unless specifically excluded by petition.[48] The significance of the listings is that unlike the characteristic determination, testing is not typically required.[49] A solid waste is a hazardous waste simply if it meets the description of the listed waste.[50] For example, any spent halogenated solvent made up of at least ten percent methylene chloride[51] before use is a hazardous waste number F002.[52]

The EPA recognized that the characteristic and listing methods of regulating hazardous waste left "a major loophole in the Subtitle C management system."[53] "[G]enerators of hazardous waste 'could evade (Subtitle C) requirements simply by commingling [listed] wastes with nonhazardous solid waste' to create a waste that did not demonstrate any of the four

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43. *Id.* § 261.22.

44. *Id.* § 261.23.

45. *Id.* § 261.24.

46. *Id.* § 261.20 (1991). The EPA's decision to choose these characteristics to define hazardous waste was based upon the fact that the characteristic in a solid waste may:

> (i) Cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (ii) Pose a substantial present or potential hazard to human health or the environment when it is improperly treated, stored, transported, disposed of or otherwise managed; and the characteristic can be: [m]easured by an available standardized test method . . . ; or [r]easonably detected by generators of solid waste through their knowledge of their waste.

Id. § 261.10.

47. *Id.* § 262.11(c)(1).

48. *Id.* §§ 261.30-33. A solid waste is specifically listed as a hazardous waste if it exhibits any of the characteristics of a hazardous waste, if it has been found to be fatal to humans in low doses, or if it contains any of the specific toxic constituents. *Id.* §§ 261.11(a)(1)-(3).

49. *See id.* § 262.11 (1991). A generator, in determining whether a solid waste it generated is in fact a hazardous waste, must first determine if the waste is listed. If the waste is listed, then it is a hazardous waste. If the waste is not listed, then the generator must determine through testing or knowledge whether the solid waste meets any of the characteristics of a hazardous waste. *Id.*

50. *Id.* § 262.11(b).

51. Methylene chloride is a colorless liquid with a chloroform-like odor. The National Institute for Occupational Safety and Health has classified methylene chloride as a carcinogen and lists the human organs that are affected by exposure to it as the central nervous system, cardiovascular system, eyes, and skin. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NIOSH POCKET GUIDE TO CHEMICAL HAZARDS 150 (1990).

52. 40 C.F.R. § 261.31 (1991).

53. Shell Oil Co. v. Environmental Protection Agency, 950 F.2d 741, 749 (D.C. Cir. 1991) (quoting 45 Fed. Reg. 33,095 (1987)).

testable characteristics but that posed a hazard for another reason."[54] For example, a generator could mix its methylene chloride spent halogenated solvent with water or chips or some other non-hazardous solid waste so that the resultant mixture no longer could be neatly classified as a "spent halogenated solvent" or no longer meets one of the characteristic criteria. Nevertheless, this mixture could still possibly pose a threat to human health or the environment.[55]

To prevent generators from evading RCRA requirements simply by commingling their listed waste with non-hazardous waste, the EPA promulgated the so-called "mixture rule."[56] The mixture rule states that a solid waste is a hazardous waste if "[i]t is a mixture of solid waste and one or more hazardous wastes listed [in the EPA regulations] . . . ."[57]

C. *The Mixture Rule Is Vacated*

In *Shell Oil Co. v. Environmental Protection Agency*,[58] petitioners challenged some of the rules promulgated by the EPA pursuant to the RCRA statute.[59] One of the challenged rules was the mixture rule.[60] The petitioners argued "that the EPA failed to provide adequate notice and opportunity for comment[61] when it promulgated the mixture . . . rule[ ], and that the rule[ ] exceed[s] the EPA's statutory authority."[62]

In determining whether the EPA had indeed failed to give adequate notice and opportunity for comment when it promulgated the mixture rule, the *Shell Oil* Court noted that Subtitle C of RCRA mandated that the EPA must develop and promulgate regulations to establish a comprehensive national system for safely treating, storing, and disposing of hazardous wastes.[63] In promulgating these regulations, the EPA was bound by the procedures of the Administrative Procedure Act (APA).[64]

In accordance with the requirements of the APA, the EPA must observe proper notice and comment procedures during its rulemaking.[65] Typically, a rule is submitted for public comment first as a proposed regulation, and then after a specified comment period has elapsed and after any comments have been assessed, the rule is promulgated in its final

54. *Id.* (quoting 45 Fed. Reg. 33,095).
55. *See supra* note 36 and accompanying text.
56. 40 C.F.R. § 261.4(a)(2)(iv) (1991).
57. *Id.* § 261.3(a)(2)(iv) (1991).
58. 950 F.2d 741 (D.C. Cir. 1991).
59. *Id.* at 744.
60. *Id.* at 745.
61. *See infra* notes 65-71 and accompanying text.
62. *Shell Oil*, 950 F.2d at 745.
63. *Id.* For example, "[Subtitle C of RCRA] gave the EPA until April 21, 1978 to develop and promulgate criteria for identifying characteristics of hazardous waste and to list particular wastes as hazardous." *Id.* (citing 42 U.S.C. § 6921(a) (1988)); *see supra* notes 36-57 and accompanying text.
64. *Shell Oil*, 950 F.2d at 746. *See* 42 U.S.C. § 6976 (1988).
65. *Id.*

form.[66] Adequacy of notice is often determined by the relationship between a proposed regulation and the rule in its final form.[67] If a significant deviation has occurred between a proposed regulation and the rule in its final form, then adequate notice will not be deemed to have occurred.[68]

Regarding the mixture rule, the *Shell Oil* Court found that there was no clear antecedent for the mixture rule in the EPA's proposed hazardous waste definition regulations, and that essentially the "mixture rule was neither implicit in nor a 'logical outgrowth' of the proposed regulations."[69] Since the final mixture rule constituted a major deviation from the proposed hazardous waste definition regulations, the *Shell Oil* Court concluded that the "EPA ha[d] not provided adequate notice and opportunity for comment . . . ."[70] Accordingly, the *Shell Oil* Court determined that "the mixture . . . rule[ ] must be set aside and remanded to the EPA."[71]

The court, however, noted that dangers may be posed by "discontinuity in the regulation of hazardous wastes"[72] and, therefore, the EPA may wish to repromulgate the rules on an interim basis pending full notice and opportunity for comment.[73]

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66. 5 U.S.C. § 553 (1988).

67. *Shell Oil*, 950 F.2d at 747.

68. *Id.* "A difference between the [proposed and final rule] will not invalidate the notice so long as the final rule is a 'logical outgrowth' of the one proposed. If the deviation from the proposal is too sharp, the affected parties will not have had adequate notice and opportunity for comment." *Id.* (citing American Fed'n of Labor v. Donovan, 757 F.2d 330, 338-39 (D.C. Cir. 1985)).

69. *Id.* at 752. The EPA acknowledged that the mixture rule was not to be found in the proposed regulations, arguing instead that the mixture rule was foreseeable, and therefore adequate notice had been given. *Id.* at 750. The EPA contended that a final rule need only be a "logical outgrowth" of proposed regulations and that interested parties should have anticipated the new final rule. *Id.* at 751. The EPA further argued that the final mixture rule merely clarifies the intent of the proposed regulations: "As industry could not have reasonably assumed that a generator could bring a listed waste outside the generic listing description simply by mixing it with a nonhazardous waste, the rule cannot be seen as a 'bolt from the blue.'" *Id.* at 749-50. The *Shell Oil* Court was "unimpressed" by the EPA's argument of implied notice, citing the lack of meaningful comments regarding mixtures generated during the proposed regulations comment period. *Id.* at 750. Further, the court noted that "an unexpressed intention cannot convert a final rule into a 'logical outgrowth' that the public should have anticipated. Interested parties cannot be expected to divine the EPA's unspoken thoughts." *Id.* at 751.

70. *Id.* at 752.

71. *Id.*

72. *Id.*

73. *Id.* The *Shell Oil* Court noted that the basis for this reenactment could be the "good cause" exemption of 5 U.S.C. § 553(b)(3)(B) (1988). *Id.* (citing Mid-Tex Elec. Coop., Inc. v. FERC, 822 F.2d 1123, 1131-34 (D.C. Cir. 1987)). It should be noted that the mixture rule was reinstated as an interim rule on February 18, 1992 (57 Fed. Reg. 7628, March 3, 1992); however, the reinstatement has prospective effect only. *Hardin County I*, No. RCRA-V-W-89-R-29, 1992 LEXIS 23 (July 10, 1992).

Further, the *Shell Oil* Court noted that since it "vacat[ed] [the mixture rule] on procedural grounds, [it did] not reach petitioners' arguments that the mixture . . . rule[ ] unlawfully expand[ed] the EPA's jurisdiction under Subtitle C of RCRA."[74]

D. Shell Oil *Decision Leaves Issue of Retroactivity or Prospectivity Unresolved*

The *Shell Oil* Court "set aside and remanded" the mixture rule to the EPA.[75] In the same opinion, however, the court also used the term "vacate" to describe its intent regarding the mixture rule.[76] While this language makes it clear that the court's intent was to void the mixture rule for the EPA's failure to follow the APA, nowhere in the *Shell Oil* opinion does the court definitively state whether its intent was to void the mixture rule retroactively or prospectively.[77]

Subsequent to the *Shell Oil* decision, the EPA recognized this dilemma and filed a Motion for Clarification, specifically asking the court to add language to its opinion stating that the decision to vacate the mixture rule is effective prospectively only.[78] Additionally, the appellants in *United States v. Goodner Bros. Aircraft Inc.*[79] filed a Motion for Leave to File Brief of an Amicus Curiae with the *Shell Oil* Court on the issue of retroactivity.[80]

The *Shell Oil* Court, upon consideration of the motions, denied the Motion for Clarification without opinion.[81] In the same order, the court dismissed the appellants' motion as moot, without further opinion.[82] This refusal by the *Shell Oil* Court to clarify in either direction opened the door for the decision in *Goodner*.[83]

III. *United States v. Goodner Bros. Aircraft*: The Mixture Rule Is Vacated Retroactively

A. *Facts*

Junior Goodner was the owner and operator of Goodner Bros. Aircraft, Inc., a business that engaged in the repainting of aircraft in Mena,

74. *Shell Oil*, 950 F.2d at 752.
75. *See supra* note 71 and accompanying text.
76. *Shell Oil*, 950 F.2d at 752; *see supra* note 74 and accompanying text.
77. *Shell Oil*, 950 F.2d at 741.
78. Appellants' Response to Appellee's Additional Brief at 9, United States v. Goodner Bros. Aircraft, 966 F.2d 380 (8th Cir. 1992) (No. 91-2466) [hereinafter Appellants' Brief].
79. 966 F.2d 380 (8th Cir. 1992).
80. Appellants' Brief at 10, *Goodner* (No. 91-2466).
81. Shell Oil Co. v. Environmental Protection Agency, No. 80-1532 (D.C. Cir. March 5, 1992) (order denying Motion for Clarification and dismissing Motion for Leave to File Brief as Amicus Curiae).
82. *Id.*
83. *See infra* notes 84-139 and accompanying text.

Arkansas.[84] The repainting process employed by Goodner often required the removal of old paint surfaces from aircraft prior to repainting.[85] Old paint was removed from aircraft by the use of a wet stripper system.[86] This wet stripper system consisted of the spraying of undiluted paint removers PR 3500 and PR 3700 onto the aircraft.[87] These paint remover solvents would cause the old paint to bubble up, blister, and slide off the aircraft.[88] The paint remover solvents were composed mainly of the chemical constituents methylene chloride, at fifty percent to seventy percent, and a lesser percentage of phenol.[89]

After the paint remover had been applied, water at high pressure was sprayed onto the aircraft to assist in the paint removal process.[90] The mixture of paint remover, peeled paint, and rinsewater would fall to the ground and collect on the hangar floor until the paint removal operations took place.[91] Goodner Brothers' employees would then scoop this mixture directly from the hanger floor into barrels.[92] When the waste filled between fifteen and twenty barrels, the waste was transported to and disposed of at the Goodner Brothers Farm.[93]

At the Goodner Brother's Farm, Goodner Brothers' employees dumped the waste into a man made pit and two natural pits.[94] "The evidence indicated that the total amount of waste so deposited was approximately . . . twenty-five tons."[95]

In 1988, a neighbor observed "'two men dumping . . . toxic-smelling waste into a ravine'"[96] on the Goodner Brothers Farm.[97] When confronted by what the neighbor had observed, Junior Goodner reassured the woman that he was aware of the situation.[98] The neighbor, however, still reported the dumping to the authorities, which prompted both the Arkansas Department of Pollution Control and Ecology and the EPA to investigate.[99] Pursuant to a search warrant, it was discovered that Good-

84. United States v. Goodner Bros. Aircraft Inc., 966 F.2d 380, 382 (8th Cir. 1992). Brief for the Appellee at 3, *Goodner* (No. 91-2466).

85. *Goodner*, 966 F.2d at 382.

86. Brief for the Appellee at 3, *Goodner* (No. 91-2466).

87. *Goodner*, 966 F.2d at 382.

88. *Id.*

89. *Id.* See also *infra* notes 110-11 and accompanying text for a discussion of the significance of this waste composition in the determination of whether this material was a hazardous waste.

90. *Goodner*, 966 F.2d at 382.

91. Brief for the Appellee at 5, *Goodner* (No. 91-2466).

92. *Id.*

93. *Goodner*, 966 F.2d at 383.

94. Brief for the Appellee at 5, *Goodner* (No. 91-2466); *see also Goodner*, 966 F.2d at 383.

95. *Goodner*, 966 F.2d at 383.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

ner Brothers had been warned years earlier about its potential liability for hazardous substances.[100] Also pursuant to warrant, the EPA conducted sampling tests on the waste mixture which came off the planes and the waste found in the dumpsites at the Goodner Farm.[101] The sampling test results disclosed that the substance at the dumpsite contained up to twenty percent phenol and, in most samples, ten percent to twenty percent methylene chloride.[102]

A jury convicted Goodner Brothers Aircraft on four counts of RCRA violations, for the "disposal of hazardous waste on certain dates without having obtained a permit pursuant to 42 U.S.C. §§ 6925 and 6926, in violation of 42 U.S.C. § 6928(d)(2)(A)."[103] In addition, both Goodner Brothers Aircraft and Junior Goodner were convicted of an additional count for a RCRA violation "involving the handling of hazardous waste and failing to file an application for a hazardous waste permit, in violation of 42 U.S.C. § 6928(d)(4)."[104]

Junior Goodner was also convicted on three counts of CERCLA[105] violations involving the release of hazardous substances into the environment.[106] According to the *Goodner* Court, the CERCLA counts were found to be unaffected by the *Shell Oil* decision to invalidate the mixture rule,[107] and therefore will not be further discussed in this Comment.

B. *Issue and Holding*

Goodner Brothers Aircraft and Junior Goodner appealed their lower court convictions raising numerous issues.[108] Before the appeal was heard, however, the *Shell Oil* decision to vacate the mixture rule was filed. Consequently, the primary issue on appeal was whether the mixture rule was vacated retroactively or prospectively in *Shell Oil*.[109]

The RCRA violation convictions were based upon the foundation that the waste being improperly handled and dumped was a hazardous waste

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100. *Id.*

101. *Id.*

102. *Id.*; *see also* Brief for the Appellee at 8, *Goodner* (No. 91-2466).

103. *Goodner*, 966 F.2d at 383.

104. *Id.* The district court sanctioned Goodner Bros. Aircraft with a five year probation and sentence, a $150,000 fine, and a $250 special assessment. *Id.*

105. *Id.* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (1988) [hereinafter CERCLA].

106. *Goodner*, 966 F.2d at 383. Junior Goodner was sentenced by the district court to fifteen months imprisonment, a $75,000 fine, and a $200 special assessment. *Id.*

107. *Id.* at 385-87.

108. *Id.* at 383. Essentially the appellants claimed for various reasons that the waste which they dumped at the Goodner Farm was not an RCRA hazardous waste. Brief for the Appellee at 13, *Goodner* (No. 91-2466). The initial appeal was brought before the *Shell* decision to invalidate the mixture rule had been filed. *Goodner*, 966 F.2d at 382.

109. *Goodner*, 966 F.2d at 383-85.

per the mixture rule.[110] If the mixture rule was vacated retroactively, the waste could not be deemed a hazardous waste and the convictions would be reversed.[111] The *Goodner* Court held that the mixture rule vacated by the *Shell Oil* Court had been vacated retroactively.[112] The court ordered the RCRA violation convictions set aside and remanded the case for a new trial.[113]

C. *Reasoning*

To avoid reversal of the Goodner Brothers Aircraft and Junior Goodner convictions, the government argued that the invalidation of the mixture rule in *Shell Oil* could not be applied retroactively.[114] The government reasoned that if the invalidation of the mixture rule does not apply retroactively, but prospectively, then the Goodner convictions must stand because the cause of action against the defendants was initiated prior to the *Shell Oil* decision.[115]

In response to the government's arguments, the *Goodner* Court noted that normally "[a] regulation not promulgated pursuant to the proper notice and comment procedures has no 'force or effect of law' and therefore is void *ab initio*."[116] The court conceded that, "'when equity demands, an unlawfully promulgated regulation can be left in place while the agency provides the proper procedural remedy.'"[117] However, the court, in summary fashion, ultimately rejected the government's argu-

110. *Id.* at 383. At trial the jury was instructed that in order to convict it must find "that the wastes were listed or identified by the Environmental Protection Agency as hazardous waste pursuant to [RCRA]." *Id.* The jury was further instructed that the EPA had listed as hazardous the "spent halogenated solvent, methylene chloride, and all spent solvent mixtures and/or blends containing, before their use, a total of ten percent or more by volume of methylene chloride." *Id.* Also, the jury was instructed that "when a listed hazardous waste is mixed with a solid, liquid, or semisolid material, the resulting mixture is also a hazardous waste." *Id.* at 384.

111. *Id.* The court noted that from the jury's verdict it was impossible to determine whether the jury relied upon the spent halogenated solvent listing or the now invalidated mixture rule ind finding that the materials used by Goodner Brothers were in fact a hazardous waste. *Id.* The *Goodner* Court then concluded that "[w]hen a jury verdict may be supportable on one ground but also may be based on another ground that is unconstitutional or illegal, and when it is impossible to tell which ground the jury selected, then the verdict must be set aside." *Id.* (citing Griffin v. United States, 112 S. Ct. 466, 474 (1991)).

112. *Id.* at 385.

113. *Id.*

114. *Id.* at 384.

115. *Id.* "*Recently*, the mixture rule was successfully challenged . . . by other parties . . . .") *Id.* (emphasis added).

116. *Id.* (citing Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979)).

117. *Id.* (quoting Fertilizer Inst. v. Environmental Protection Agency, 935 F.2d 1303, 1312 (D.C. Cir. 1991)).

ments and found that the "invalidation of the mixture rule applies retroactively."[118]

In support of its argument that the *Shell Oil* Court intended to invalidate the mixture rule only prospectively, the government interpreted the language of the *Shell Oil* opinion.[119] Specifically, the government noted that the *Shell Oil* decision indicated that "the EPA may wish to reenact the mixture rule on an interim basis pending full notice and comment to avoid '*discontinuity* in the regulation of hazardous wastes'. . . ."[120] The government interpreted this language to mean that the *Shell Oil* Court "must have intended only prospective invalidation because discontinuity would not exist if the rule was void *ab initio*."[121] The *Goodner* Court rejected the government's interpretation for two reasons.

First, the court asserted that the government's interpretation was inconsistent with the language of the *Shell Oil* opinion.[122] The court noted that the *Shell Oil* decision "specifically pronounce[d] that the [mixture] rule is 'vacated' and 'set aside.'"[123] The *Goodner* Court then focused on the meaning of the term "vacate" and reasoned that to "vacate" means "to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside."[124]

Interestingly, the *Goodner* Court also noted in a footnote that after filing its opinion, the *Shell Oil* Court had "summarily denied the government's request to 'clarify that' the [*Shell Oil*] opinion only voided the mixture rule prospectively."[125] The *Goodner* Court does not again mention the denied motion or assign it any significance in the text. By reference, it appears clear that the *Goodner* Court was in some way persuaded that the denial was dispositive of the *Shell Oil* Court's intent.

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118. *Id.*

119. *Id.*

120. *Id.* (quoting Shell Oil Co. v. Environmental Protection Agency, 950 F.2d 741, 752 (D.C. Cir. 1991)).

121. *Id.* (emphasis added); see Additional Brief for the United States at 4, United States v. Goodner Brother Aircraft, Inc., 966 F.2d 380 (8th Cir. 1991) (No. 91-2466) [hereinafter Appellee's Additional Brief], where the government argued that:

> [i]f the mixture rule . . . were void *ab initio*, the interim rule would be, in essence, the first mixture rule to exist. The interim rule would do nothing to address the discontinuity within the RCRA enforcement scheme resulting from the *Shell Oil* decision. Construing the *Shell Oil* decision to apply retroactively would result in precisely the kind of disruption and discontinuity that the D.C. Circuit expressly sought to avoid . . . .

Id.

122. *Goodner*, 966 F.2d at 384.

123. *Id.*; *see supra* notes 73-76 and accompanying text.

124. *Goodner*, 966 F.2d at 380, 384 (quoting Action On Smoking & Health v. Civil Aeronautics Bd., 713 F.2d 795, 797 (D.C. Cir. 1983)).

125. *Id.* at 384 n.1.

Second, the *Goodner* Court dismissed the "discontinuity" language argument, stating that "'discontinuity' could easily refer to the practical effect of invalidation of the mixture with respect to the compliance practices of regulated industries rather than referring to the legal force of the mixture rule."[126]

Additionally, the government had argued that the prospective application of the invalidation of the mixture rule complies with the principles announced in *Chevron Oil Co. v. Huson*,[127] which set forth the test for prospective application of court decisions.[128] However, the *Goodner* Court reasoned that the invalidation of the mixture rule retroactively was "'consistent with the Supreme Court's recent decision in *James B. Beam Distilling Co. v. Georgia*[129] . . . .'"[130]

The court interpreted the *James B. Beam Distilling* decision as limiting the applicability of *Chevron Oil's* prospectivity test.[131] The court also interpreted *James B. Beam Distilling* as standing for the principle that full retroactivity is the normal rule in civil cases.[132] Further, the *Goodner* Court interpreted *James B. Beam Distilling* as meaning that full retroactive effect must be given to a new rule of civil law when the new rule is applied to the litigants in the case in which the rule was announced.[133]

The *Goodner* Court noted that the *Shell Oil* Court declined to reach the petitioners' substantive arguments regarding the mixture rule because it vacated the mixture rule on procedural grounds.[134] Therefore, the *Goodner* Court reasoned that the *Shell Oil* Court applied the invalidation of the mixture rule to the parties before it.[135] Accordingly, the *Goodner* Court implied that in accordance with *James B. Beam Distilling*, the *Shell Oil*

126. *Id.* at 384-85.

127. 404 U.S. 97 (1971).

128. Appellee's Additional Brief at 8, *Goodner Bros.* (No. 91-2466). The test for prospective application is three-pronged. First, prospective application applies only to a decision that establishes a new principle of law. *Id.* (citing Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971)). Second, the court in determining prospective application must "'weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.'" *Id.* (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971) (quoting Linkletter v. Walker, 381 U.S. 618, 629 (1965))). Finally, the court must weigh "'the inequity imposed by retroactive application . . . .'" *Id.* (quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971)).

129. 111 S. Ct. 2439 (1991).

130. United States v. Goodner Bros. Aircraft Inc., 966 F.2d 380, 385 (8th Cir. 1992) (quoting Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064, 1074-75 (8th Cir. 1992)).

131. *Id.* (citing Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064 (8th Cir. 1992)).

132. *Id.*

133. *Id.* at 385 (citing Boudreau v. Deloitte, Haskins & Sells, 942 F.2d 497, 498 n.1 (8th Cir. 1991)).

134. *Id.*; *see supra* note 74 and accompanying text.

135. *Goodner Bros.*, 966 F.2d at 385.

Court invalidated the mixture rule retroactively.[136] Consequently, "[u]nder *James B. Beam Distilling* and consistent with the meaning of the word 'vacate,' [the *Goodner* Court found] that invalidation of the mixture rule applies retroactively."[137]

IV. ANALYSIS

A. *Should the Mixture Rule Have Been Vacated Retroactively or Prospectively?*

Is it justice or disaster which the Eighth Circuit has wrought upon the country's environmental protection policy? The answer to the question, surprisingly, may be both. Justice and disaster were borne out by the *Goodner* Court's decision to vacate the mixture rule retroactively.[138]

Justice has been served in the sense that, despite flaws in its logic, the *Goodner* Court appears to have correctly interpreted the *Shell Oil* Court's implied intent to invalidate the mixture rule retroactively.[139] Since the defendants in *Goodner* were convicted of violating the law premised upon the mixture rule, if the mixture rule is void *ab initio*, then the defendants should go free.[140]

Nonetheless, the *Goodner* decision is also a disaster in its effect.[141] A major loophole in the country's plan to manage hazardous waste, thought to have been plugged by the mixture rule,[142] has been judicially ripped open. Congress's clear intent—and the stated national policy of the United States that waste that is generated be handled "so as to minimize the present and future threat to human health and the environment,"[143]—has been subverted. As a result, polluters of the environment will go free.

The sorry state of this result is compounded by the fact that this disaster could have been avoided. The *Shell Oil* Court could have specifically invalidated the mixture rule prospectively only.[144] Additionally, the *Shell Oil* Court could possibly have left the rule in place pending remediation

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136. *Id.*

137. *Id.* In order to avoid reversal of the *Goodner* convictions, the government also argued that the Arkansas state mixture rule could be relied upon in place of the vacated federal one. *Id.* The *Goodner* Court found any reliance on the state law to be inappropriate because the defendants were convicted based upon a federal statute, which is defined by federal law, and because the federal law did not incorporate state law definitions of hazardous waste. *Id.*

138. *See infra* text accompanying notes 139-92.

139. *See infra* text accompanying notes 147-77.

140. *Id.*

141. *See infra* text accompanying notes 141-44.

142. Shell Oil Co. v. Environmental Protection Agency, 950 F.2d 741, 749 (D.C. Cir. 1991) (quoting 45 Fed. Reg. 33,095); *see also supra* text accompanying notes 53-57.

143. 42 U.S.C. § 6902(b)(2) (1988); *see also supra* notes 24-29 and accompanying text.

144. *See infra* text accompanying note 178.

of the APA violations.[145] Justice in its true sense could have been brought to bear, with environmental criminals paying for their crimes.

Instead, the *Shell Oil* Court did not leave the mixture rule in place; it "set aside and remanded" and "vacated" the mixture rule due to the EPA's failure to conform with the APA during the mixture rule's promulgation.[146] However, the *Shell Oil* Court did not specifically state whether its decision to invalidate the mixture rule should be applied retroactively or prospectively.[147]

When the appellants in *Goodner* raised the invalidation of the mixture rule as a defense, the *Goodner* Court appeared to have no choice but to interpret what the *Shell Oil* Court intended regarding its decision. Three possible interpretations of the *Shell Oil* decision were available. The *Goodner* Court could have found that the *Shell Oil* Court (1) intended to invalidate the mixture rule retroactively, or (2) intended to invalidate the mixture rule prospectively only, or (3) did not address the issue and then decided the mixture rule's applicability issue on its own.

Based mainly on the meaning of the term "vacate" and the Supreme Court's recent ruling in *James B. Beam Distilling Co. v. Georgia*,[148] the *Goodner* Court concluded that the *Shell Oil* Court intended to invalidate the mixture rule retroactively.[149] Though the court's conclusion is sound, its reasoning is somewhat flawed.

First, with regard to the term "vacate," the *Goodner* Court seized upon its definition, with little analysis, as though it contained some magic wording synonymous with retroactivity.[150] According to the *Goodner* Court, the term "vacate" is inconsistent with prospectivity because it means "to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority; to set aside."[151] From this definition, the court reaches a curious conclusion.

To "vacate" certainly means "to void," and it is clear that *Shell* intended to void the mixture rule for procedural deficiencies during the rule's promulgation.[152] However, there is nothing inherent in the definition of the term "vacate" that implies retroactivity. To vacate a rule is not synonymous with retroactivity. Vacating a rule is ambivalent as to the retroactive or prospective application of that invalidation.[153]

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145. *See infra* text accompanying note 179.

146. *Shell Oil*, 950 F.2d at 752; *see supra* text accompanying notes 72-76.

147. *See supra* notes 77-83 and accompanying text.

148. 111 S. Ct. 2439 (1991).

149. United States v. Goodner Bros. Aircraft, 966 F.2d 380, 385 (8th Cir. 1992); *see supra* notes 119-38 and accompanying text.

150. *Goodner*, 966 F.2d at 384.

151. *Id.*; *see supra* note 124 and accompanying text.

152. *See supra* notes 69-71 and accompanying text.

153. *See infra* note 155 and accompanying text.

In fact, as the *Goodner* Court points out, to vacate means to "annul."[154] However, to "annul" a judgment means only to void it or "to deprive it of all force and operation, either *ab initio* or prospectively as to future transactions."[155]

The *Goodner* Court relied heavily upon its reasoning that "vacating" the mixture rule was synonymous with retroactivity.[156] It did so in refuting the government's assertion that the *Shell Oil* decision's language regarding "discontinuity in the regulation of hazardous waste"[157] indicates an intent for prospective invalidation.[158] However, if the term "vacate" is not synonymous with retroactivity, but is in fact ambivalent towards retroactivity, then the government's assertions carry more weight.

In dismissing the government's "discontinuity" language argument, the court also noted that the language "could easily refer to the practical effect of invalidation of the mixture [rule] with respect to the compliance practices of the regulated industries . . . ."[159] The court's logic appears flawed.

The *Shell Oil* Court was specifically concerned with "discontinuity" in the regulation of hazardous waste; consequently, it suggested that the EPA could reenact the mixture rule on an interim basis to avoid this discontinuity.[160] However, in order for there to be "discontinuity" in the regulation of hazardous waste, there must be regulation of the mixture as hazardous and then, suddenly, no regulation of the mixture as hazardous. Herein lies the "discontinuity": a waste is regulated and then suddenly it is not. For example, if the mixture rule is vacated retroactively, there is no "discontinuity," since retroactive invalidation means that the mixture never was hazardous waste. Thus, retroactively vacating the mixture rule brings about continuity, since the mixture never was regulated and need not be now.

The *Goodner* Court also relied heavily on the Supreme Court's decision in *James B. Beam Distilling Co. v. Georgia*[161] in determining that the *Shell Oil* invalidation acts retroactively.[162] While reliance on that case is not wholly improper, the case should have been placed in its proper context. Discussions regarding the retroactivity of judicial decisions, such as those in *James B. Beam Distilling*, normally arise in a constitutional con-

154. *See supra* note 124 and accompanying text.

155. BLACK'S LAW DICTIONARY 90 (6th ed. 1990).

156. United States v. Goodner Bros. Aircraft, 966 F.2d 380, 384 (8th Cir. 1992).

157. *Id.* (quoting *Shell Oil*, 950 F.2d at 752).

158. *Id.* at 384-85; *see supra* notes 121-26 and accompanying text.

159. *Goodner Bros.*, 966 F.2d at 384-85; *see supra* note 130 and accompanying text.

160. Shell Oil Co. v. Environmental Protection Agency, 950 F.2d 741, 749 (D.C. Cir. 1991); *see supra* note 73 and accompanying text.

161. 111 S. Ct. 2439 (1991).

162. *Goodner*, 966 F.2d at 385; *see supra* notes 131-37 and accompanying text.

text,[163] whereas *Shell Oil* did not involve a constitutionally based ruling. Nonetheless, Supreme Court cases such as *James B. Beam Distilling* and *Chevron Oil v. Huson*[164] provide a good barometer for the determination of whether a new rule should be applied retroactively. Reliance on these cases should be tempered, however, with the knowledge that the rules they set out were intended for constitutionally based decisions. Perhaps there may be room in non-constitutionally based circumstances for variance from these rulings.

For example, the *Goodner* Court stated that the retroactive application of the *Shell Oil* decision was consistent with Supreme Court decisions, because, in *James B. Beam Distilling*, the Supreme Court announced that "full retroactivity is the normal rule . . . ."[165] The *Goodner* Court should have given some credence to the fact that the Supreme Court in *James B. Beam Distilling* was discussing constitutionally based decisions.[166]

Further, the *Goodner* Court stated that the Supreme Court in *James B. Beam Distilling* limited the prospectivity test of *Chevron Oil*.[167] This assessment is true, but the limitation is not as restrictive as the *Goodner* Court implied. In *James B. Beam Distilling*, the Supreme Court did not limit pure prospectivity as an option;[168] it eliminated only modified prospectivity or the practice of a court to "apply a new rule in the case in which it is pronounced, then return to the old one with respect to all others arising on facts predating the pronouncement."[169]

While *James B. Beam Distilling* may not be directly on point as used in the *Goodner* decision, the case does provide a somewhat dispositive clue regarding the *Shell Oil* Court's intent when invalidating the mixture rule.

Per the Supreme Court in *James B. Beam Distilling*, a fully retroactive decision is applied "both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations."[170] A purely prospective decision, on the other hand, occurs when a "new rule is applied neither to the parties in the law-making decision nor to those others

163. *James B. Beam Distilling*, 111 S. Ct. at 2442. Petitioner in *James B. Beam Distilling* claimed that a Georgia ordinance violated the Commerce Clause. *Id.*

164. 404 U.S. 97 (1971). *Chevron Oil* set forth the analysis which is still used today to determine whether prospective application of a new constitutional rule was just. *Id.*

165. *Goodner Bros.*, 966 F.2d at 385 (quoting Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064 (8th Cir. 1992)).

166. *James B. Beam Distilling*, 111 S. Ct. at 2443.

167. *Goodner*, 966 F.2d at 385.

168. *James B. Beam Distilling*, 111 S. Ct. at 2448: "We do not speculate as to the bounds or propriety of pure prospectivity."

169. *Id.* at 2444, 2448. "[W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Id.*

170. *Id.* at 2443. "This practice is overwhelmingly the norm, . . . and is in keeping with the traditional function of the courts to decide cases before them based upon their best current understanding of the law." *Id.* (citations omitted).

against or by whom it might be applied to conduct or events occurring before that decision."[171]

Consequently, if one follows *James B. Beam Distilling*, the *Shell Oil* Court could not have meant to apply pure prospectivity to its invalidation of the mixture rule since, as the *Goodner* Court noted, "it declined to reach the substantive arguments of the petitioner regarding the mixture rule because it had vacated the mixture rule."[172]

The fact that the new rule (invalidation of the mixture rule) was applied to the parties in the law-making decision (the invalidation was applied in *Shell Oil* to the *Shell Oil* petitioners), eliminates pure prospectivity as an option regarding the interpretation of the *Shell Oil* Court's mixture rule invalidation. Only retroactivity or modified prospectivity are then left as potential interpretations. However, as the Supreme Court ruled in *James B. Beam Distilling*, modified prospectivity has been rejected as an option for the courts in the choice of laws, at least in a constitutional context.[173] Therefore, if one relies on *James B. Beam Distilling*, that leaves only retroactivity as a potential interpretation of the *Shell Oil* decision. Since the *Shell Oil* Court applied its decision to the parties before it, when it refused to reach the substantive arguments of the petitioners because it had vacated the mixture rule,[174] retroactivity was the proper interpretation.

The *Shell Oil* Court's denial of the government's motion for clarification serves to further reinforce the *Goodner* conclusion that the mixture rule was vacated retroactively. Though the government would argue that this denial should not be construed as an opinion on the merits,[175] the *Goodner* Court correctly placed some significance upon the denial.[176]

First, the court's denial itself, though not accompanied by a detailed opinion, was rendered "upon consideration" of respondents' motion, the responses thereto, and the reply.[177] Second, had the *Shell Oil* Court agreed with the government's prospective interpretation, it would have been easy to modify the judgment to add the requested language regarding prospectivity.[178]

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171. *Id.* "The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision. This Court has, albeit infrequently, resorted to pure prospectivity." *Id.* (citing Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)) (other citations omitted).

172. United States v. Goodner Bros. Aircraft Inc., 966 F.2d 380, 385 (8th Cir. 1992) (citing Shell Oil Co. v. Environmental Protection Agency, 950 F.2d 741, 752 (1992)); *see supra* note 130 and accompanying text.

173. *See supra* notes 168-69 and accompanying text.

174. *See supra* notes 76-77 and accompanying text.

175. *Hardin County* I, No. RCRA-V-W-89-R-29, 1992 LEXIS 23 (July 10, 1992).

176. *Goodner*, 966 F.2d at 384; *see supra* note 125 and accompanying text.

177. Shell Oil Co. v. Environmental Protection Agency, No. 80-1532 (D.C. Cir. March 5, 1992) (order denying Motion for Clarification and dismissing Motion for Leave to File Brief as Amicus Curiae); *see supra* notes 81-82 and accompanying text.

178. Appellant's Brief at 10, *Goodner* (No. 91-2466).

Accordingly, provided the court appropriately relied on constitutionally based theories of retroactivity, the *Goodner* Court had no choice but to interpret the *Shell Oil* decision as vacating the mixture rule retroactively.

The most disappointing aspect of the *Shell Oil* decision, however, is that it could have avoided the *Goodner* result. The *Shell Oil* Court could have specifically applied its invalidation purely prospectively,[179] or left the mixture rule in place while the APA violations were being rectified.[180] Additionally, the *Goodner* Court could have distinguished its decision from the constitutionally based rulings of *James B. Beam Distilling*[181] and determined, based upon equity demands, that the mixture rule only be vacated prospectively.

Generally, regulations not promulgated pursuant to the statutory procedural minimum found in the APA cannot be afforded the "force and effect of law."[182] However, in the environmental law area, courts have been willing to make exceptions to this general rule and leave some ill-fated environmental regulations in place.[183]

The same District of Columbia Circuit Court that ruled in *Shell Oil* has stated in another case, "'[o]ur intervention into the process of environmental regulation, a process of great complexity, should be accomplished with as little intrusiveness as feasible.'"[184] "When equity demands, an unlawfully promulgated regulation can be left in place while the Agency provides the proper procedural remedy."[185]

Equity never demanded more than that a rule remain in effect under the circumstances surrounding the mixture rule.[186] The mixture rule's purpose was to close a major loophole in the management of hazardous waste in the United States.[187] This management program was mandated by Congress, which established the national policy of the United States to protect health and the environment from the improper handling of hazardous waste.[188] The mixture rule served as the cornerstone of the United States' national policy for over ten years.[189] Without the mixture

179. *See* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

180. Appellee's Additional Brief at 7, *Goodner* (No. 91-2466). *See* Fertilizer Inst. v. Environmental Protection Agency, 935 F.2d 1303, 1312 (D.C. Cir. 1991); Western Oil & Gas Ass'n v. Environmental Protection Agency, 633 F.2d 803, 812-13 (9th Cir. 1980).

181. *See supra* notes 162-65 and accompanying text.

182. Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979) (citations omitted).

183. Appellee's Additional Brief at 7-8, *Goodner* (No. 91-2466); *see supra* note 179 and accompanying text and *infra* notes 184-85 and accompanying text.

184. *Fertilizer Inst.*, 935 F.2d at 1312 (quoting *Western Oil & Gas Ass'n*, 633 F.2d 803, 813).

185. *Id.*

186. *See infra* notes 186-90 and accompanying text.

187. *See supra* notes 53-55 and accompanying text.

188. *See supra* note 29 and accompanying text.

189. *See supra* notes 5-6 and accompanying text.

rule, polluters are free to pollute,[190] an act that is contrary to both the intent of Congress and this country's national policy.

The *Shell Oil* Court had the power to leave the mixture rule in place until the procedural problems with its promulgation were rectified.[191] It should have done so. Instead, the court vacated the rule, setting up the inevitable result in *Goodner* that the mixture rule was invalidated retroactively.[192]

Provided that the *Goodner* Court appropriately relied on *James B. Beam Distilling*,[193] it had no choice but to rule that the mixture rule vacated in *Shell Oil* had indeed been vacated retroactively.

Having concluded that the *Goodner* Court's decision regarding retroactivity was basically sound, another issue looms: is the retroactive invalidation of the federal mixture rule even relevant? After *Goodner*, an EPA Administrative Law Judge (ALJ) ruled similar to the *Goodner* Court when deciding *In re Hardin County* (*Hardin County I*).[194] The ALJ dismissed a civil complaint premised upon the mixture rule; as in *Goodner*, the ALJ determined that the mixture rule had been vacated retroactively in *Shell Oil*.[195] The government then appealed the *Hardin County I* decision and was successful in convincing the Environmental Appeals Board (EAB) to vacate the ALJ dismissal.[196] However, the appellate decision in *Hardin County II* was not based upon a retroactivity analysis of *Shell Oil*.[197] Instead, the EAB relied upon a theory that had been summarily dismissed in *Goodner*.[198]

In *Hardin County II*, contrary to *Goodner*, the EAB held that the invalidation of the federal mixture rule was largely irrelevant in an authorized state.[199] The EAB found that in an authorized state, the state regulations

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190. *See supra* notes 140-44 and accompanying text.

191. *See supra* note 179 and accompanying text.

192. United States v. Goodner Bros. Aircraft, 966 F.2d 380, 384-85 (8th Cir. 1992).

193. *See supra* note 167 and accompanying text.

194. *Hardin County I*, No. RCRA-V-W-89-R-29, 1992 LEXIS 23 (July 10, 1992); *but see, infra* notes 195-208 and accompanying text.

195. *Hardin County I*, at *14.

196. *In re Hardin County*, No. RCRA-V-89-R-29, 1992 LEXIS 102 (Nov. 6, 1992) [hereinafter *Hardin County II*].

197. *Id.* at *15; *see infra* note 199 and accompanying text.

198. *See supra* note 138 and *infra* note 199 and accompanying text.

199. *Hardin County II*, at *15. "We need not address [whether *Shell* invalidated the mixture rule retroactively or prospectively] at this time, . . . because the relevant counts of the complaint may be governed in their entirety by the [state] mixture rule and not the federal mixture rule at issue in *Shell Oil*." *Id.* at *6. "Under RCRA . . . EPA may authorize any state to administer and enforce a hazardous waste program. To obtain EPA authorization, the state program must be equivalent to the federal program and consistent with the hazardous waste programs applicable in other States." *Id.* at *7. "EPA [may] bring an enforcement action in an authorized state for violations of a State's hazardous waste regulations." *Id.* at *7-8.

> Congress intended that States assume responsibility for implementing RCRA, with oversight from the federal government. The rationale was that

which must be at least equivalent to the federal regulations, operate in lieu of the federal regulations.[200] Consequently, the EAB determined that the ALJ's dismissal of the complaint solely based upon *Shell Oil* was in error.[201] The EAB vacated the dismissal and remanded the case for the purpose of determining whether the state was authorized at the time of the alleged violations.[202]

In contrast, the *Goodner* Court paid very little attention to this line of reasoning.[203] Instead, it noted only that any reliance on the state mixture rule was inappropriate, since Goodner Brothers Aircraft was convicted of a federal statute defined by federal law.[204] This statement appears inaccurate, based upon *Hardin County II's* analysis[205] and RCRA's intent.[206] It is more accurate to state that the federal statute convictions could have

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States are more familiar with the regulated community and are in a better position to administer the programs and respond to specific state and local needs most effectively. The process that States must go through to obtain the responsibility for the [hazardous waste] program involves developing a [s]tate hazardous waste program and having it approved by the EPA.

RCRA 1990 MANUAL, *supra* note 3, at III-98. This process is called "authorization." *Id.* Authorization status is granted to a state only after it successfully submits an application in accordance with 40 C.F.R. § 271.5. *Id.*

200. *Hardin County II*, at *7; *see also* 40 C.F.R. § 271 (1991). "States approved under this subpart are authorized to administer and enforce their hazardous waste program in lieu of the federal program . . . ." *Id.* § 271.3(b).

201. *Hardin County II*, at *14. The EAB reasoned that:

The mixture rule invalidated by *Shell Oil* was a federal regulation not a state regulation, and the basis for the invalidation was procedural not substantive. Therefore, the validity of state mixture rules is not at issue by reason of the [*Shell Oil*] Court's ruling, since they would have been promulgated under procedures different from those used for the federal mixture rule.

Id. at 13 n.6. However, the EAB did note that "[q]uestions as to the federal enforceability of state mixture rules are not addressed in this remand order." *Id.*

202. *Hardin County II*, at *14.

203. *See supra* note 148.

204. United States v. Goodner Bros. Aircraft, 966 F.2d 380, 385 (8th Cir. 1992).

205. *Hardin County II*, at *8. "[W]henever EPA brings an enforcement action in [an authorized state] . . . EPA is enforcing state law because the authorized state program is a 'requirement' of RCRA." *Id.* (citing United States v. T & S Brass & Bronze Works, Inc., 681 F. Supp. 314 (D. S.C. 1988)). "The obvious and natural reading of the phrase 'any requirement of this subchapter' in [the federal enforcement section of 42 U.S.C. § 6928(a)] embraces the requirements of the federal program and the requirements of any EPA-approved state program." *Id.* at *9 n.5.

206. David Schnapf, *State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act*, 12 ENVTL. L. REP. 679 (Envtl. L. Inst.) 694-95 (1982). "[A] state program, upon authorization from EPA, operates 'in lieu of' the federal hazardous waste program. EPA interprets this language to mean that federal program regulations do not apply in an authorized state." *Id.* at 695 (citing 45 Fed. Reg. § 33,377,394 (1980)). "EPA retains back-up enforcement authority under . . . RCRA . . . ." *Id.* "In exercising this oversight authority, EPA is limited to the enforcement of the [s]tate program requirements that, in effect, have become the federal requirements under RCRA." *Id.*

been defined by the authorized state's law,[207] and therefore upheld. Consequently, in an authorized state, the invalidation of the federal mixture rule and its retroactive application may be of little or no consequence, since it is the state law which can be relied on in an enforcement action.[208]

B. *What is the Impact of the Goodner Decision Vacating the Mixture Rule Retroactively?*

Regardless of what the *Shell Oil* or *Goodner* Courts might have done, the fact remains that at least in the Eighth Circuit,[209] the mixture rule is invalidated retroactively. The mixture rule, in a sense, never existed. The issue then must be focused on the potential impact of the *Goodner* decision on the numerous past and pending enforcement actions taken during the past ten years which used the mixture rule as their basic foundation.

1. Impact on Pending Cases

Goodner was a pending criminal case.[210] It then appears that, at least in the Eighth Circuit and in a pending criminal case, the retroactivity of the mixture rule's invalidation spells relief from liability, if that liability was premised on the mixture rule. The *Goodner* Court, however, made no distinction of its ruling along criminal or civil lines. The *Goodner* Court offered no discussion on whether the result it had reached would have been different in a civil context or if the appeal period had indeed passed.[211] To determine the likely impact that retroactivity of the mixture rule will have on civil or past cases, other sources must be analyzed.

A clue as to how courts may handle civil cases still pending was provided in *Hardin County I*.[212] *Hardin County I* indicates that the civil and

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207. *See supra* notes 203-04 and accompanying text.

208. *See supra* notes 198-206 and accompanying text.

209. To date, no other circuit has addressed the issue of retroactive invalidation of the mixture rule. If and when the other circuits do test the issue, they will be free to draw their own conclusions regarding the *Shell Oil* Court's intent. Consequently, it is possible that a split in the circuits could arise if another circuit agrees with the government and finds that the mixture rule is invalidated prospectively only.

Additionally, other circuits may rule contrary to *Goodner* and rely on the analysis of *Hardin County II*, thereby determining that the impact of retroactivity in an authorized state is minimal, since enforceability can be premised upon the authorized state's law. *See supra* notes 193-207 and accompanying text.

210. "Pending" means awaiting an occurrence or conclusion of action. BLACK'S LAW DICTIONARY 1021 (5th ed. 1979). The *Goodner* case was still within the allowable appeal period when brought on appeal. Consequently, the *Goodner* trial convictions were not yet a final judgment.

211. United States v. Goodner Bros. Aircraft, 966 F.2d 380, 383-85 (8th Cir. 1992).

212. *Hardin County I*, No. RCRA-V-W-89-R-29, 1992 LEXIS 23 (July 10, 1992). The EPA had filed a civil complaint against the defendants for RCRA violations premised on the mixture rule. The defendants' reply noted that the mixture rule had been

criminal distinctions are irrelevant in this context.[213] Like the *Goodner* Court, the ALJ determined that the *Shell Oil* Court intended the invalidation of the mixture rule to apply retroactively.[214] Accordingly, the ALJ dismissed the EPA's civil complaint with prejudice, since the retroactivity of the mixture rule rendered the claims in the complaint unenforceable.[215]

2. Impact on Past Cases

James B. Beam Distilling Co. v. Georgia provides some answers regarding how a court might react to the retroactive application of a new rule on past cases.[216]

The overwhelming need for finality in judgments makes it unlikely that the retroactive invalidation of the mixture rule provides any relief either in criminal or civil cases to those on the losing end of a final judgement.[217] While new rules will apply retroactively to criminal cases pending on direct review, new rules will not relate back to convictions challenged on habeas corpus.[218] Similarly, in civil cases, the need for

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vacated in the recent *Shell Oil* decision and therefore the rule was void *ab initio.* Similar to *Goodner,* the government argued prospective application of the *Shell* decision. *Id.; but see supra* notes 195-207 and accompanying text.

213. *Hardin County I,* at *5 n.6.

> It is recognized that *Goodner* is a criminal case, and that retroactivity of new rules as applied to criminal defendants could include special considerations not applicable in the civil context. However, it is persuasive authority on the issues presented here, especially because the relevant authorities relied upon by that court in its decision are civil cases, and the new ruling at issue is not a criminal law matter.

Id.; *but see supra* note 194 and accompanying text.

214. *Hardin County I,* at 6; *but see supra* notes 193-207 and accompanying text.

215. *Hardin County I,* at 9. The ALJ stated that "[t]he mixture rule was void during the time periods relevant to this proceeding, under the rule of retroactivity, thus rendering the claims in the complaint unenforceable." *Id.*; *but see supra* notes 195-207 and accompanying text.

216. 111 S. Ct. 2439, 2446 (1991). Though *James B. Beam Distilling* discusses the retroactivity issue in a constitutional context, the analysis would appear persuasive in a non-constitutional context since the Court ultimately concludes that new retroactive rules should not be applied to final judgements. *Id.* If the Court is unwilling to apply new retroactive constitutionally based rules to final judgments, they would most likely be even less inclined to do so regarding a less weighty, non-constitutionally based new rule. Editor's Corner, *In the Aftermath of Shell,* NAT'L ENVTL. ENFORCEMENT J., 17 (Aug. 1992).

217. *James B. Beam Distilling Co.,* 111 S. Ct. at 2439. "'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.'" *Id.* (citing Federated Department Stores v. Moitie, 452 U.S. 394, 401 (1981) (quoting Baldwin v. Iowa State Traveling Men's Assn., 283 U.S. 522, 525 (1931))).

218. *Id.* at 2446 (citing Teague v. Lane, 489 U.S. 288 (1989)); *see* Griffith v. Kentucky, 479 U.S. 314 (1987).

finality limits retroactivity.[219] "[O]nce suit is barred by *res judicata* or by statutes of limitation or repose, a new rule cannot reopen the door already closed."[220]

Though it might seem unfair and arbitrary that those whose cases are pending can enjoy a new, favorable retroactive rule while those whose judgments are final cannot, "[f]inality must thus delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time."[221]

3. Unusual Administrative Circumstances

Two distinct situations can arise in a RCRA context which could produce unpredictable results. First, it is not uncommon for the EPA to issue an administrative order,[222] either unilaterally or by a consent order documenting a settlement agreement between the EPA and a RCRA violator.[223] In determining the impact of the retroactive invalidation of the mixture rule on these orders, a key factor to the result would be whether a court would consider the case to be more similar to a past or pending case. Perhaps an important consideration to this determination would be if the appeal period for the order has terminated.

There could be a similar impact on EPA-issued permits premised upon the mixture rule. These permits could require a facility to conduct corrective action of any releases of hazardous waste at their RCRA facility.[224] The impact of the retroactive invalidation of the mixture rule on these permits is unknown. Similar to an order, if a facility were to raise such an issue, key to a court's determination would likely be whether the court considered the EPA permits to act more like a past or a pending case.

V. CONCLUSION

For the past decade the EPA has utilized the so-called "mixture rule" as one of its primary methods to determine whether a material was a hazardous waste and thus was required to be handled in accordance with RCRA's provisions. Since the mixture rule's promulgation in 1980, the EPA has taken an untold number of environmental enforcement actions against RCRA violators, with the mixture rule serving as the very basic

219. *Id.* (citing Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940)).

220. *James B. Beam Distilling*, 111 S. Ct. at 2446.

221. *Id.* at 2447.

222. RCRA 1990 MANUAL, *supra* note. 3, at III-92. Examples of such orders would be compliance orders, corrective action orders, § 3013 orders, and § 7003 orders. *Id.* at III-92 to 93. "Orders can be used to force a facility to comply with specific regulations, to take corrective action, to perform monitoring, testing and analysis, or to address a threat of harm to human health and the environment." *Id.* at III-92.

223. *Id.*

224. *Id.* at III-82.

foundation for many of these actions. However, in *Shell Oil*, the Court of Appeals for the District of Columbia vacated the mixture rule because of the EPA's failure to fully comply with the APA during the rule's promulgation.

Both justice and disaster were brought to bear when the *Goodner* Court later reversed criminal convictions due to its conclusion that the *Shell Oil* Court's invalidation of the mixture rule applied retroactively. Justice was served, since the *Goodner* Court appears to have reached the proper result interpreting the *Shell Oil* Court's decision. Yet, the *Goodner* decision is disastrous in its effect, since a major loophole in the country's environmental protection policy has once again been opened. Contrary to Congressional intent, polluters will go free as a result of the *Shell Oil* and *Goodner* Courts' decisions.

The disaster is compounded by the fact that this result did not have to occur. The *Shell Oil* Court could have either specifically invalidated the mixture rule only prospectively or could have even left the mixture rule in place pending satisfaction of the APA requirements. The *Shell Oil* Court did neither of these, leaving the *Goodner* Court with no real choice but to find the mixture rule's invalidation retroactive.

However, the *Goodner* Court could have, and possibly should have, ruled similar to the subsequent administrative Environmental Appeal's Board case of *Hardin County II*, and found that the retroactive invalidation of the federal mixture rule would be largely irrelevant in an authorized state. Accordingly, the *Goodner* Court could have avoided this environmental disaster and upheld the defendants' convictions based upon state law.

The *Goodner* decision, being a circuit court opinion, coupled with the contrary Environmental Appeal's Board opinion of *Hardin County II*, leaves the impact of invalidating the mixture rule retroactively in question. If an environmental enforcement action was premised solely upon the mixture rule and that action is still pending, it is possible that relief from the action is available, at least in the Eighth Circuit and in those circuits that would chose to follow *Goodner*. However, relief from judgment may not be available in those circuits which would hold contrary to *Goodner* and similar to *Hardin County II*, and find that the invalidation of the federal mixture rule is largely irrelevant in an authorized state. Additionally, if the action has passed or reached final judgment, it would appear that the retroactive application of the mixture rule will not provide any relief.

*Richard M. Filosa**

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* This article is dedicated to my wife Jane, for her love and support.

NOTES

The Evolution of Horizontal Mergers and the 1992 Merger Guidelines

I. INTRODUCTION

On April 2, 1992, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) jointly released Horizontal Merger Guidelines.[1] Through the establishment of guidelines, the DOJ and the FTC seek to deter mergers that have anticompetitive effects, while encouraging firms to merge if such a combination would enhance competition.[2] The purpose of these merger guidelines is to provide a "road map" for businesses as to the types of mergers that would be challenged by these antitrust enforcement agencies.[3]

Both the DOJ and the FTC have the authority to challenge horizontal mergers[4] and have coordinated their activities in the past with a "mini-

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1. ANTITRUST DIV., U.S. DEP'T OF JUSTICE AND FEDERAL TRADE COMMISSION, MERGER GUIDELINES, *reprinted* in 4 *Trade Reg. Rep.* (CCH), April 2, 1992, ¶¶ 13, 104 [hereinafter 1992 GUIDELINES].

2. *Id.* at *Statement Preceding.* Mergers that would have a "neutral" effect on competition are also permitted under the Merger Guidelines. *Id.*

3. *Id.* The rationale and objective of the Merger Guidelines are described below:

> Central to the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines is a recognition that sound merger enforcement is an essential component of our free enterprise system benefitting the competitiveness of American firms and the welfare of American consumers. Sound merger enforcement must prevent anti-competitive mergers yet avoid deterring the larger universe of pro-competitive or competitively neutral mergers. The 1992 Horizontal Merger Guidelines implement this objective by describing the analytical foundations of merger enforcement and providing guidance enabling the business community to avoid antitrust problems when planning mergers.

Id.

4. A horizontal merger is defined as a merger in which the firms involved are engaged in similar lines of production. FTC REPORT ON THE MERGER MOVEMENT 29 (1948). The power of the DOJ to enforce antitrust law is derived from the text of the Sherman and Clayton Acts. *See* 15 U.S.C. §§ 1, 2, 4, 15, 25, 26 (1988). The Federal Trade Commission Act of 1914 states in part, "a commission is hereby created and established, to be known as the Federal Trade Commission .... [T]he Commission is hereby empowered and directed to prevent persons, partnerships, or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." Pub. L. No. 62-203, 38 Stat. 717 (current version at 15 U.S.C. § 45 (1988)).

mum of friction."[5] However, these agencies have never provided a uniform merger policy.[6] The 1992 Horizontal Merger Guidelines provide this uniform policy, replacing both the 1984 Merger Guidelines released by the DOJ,[7] and the 1982 Statement Concerning Horizontal Merger Guidelines[8] issued by the FTC.[9]

The DOJ and FTC developed Merger Guidelines to add predictability to their enforcement actions.[10] The stated objective of these guidelines is to identify "whether [a] merger is likely to create or enhance market power or to facilitate its exercise."[11] As such, the Merger Guidelines attempt to outline those activities that would likely challenge these regulatory agencies, as well as permissive types of merger activity.[12]

The antitrust enforcement agencies challenge mergers between firms where such a combination will increase the market power of the merging firms.[13] The term "market power" refers to the "power to control prices or exclude competition."[14] Firms with market power can charge higher-than-competitive prices for their products.[15] Antitrust enforcers are concerned with this transfer of wealth from consumers to suppliers.[16]

In measuring the market power of a firm, it is appropriate to (1) determine the relevant product market, (2) determine the relevant geographic market, and (3) calculate the percentage of the output in the

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5. LAWRENCE A. SULLIVAN, ANTITRUST 754 (1977).

6. *Statement Preceding* 1992 GUIDELINES, *supra* note 1.

7. DOJ *Merger Guidelines*, 4 TRADE REG. REP. (CCH), June 29, 1984, ¶¶ 13, 103 [hereinafter 1984 GUIDELINES].

8. FTC STATEMENT CONCERNING HORIZONTAL MERGERS (June 14, 1982) [hereinafter FTC STATEMENT].

9. *Statement Preceding* 1992 GUIDELINES, *supra* note 1.

10. 1992 GUIDELINES, *supra* note 1, § 0.1. "The Guidelines are designed primarily to *articulate the analytical framework* the Agency applies in determining whether a merger is likely substantially to lessen competition. . . ." *Id.* (emphasis added).

11. Kevin Arquit, *FTC Perspectives on Merger Guidelines*, 61 ANTITRUST 121, 123 (1992).

12. 1992 GUIDELINES, *supra* note 1, § 0.

> The 1992 Guidelines summarize the present enforcement policy of the DOJ and the FTC . . . concerning horizontal acquisitions and mergers. . . . They describe the analytical framework and specific standards normally used by the [DOJ and FTC] in analyzing mergers. By stating its policy as simply and clearly as possible, the [DOJ and FTC] hope to reduce the uncertainty associated with enforcement of the antitrust laws in this area.

Id.

13. *See infra* notes 49-54 and accompanying text.

14. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

15. HERBERT HOVENCAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 55 (1985). Although in many areas of antitrust law a plaintiff must show that a defendant actually possesses market power to prove a lessening of competition, the laws surrounding mergers generally do not require "present" market power. Instead, mergers may even be condemned if they demonstrate a propensity to create future market power. *Id.* at 56. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

16. *See infra* note 48.

relevant market belonging to the firm.[17] "A relevant market for a market power inquiry is any grouping of sales whose sellers could raise and maintain prices significantly above the competitive level, if those sellers were unified by a hypothetical cartel or merger."[18] As the Merger Guidelines make clear, the relevant market extends beyond those products currently available in a market to include future producers or sellers likely to enter the market and compete, should a "small but significant and nontransitory" price increase be imposed.[19] The difficulty in measuring the responses of these future competitors undermines the accuracy of the relevant market and market concentration analyses.[20]

This Note will discuss the 1992 Horizontal Merger Guidelines with respect to the market power inquiry. As a prelude to this analysis, Part II begins with a basic review of relevant economic concepts relating to merger analysis. Whether one follows the Chicago School or populist views toward antitrust law,[21] any merger analysis must consider certain economic issues.[22] These issues will be addressed through the concepts of perfect competition and monopoly, with a focus on the attainment of market power through merger or acquisition.[23]

Part III traces the development of statutory and case law governing mergers and acquisitions from the enactment of the Clayton Act in 1914.[24] This historical perspective will be separated into three sections:

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17. HOVENCAMP, *supra* note 15, at 59.

18. Donald I. Baker & David A. Balto, *Foreign Competition and Market Power*, 60 ANTITRUST 945, 959 (1990). A relevant market refers to all products in competition within a given geographic area. 1992 GUIDELINES, *supra* note 1, § 1.0. Section 7 of the Clayton Act prohibits mergers that substantially lessen competition "in any line of commerce in any section of the country." 15 U.S.C. § 15 (1988). For a discussion of relevant markets, *see infra* notes 65-75 and accompanying text.

19. 1992 GUIDELINES, *supra* note 1, § 1.0. This group of future competitors, which the Merger Guidelines refer to as "firms that participate through supply response," will be discussed in Section III of this Note. *See infra* note 68 and accompanying text. *See also* 1992 GUIDELINES, *supra* note 1, § 1.32.

20. *See infra* notes 65-75 and accompanying text.

21. Supporters of the Chicago School theory advocate the use of economics in antitrust analysis, focusing on 'efficiencies'; in contrast, populist supporters tend to prefer more qualitative methods of measuring markets. *See infra* note 32 and accompanying text.

22. *See infra* note 32 and accompanying text.

23. *See infra* notes 32-64 and accompanying text.

24. Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 18 (1988)). The first merger movement might be traced back as far as the formation of the Standard Oil Trust in 1879; however, to understand current merger law, one need only go back as far as 1914. The 1914 Clayton Act followed the 1911 breakup of the Standard Oil Trust. *See* Standard Oil Co. v. United States, 221 U.S. 1 (1911). The original Clayton Act limited the ability of corporations to acquire the stock of other corporations engaged in the same business if the effect would be to lessen competition, restrain trade in a geographic location, or create a monopoly. *See infra* notes 96-99 and accompanying text. For a discussion of merger law prior to the enactment of the Clayton Act, see SULLIVAN, *supra* note 5, at 576-87.

merger law under the original Clayton Act;[25] the effect of the 1962 Supreme Court decision in *Brown Shoe Co. v. United States*[26] on the power of the antitrust agencies and the courts to restrict merger activity;[27] and the current state of merger law since the release of the first Merger Guidelines in 1968.[28] This historical review will draw out the conflicts that have existed in merger law since its inception, focusing primarily on the competing interests of serving competition versus inefficient competitors.[29]

Part IV evaluates the 1992 Merger Guidelines, the "next logical step in the development of the agencies' analysis of mergers."[30] Drawing on over eighty years of merger enforcement history, the 1992 Merger Guidelines demonstrate a sensitivity toward past court decisions, empathy toward merging businesses, and experience gathered from enforcement of prior merger guidelines. As a result, the guidelines depart from some of the underlying policies of the merger statutes and ignore some inconsistent case law. This departure will be addressed in the conclusion, Part V.[31]

II. Elements of Merger Analysis: Economic Concepts in Antitrust Law

It is appropriate to begin a discussion of the elements of merger analysis with an overview of some basic economic concepts. Though the debate continues about what role economics should play in antitrust law, an understanding of the Merger Guidelines requires a rudimentary understanding of these concepts.[32] With this in mind, the following section

25. *See infra* notes 92-110 and accompanying text.

26. 370 U.S. 294 (1962).

27. *See infra* notes 111-52 and accompanying text.

28. Antitrust Div., U.S. Dep't of Justice, *Merger Guidelines, reprinted in* 1 Trade Reg. Rep. (CCH), May 30, 1968, ¶¶ 4, 430 [hereinafter 1968 Guidelines]; *see infra* notes 153-64 and accompanying text.

29. *See infra* notes 87-164.

30. *Statement Preceding* 1992 Guidelines, *supra* note 1; *see generally infra* notes 169-171 and accompanying text.

31. *See infra* notes 196-205 and accompanying text.

32. The Chicago School and the populist theorists represent opposite sides of an ongoing debate as to the proper role of economic analysis in antitrust regulation. Followers of the Chicago School theory believe that "allocative efficiency should be the exclusive goal of the antitrust laws." Hovencamp, *supra* note 15, at 41. *See also* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. L. Rev. 925 (1979); *see generally* Robert H. Bork, The Antitrust Paradox 116 (1978). Populist school supporters "believe that antitrust policy should consider certain 'competing' values"that is, values that either cannot be accounted for within the economic model or values that can be asserted only at the cost of a certain amount of efficiency." Hovencamp, *supra* note 15, at 41. *See generally* Sullivan, *supra* note 5; Brown Shoe Co. v. United States, 370 U.S. 294 (1962). For a discussion of the role of economics in antitrust law, compare Richard A. Posner, Antitrust Law (1976) and Bork, *supra* (both advocating intense economic analysis in antitrust cases) with Sullivan, *supra* note 5, at 1-17 (noting the importance and limitations of economics to antitrust law).

provides the economic fundamentals necessary for an understanding of the policies and purposes of the Merger Guidelines and their application to potential mergers.[33]

The law of supply and demand states that the higher the price of a good, the more sellers will be willing to manufacture.[34] Conversely, the lower the price, the more of that product buyer(s) will be willing to purchase.[35] At some point, there is an "equilibrium" at which the number of units that sellers are willing to supply equals the number of units demanded by the buyers.[36] This is the exact amount at which goods in a perfectly competitive market will be priced.[37]

When economists speak of "perfect competition," they refer to a market where an infinite number of sellers sell perfectly homogenous products in a market where buyers have access to all information regarding the price and quality of goods available.[38] In perfect competition, if any seller attempted to price a product even slightly above the market level, buyers would cease to purchase from that seller, given the unlimited number of substitutes available at the lower prices.[39] This forces sellers to price their products competitively and motivates them to seek ways of reducing their costs of production.[40]

Monopoly might be considered the opposite of perfect competition.[41] In a monopoly, instead of an infinite number of homogenous substitute

33. *See infra* notes 34-48 and accompanying text.

34. *See* EDWARD H. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 12-20 (2d ed. 1962).

35. *Id.*

36. *Id.*

37. HOVENCAMP, *supra* note 15, at 2. In perfect competition, the "equilibrium price" equals the market price; in reality, such is not always the case. *Id.* at 14. For an example of a situation where the market price varies from the equilibrium price, see *infra* notes 41-48 and accompanying text.

38. The elements of a "perfectly competitive market" have been described as: (1) all sellers sell absolutely homogenous products; (2) each seller is so small that an increase or decrease in output will not affect the decisions of other sellers; (3) all buyers and sellers have perfect knowledge of price, output, and other information about the market; and (4) products are divisible. GEORGE J. STIGLER, THE THEORY OF PRICE 87-88 (3d ed. 1966).

39. *See* JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 16 (1969).

40. *See* CHAMBERLIN, *supra* note 34, at 16-25. As an example of the cost reduction incentive of perfect competition, consider the following hypothetical: Seller manufactures Product at a cost of $80 which is sold at a market price of $100. The profit is $20. Given the fact that a perfectly competitive market does not permit Seller to raise the price, for Seller to increase profits above $20, he or she must look for methods of reducing the cost of getting the product to market. By contrast, a monopolist might be able to increase prices by cutting back on production. *See infra* notes 43-46 and accompanying text.

41. *Id.* at 1. A monopoly has been said to exist "[w]hen a specific individual or enterprise has sufficient control over a particular product or service to determine significantly the terms on which other individuals shall have access to it." MILTON FRIEDMAN, CAPITALISM AND FREEDOM 120 (1982). Friedman speaks of three different

products, a single seller markets a product that lacks substitutes.[42] Without the threat of competition, a monopolist possesses the ability to price the product above competitive levels by reducing its availability in the market.[43] This follows the notion that to the extent demand exceeds supply, price will rise.[44] In a monopoly, the monopolist has the power to restrain output and create such a supply shortage.[45] There is no risk of a competitive supply response to this unmet demand because there are no substitute products in a monopoly. Thus, the monopolist is able to charge higher than competitive prices for his or her products.[46] For example, if a monopolist raised prices above competitive levels, consumers would be forced to make a decision between paying the higher price and not having the product at all. Though some consumers would decide not to purchase the product, there are some that would pay the higher price.[47] This power to affect the market price is referred to as market power.[48]

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types of monopoly: (1) monopoly in industry; (2) monopoly in labor; and (3) governmentally produced monopoly. *Id.* at 121-28. Since the antitrust laws are not designed to address monopolies in labor (*see* SULLIVAN, *supra* note 5, at 718, 723-31 (noting that the labor organizations are exempt from antitrust enforcement under the Clayton Act due to the policy that labor cartelization is an activity that should be encouraged)) or governmentally authorized monopolies, this Note is concerned only with monopolies in industry.

42. STIGLER, *supra* note 38, at 198.

43. POSNER, *supra* note 32, at 8. Perfect competition and pure monopoly rarely, if ever, arise in reality. *See* ROBINSON, *supra* note 39, at 4-5. However, analyzing markets in the extremes aids in understanding them. It may be helpful to think of a continuum with pure competition at one end and monopoly at the other. As the market power of a firm increases, it moves closer to the monopoly end of the continuum. For a discussion of market power, see *infra* notes 49-54 and accompanying text.

44. *See* STIGLER, *supra* note 38, at 184-87. Every consumer has a limit as to how much he or she will pay for a given product. These limits are not uniform among consumers. Although all consumers might pay the same price for a product in the market (no consumer is going to offer to pay above the selling price for a product), some might be willing to pay above the market level, if conditions so dictated. *Id.*

45. For a discussion of the economics of monopoly pricing, see ROBINSON, *supra* note 39, at 47-59.

46. It might be beneficial for a seller to sell a smaller quantity, if doing so will enable him or her to offset the lost volume with an increased price per unit. *See* ROBINSON, *supra* note 39 at 53. Consider the following hypothetical: Monopolist manufactures Product X at a cost of $90/unit. Monopolist can sell 1000 units of X at $100 each. Alternatively, if Monopolist was to price X at $120 each, only 900 units could be sold. The gross profit from charging $100 would be only $10,000 (($100 – $90) × 1000 = $10,000) whereas charging $120 would return a gross profit of $27,000 (($120 – $90) × 900 = $27,000), even though less product was sold. The monopolist in this case would have an incentive to restrict his or her supply to 900 units.

47. Stigler, *supra* note 38, at 184-87.

48. 1992 GUIDELINES, *supra* note 1, § 0. Monopolies are disfavored in antitrust law because this exercise of market power transfers wealth from the consumers to the monopolist. Using the example in *supra* note 46, raising prices above competitive levels increases the amount the monopolist receives for his or her goods at the expense of the consumer. The extent of this wealth transfer equals the difference be-

A. *Market Power*

A fundamental purpose of antitrust law is to promote competition within markets[49] by restricting the ability of firms to achieve and exercise market power.[50] As Sullivan describes it, "[w]hether a seller possesses such power depends upon the reaction of buyers to price changes initiated by the seller. Buyer reactions, in turn, will depend upon [the] availability of substitutes for seller's product."[51] Hence, the price-elasticity of the product[52] and competitive barriers to entry[53] affect the ability of a firm to achieve and exercise market power.[54]

B. *Horizontal Merger*

Merely possessing market power does not necessarily give rise to an antitrust violation.[55] Possessing market power as a result of merger, however, is likely to draw a challenge from the antitrust agencies.[56] As the 1992 Guidelines explain, "the ultimate inquiry in merger analysis [is]

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tween the price the monopolist charges for the product and what the 'optimum price' for the product would be given perfect competition. POSNER, *supra* note 32, at 18.

Monopolies are also criticized for leaving some consumers without products they would have otherwise purchased if those products were priced at competitive levels; these 'lost' consumers are individuals that were willing to purchase a product at 'optimum' levels, but not at the monopoly price. *See supra* note 44. This is referred to as the 'social cost of monopoly'. HOVENCAMP, *supra* note 15, at 19-20.

49. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (promoting "protection of competition, not competitors").

50. 1992 GUIDELINES, *supra* note 1, § 0.1. "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time." *Id.* The guidelines also note that "[s]ellers with market power also may lessen competition on dimensions other than price, such as product quality, service or innovation." *Id.* at n.6.

51. SULLIVAN, *supra* note 5, at 30-31.

52. Price elasticity refers to the relation of stat increase in a product's price to the corresponding decrease in demand. *See* ROBINSON, *supra* note 39, at 18. If a small price increase would cause the demand for a product to drop sharply, the price is said to be very price-elastic. If a product's price is very elastic, it is more difficult to exercise market power because buyers will be less willing to absorb any increase in price. *See supra* notes 44-8 and accompanying text.

53. "Barriers to entry" generally refer to the costs associated with entering a given market. RICHARD A. GIVENS, ANTITRUST: AN ECONOMIC APPROACH, 16 ANTITRUST SERIES § 3.10 (1993). These costs include capital requirements, as well as brand loyalty and other non-economic concepts, that may make it difficult for a firm to enter a market. The term "barriers to entry" also includes "barriers to exit" which implies that a potential competitor would be less apt to enter a given market if circumstances existed that would make it difficult for the firm to recover its investment should the decision be made to cease competing in the market. *Id.*

54. *Id.*

55. HOVENCAMP, *supra* note 15, at 293-94.

56. *See supra* note 50 and accompanying text.

whether the merger is likely to *create or enhance* market power or to facilitate its exercise."[57]

Increasing market power through horizontal merger[58] draws strict scrutiny from the federal antitrust agencies for two reasons. First, because a horizontal merger involves the combination of firms within the same industry, the post-merger relevant market contains one less competitor.[59] Second, the resultant firm controls a larger market share than either of its pre-merger parts.[60]

In determining whether a merger should be challenged, the regulatory agencies assess whether the merger would significantly increase concentration and result in a highly concentrated market.[61] Before that can be done, however, both the relevant product market[62] and the relevant geographic market[63] must be calculated.[64]

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57. 1992 GUIDELINES, *supra* note 1, § 0.2 (emphasis added).

58. Other methods of increasing market power include vertical merger, conglomerate merger, growth, expansion, and possessing comparative advantages over competition. HOVENCAMP, *supra* note 15, at 293.

59. *Id.*

60. *Id.*

61. *See infra* notes 76-86 and accompanying text. *See generally* 1992 GUIDELINES, *supra* note 1, §§ 1.4-1.5.

62. Product market definition includes the identification of those products that act as substitutes to a given product. 1992 GUIDELINES, *supra* note 1, § 1.1. For a look at the evolution of court decisions defining product markets, see United States v. Grinnell, 384 U.S. 563 (1966) (narrowly defining product market due to brand preference for defendant's central station security system); United States v. Continental Can Co., 378 U.S. 441 (1964) (expanding relevant market to include both products of two merging firms where products were substitutes; however, other substitute products were excluded); United States v. Aluminum Co. of Am., 377 U.S. 271 (1964) (narrow submarkets represent relevant product markets); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (recognizing that broad markets may contain 'well-defined submarkets' constituting product markets for antitrust purposes); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956) (broadly defining market based on 'cross-elasticity of demand' between cellophane and other flexible wrapping products); *see also Horizontal Mergers: Law and Policy*, A.B.A. SEC. ANTITRUST, MONOGRAPH NO. 12, 73-78 (1986) [hereinafter A.B.A. MONOGRAPH 12].

63. The relevant geographic market refers to the geography in which the relevant products compete. 1992 GUIDELINES, *supra* note 1, § 1.2. In *Brown Shoe Co.*, the Court indicated that "[t]he criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market .... The geographic market selected must ... both 'correspond to the commercial realities' of the industry and be economically significant." 370 U.S. at 336-37 (footnotes omitted). For cases discussing the definition of relevant geographic markets, see United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974) (relevant geographic market represents a 'section of the country' where goods are marketed to a significant degree by the acquired firm); United States v. Pabst Brewing Co., 384 U.S. 546 (1966) (Clayton Act only requires a showing that a particular merger has anticompetitive effects somewhere in the country); United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (geographic market defined as the area where the impact of the merger will be immediate); *see also* A.B.A. MONOGRAPH NO. 12, *supra* note 62, at 85.

C. *Relevant Market Analysis*

Determining the relevant market is the threshold inquiry into whether a horizontal merger would increase concentration and result in a concentrated market.[65] Under the 1992 Guidelines, a market is defined as:

> a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant.[66]

The relevant market includes the smallest number of products within the narrowest geographic area that still satisfies this test.[67] This relevant market also includes those "uncommitted" firms likely to enter the market if this hypothetical price increase were to take place.[68]

Properly defining the relevant market is possibly the most important issue in merger enforcement.[69] Still, as Robert Pitofsky points out, antitrust enforcement agencies have historically failed in their attempts to define markets.[70] Pitofsky explains:

> This failure has resulted in part because of persistent and unreconciled conflicts of approach in important judicial opinions. It also reflects the fact that the critical issues in relevant market definition"(1) what products are sufficiently close substitutes to compete effectively in each other's market (definition of 'relevant product market'); (2) what firms are sufficiently proximate to others in spatial terms to compete effectively

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64. 1992 GUIDELINES, *supra* note 1, § 0.2.

65. *Id.* § 1.0. "[A] merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, *properly defined and measured.*" *Id.* (emphasis added).

66. *Id.*

67. *Id.*

68. *Id.*

> A firm is viewed as a participant if, in response to a 'small but significant and nontransitory' price increase it likely would enter rapidly into production or sale of a market product in the market's area, without incurring significant sunk costs of entry and exit. Firms likely to make any of these supply responses are considered to be 'uncommitted' entrants because their supply response would create new production or sale in the relevant market and because that production or sale could be quickly terminated without significant loss. Uncommitted entrants are capable of making such quick and uncommitted supply responses that they likely influenced the market premerger, and accordingly are considered as market participants at both times.

Id. *See* FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) (noting that presence of respondent as a potential competitor exerted considerable influence on the market).

69. Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1807 (1990).

70. *Id.*

> (definition of 'relevant geographic market'); and (3) what substitute sources of supply can be diverted promptly and economically to offer effective competition ('supply substitutability')"are all matters of degree that are extremely difficult to measure.[71]

The concentration of the relevant market and the share of the merging firms directly relate to how much leverage these market participants can exercise.[72] As such, accurately measuring the relevant market is crucial in the determination of whether a firm has market power.[73] To the extent that a relevant market is overstated, the market power of merging firms within that market will be understated.[74] Alternatively, defining a market too narrowly will result in an overstatement of market power, increasing the likelihood that a particular merger will be challenged by the DOJ or FTC.[75]

D. *Market Concentration*

After defining the relevant market, the regulatory agencies determine whether the market is concentrated.[76] The market concentration is a "function of the number of firms in a market and their respective market shares."[77] Depending upon the nature of the specific market, different indicators will be used to calculate the market shares of competitors. The 1992 Guidelines provide that the best indicator of [the] firms' future com-

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71. *Id.* (citations omitted).

72. For other factors affecting market power, see *supra* notes 51-54 and accompanying text.

73. The Supreme Court has defined market power as "the power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

74. The larger the relevant market, the smaller the market share a particular firm or firms will have. Consider the following hypothetical: Firms *A*, *B*, and *C* have sales of $40 million, $10 million, and $110 million respectively. If the relevant market is determined to only include Firms *A* and *B*, *A* would possess 80% of the market. If, on the other hand, the relevant market was determined to also include firm *C*, *A*'s market share would be 25%. Thus, by broadly defining the market to include all three firms, the firms' relative shares decrease.

75. For an example of a situation where a market was defined narrowly, see United States v. Grinnell Corp., 384 U.S. 563, 576 (1966); *but cf.* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

76. 1992 GUIDELINES, *supra* note 1, § 1.5.

77. *Id.* Certain early merger decisions looked solely at the market share of the merging firms to determine whether a merger was anticompetitive. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (establishing a rule of presumptive liability for firms with market share above a threshold level); *see also* United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Aluminum Co. of Am., 377 U.S. 271 (1964). Other decisions have disregarded the modest market shares of the merging firms, yet still struck down the mergers based on what the courts perceived as undesirable market trends toward concentration. *See* United States v. Von's Grocery Co., 384 U.S. 270 (1966); United States v. Continental Can Co., 378 U.S. 441 (1964); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

petitive significance should be used in calculating the market shares of the market participants.[78]

The 1992 Guidelines introduced the Herfindahl-Hershman Index (HHI) as an aide to interpreting market data relating to the concentration of a market.[79] The HHI is calculated by squaring the individual market shares of all competitors within a relevant market, then totalling these sums.[80] Both a pre-merger and a post-merger HHI analysis are conducted.[81]

The 1992 Guidelines set out three classifications into which an HHI might fall.[82] The first is the "safe harbor," which includes firms with post-merger HHIs below 1,000.[83] The Guidelines suggest that "[t]he Agency

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78. 1992 GUIDELINES, *supra* note 1, § 1.41. Depending upon the structure of the market, different "indicators" will be used. For instance, in a market where firms are distinguished by differentiated products, dollar sales or shipments will be used. *Id.* However, in a market with relatively homogenous products, where firms are distinguished by the services they provide, unit sales will be used. *Id.* When dealing with foreign firms, market shares will be assigned in the same manner as domestic firms. *Id.* § 1.43.

79. 1992 GUIDELINES, *supra* note 1, § 1.5. The HHI was first introduced by the DOJ, reprinted in the 1982 Guidelines. DEPARTMENT OF JUSTICE MERGER GUIDELINES, 4 Trade Reg. Rep. (CCH), June 14, 1982, ¶¶ 13,102, § III(A) [hereinafter 1982 GUIDELINES].

80. For example, if a market contains 5 firms: X_1, X_2, X_3, X_4, and X_5 who possess market shares of 25%, 25%, 20%, 20%, and 10% respectively. The pre-merger HHI for the market equals:

$$25^2 + 25^2 + 20^2 + 20^2 + 102 = 625 + 625 + 400 + 400 + 100 = 2{,}150$$

Assume that X_4 and X_5 are contemplating merger. Their post merger HHI equals:

$$25^2 + 25^2 + 20^2 + (20 + 10)^2 = 625 + 625 + 400 + (900) = 2{,}550$$

Thus, if X_4 and X_5 merged, the concentration of the market would increase by 400 points $(2{,}550 - 2{,}110)$.

A short cut for calculating the difference between pre- and post-merger HHI is to multiply the pre-merger share of each merging firm together, then multiply that number by two. In other words:

$$X_4 \times X_5 \times (2) = (20) \times (10) \times (2) = 400$$

This follows basic algebra: before the merger, firms X_4 and X_5's market shares are squared separately:

$$X_4^2 + X_5^2$$

After the merger, however, the sum of their market share is squared:

$$(X_4 + X_5)^2$$

Another way to describe $(X_4 + X_5)^2$ is:

$$X_4^2 + 2X_4X_5 + X_5^2$$

By subtracting the pre-merger shares from the post-merger share, the change in market concentration is seen to be $2X_4X_5$.

$$(X_4^2 + 2X_4X_5 + X_5^2) - (X_4^2 + X_5^2) = 2X_4X_5$$

For an analysis of how to analyze HHI calculations, see *infra* notes 168-71 and accompanying text. *See also* 1992 GUIDELINES, *supra* note 1, §§ 1.5 n.17, 1.51 n.18.

81. In practicality, only a post-merger HHI need be conducted. The calculation of pre-merger HHI is only necessary to do the longhand calculation of the change in market concentration. *See supra* note 80.

82. 1992 GUIDELINES, *supra* note 1, § 1.5.

83. *Id.* § 1.51.

regards markets in this region to be unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis."[84]

The second category for analyzing the concentration of markets contains those markets where the post-merger HHI is between 1,000 and 1,800:

> The Agency regards markets in this region to be moderately concentrated. Mergers producing an increase in the HHI of less than 100 points in moderately concentrated markets post-merger are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 100 points in moderately concentrated markets post-merger potentially raise significant competitive concerns depending upon other factors.[85]

The final classification of market concentration under the guidelines is highly concentrated markets, i.e., those markets with a post-merger HHI above 1800:

> Mergers producing an increase in the HHI of less than 50 points, even in highly concentrated markets post-merger, are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 50 points . . . potentially raise significant competitive concerns. . . . [M]ergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power . . . .[86]

The HHI provides both objectivity and clarity to merger analysis. Such clarity has not always existed in the area of mergers. Due to the ambiguity of the antitrust statutes which invites interpretations, merger law has been strongly affected by shifting political sentiments.

III. MERGER ANALYSIS

A. *The Clayton Act of 1914*

> Enthusiasm for bright lines ebbs and flows. There are times when the fashion is to strive for perfect, fine-tuned outcomes. Then the costs of uncertainty "both to litigants and to society" assume greater significance. Eventually the legal system celebrates the virtues of certainty and simplicity, until attention shifts to the inevitable errors that oversimplification yields. "The rythymn [sic] of shifting sentiments regularly plays itself out in antitrust law. Merger law becomes complex, then simple, and then complex again."[87]

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84. *Id.*

85. *Id.*

86. *Id.* Mergers increasing HHI more than 100 points in a highly concentrated markets are presumed to create or enhance market power. This presumption, however, can be overcome by showing other factors. For a discussion of these factors, see United States v. Baker Hughes, 908 F.2d 981, 988-92 (D.C. Cir. 1990).

87. Stephen Calkins, *The 1990-91 Supreme Court Term and Antitrust: Toward Greater Certainty*, 60 ANTITRUST L. J. 603, 603 (1991).

Before 1914, challenges to horizontal mergers[88] only occurred if a merger would create monopolistic effects under section 2 of the Sherman Act.[89] But, these challenges were largely ineffective and offered little consistency in enforcement.[90] In 1914, in an attempt to better regulate activity,[91] Congress enacted the Clayton Act.[92] Through the Clayton Act, Congress sought to stop the formation of holding companies which were perceived as the next generation of "great trusts" that were the driving forces behind the creation of the Sherman Act.[93] Unfortunately, section 7, the merger section of the Clayton Act, was "considered by many observers to be ineffective in its then existing form."[94] Its major weakness was

88. Horizontal mergers should be distinguished from vertical mergers (mergers between buyers and sellers) and conglomerate mergers (mergers not falling into the category of horizontal or vertical). Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962). Generally speaking, horizontal mergers are more strictly regulated than vertical or conglomerate mergers. HOVENCAMP, *supra* note 15, at 321.

89. The Sherman Act, ch. 647, § 2, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 2 (1988)) provides:

> [E]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years or by both said punishments, in the discretion of the court.

Id.

90. THOMAS W. BRUNNER ET AL., MERGERS IN THE NEW ANTITRUST ERA (1985) [hereinafter BRUNNER]. With the Supreme Court's introduction of "Rule of Reason" analysis in 1911, *see* Standard Oil Co. v. United States, 221 U.S. 1 (1911), and United States v. American Tobacco Co., 221 U.S. 106 (1911), there was growing uncertainty as to whether certain mergers might be outside the scope of the Sherman Act. *Merger Standards under Antitrust Laws,* A.B.A. SEC. ANTITRUST, MONOGRAPH NO. 7 at 3 (1981) [hereinafter A.B.A. MONOGRAPH 7].

91. A.B.A. MONOGRAPH 7, *supra* note 90, at 5. "So pervasive was the public concern about corporate size that, in 1912, all three major parties [Republican, Progressive, and Democratic] advocated legislation to strengthen the antitrust laws, and to supplement the broad but flexible prohibitions of the Sherman Act, in their platforms." *Id.*

92. Clayton Act, ch. 323 § 7, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1988)).

> As enacted in 1914, § 7 of the original Clayton Act prohibited the acquisition by one corporation of the *stock* of another corporation when such acquisition would result in a substantial lessening of competition *between the acquiring and the acquired* companies, or tend to create a monopoly in any line of commerce.

Brown Shoe Co. v. United States, 370 U.S. 294, 312-13 (1962).

93. SULLIVAN, *supra* note 5, at 590. The original Clayton Act was "an Act then conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors' stock." *Brown Shoe Co.*, 370 U.S. at 314.

94. *Brown Shoe Co.*, 370 U.S. at 311.

the limited scope of mergers that were subject to scrutiny under the act.[95]

In its original form, the Clayton Act covered only "stock acquisitions."[96] This created a large loophole that placed "asset acquisitions" outside the power of the act.[97] In *Thatcher Mfg. Co. v. FTC*,[98] the Supreme Court further extended the "asset acquisition" loophole. The *Thatcher* Court held that the FTC could not exercise section 7 power over a firm that acquired the stock of a competitor, if an asset transfer took place before the FTC filed its complaint.[99] This extended the loophole beyond asset acquisitions, detracting from the power the FTC could exercise over certain stock acquisitions.

In the thirty-six years between the enactment of the Clayton Act and its revision in 1950, the Supreme Court ruled on the merits of only five merger challenges.[100] Of those, only one challenge was successful.[101]

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95. Another limitation of the original Clayton Act was that it seemingly applied only to horizontal mergers and not to vertical or conglomerate mergers. BRUNNER, *supra* note 91, at 4.

96. A "stock acquisition" refers to a firm acquiring the stock of another firm. Any reference to "asset acquisition" was omitted from § 7 of the original Clayton Act. An "asset acquisition" involves the transfer of the property of one entity to another. Oftentimes, the first step in a merger would involve one firm first acquiring a controlling share of the stock of another. Once the acquiring firm held enough stock to establish voting control of the company, that firm would transfer the assets of the acquired firm into its possession. SULLIVAN, *supra* note 5, at 587-90. For an example of "stock acquisition" followed by "asset acquisition," see Thatcher Mfg. Co. v. FTC, 272 U.S. 554 (1926); FTC v. Western Meat Co., 272 U.S. 554 (1926); Swift & Co. v. FTC, 272 U.S. 554 (1926).

97. SULLIVAN, *supra* note 5, at 589. "[T]hough [the Supreme Court] declined to overturn a merger directly achieved by a straight-out asset acquisition, its orders routinely forbade asset acquisition consummated after stock had been acquired and, presumptively, in the exercise of power attained by virtue of the stock acquisition." *Id.* The power of the FTC to regulate asset acquisition occurring after stock acquisition was limited by the Supreme Court in *Thatcher Mfg. Co.*, 272 U.S. at 554.

98. 272 U.S. 554 (1926).

99. *Id.* at 561; *see* Swift & Co. v. FTC, 272 U.S. 554 (1926). The Supreme Court decision in *Thatcher*, 272 U.S. 554, along with *Swift & Co.*, 272 U.S. 554, and Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1926), "perhaps provided more of a spur to enactment of the 'assets' amendment to § 7 than any other single factor. These decisions were universally regarded as opening the unfortunate loophole whereby § 7 could be evaded through the use of an asset acquisition." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 391 (1963).

100. Three significant companion cases were brought in 1926: Thatcher Mfg. Co. v. FTC, 272 U.S. 554, 560-61 (1926) (FTC could not restrict the transfer of assets following a stock acquisition where the transfer occurred prior to the FTC filing a complaint); FTC v. Western Meat Co., 272 U.S. 554, 557-60 (1926) (upholding a divestiture order which barred the acquiring company from transferring stock or assets of the acquired company to any of its subsidiaries when the complaint was filed prior to the transfer); Swift & Co. v. FTC, 272 U.S. 554, 561-63 (1926) (FTC could not restrict the transfer of assets following a stock acquisition where the transfer occurred prior to the FTC filing a complaint). In the 1930s, the Supreme Court decided International Shoe Co. v. FTC, 280 U.S. 291 (1930) (acquiring a company on the verge of liquidation did not violate § 7 of Clayton Act); and Arrow-Hart & Hegeman Elec. Co.

The Court was clearly unwilling to read into the Clayton Act restrictions it felt did not exist.[102]

Every year between 1927 and 1950, the FTC recommended that the Clayton Act be amended.[103] The merger regulators were dealt a blow in 1948 when the DOJ unsuccessfully challenged the acquisition of Consolidated Steel by Columbia Steel.[104] Although the Supreme Court recognized the need for tightening the existing merger laws, it refused to do so.[105] The Court held that:

> it is not for courts to determine the course of the Nation's economic development. . . . The basic industries, with few exceptions, do not approach in America, a cartelized form. If businesses are to be forbidden from entering into different stages of production that order must come from Congress, not the courts.[106]

The same year as the decision in *Columbia Steel*, the FTC warned that "[i]f nothing is done to check the growth in concentration [of industries], either the giant corporations will ultimately take over the country, or the Government will be impelled to step in and impose some form of direct regulation in the public interest."[107] In 1950, due in part to the pressure applied by the Court[108] and the FTC,[109] Congress enacted the Celler-Kefauver Amendments to section 7 of the Clayton Act[110] and the pendu-

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v. FTC, 291 U.S. 587 (1934) (Section 7 ineffective to regulate asset acquisition even if transfer of assets arises out of stock acquisition).

101. FTC v. Western Meat Co., 272 U.S. 554 (1926). Additionally, the DOJ challenged only 16 mergers under § 7 between 1914 and 1950. Of these challenges, eight were settled by consent decrees. A.B.A. MONOGRAPH 7, *supra* note 90, at 25. Although few merger cases were actually litigated prior to Brown Shoe Co. v. United States, 370 U.S. 294 (1962), many of the analytical principles currently used are borrowed from the pre-*Brown Shoe* period. *Id.*

102. United States v. Columbia Steel Co., 334 U.S. 495 (1948). *See also Brown Shoe Co.*, 370 U.S. at 314-16; United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 338-40 ("the courts found mergers to be beyond the reach of § 7, even when the merger technique had supplanted stock acquisitions as the prevalent mode of corporate amalgamation") (citations omitted).

103. *Brown Shoe Co.*, 370 U.S. at 314-15. By 1940, a wave of mergers began to change the structure of industry. John Litner & John Butters, *Effect of Mergers on Industrial Concentration, 1940-47*, 32 REV. ECON & STAT. 30 (1950); SULLIVAN, *supra* note 5, at 591. Still, due to the focus of the country on World War II, few efforts were made to block the momentum of this acquisition movement. *Id.* at 590.

104. United States v. Columbia Steel Co., 334 U.S. 495, 498 (1948). Section 1 of the Sherman Act prohibits unreasonable restraints of trade. 15 U.S.C. § 1 (1988). Section 2 prohibits attempts to monopolize in restraint of trade. *Id.* § 2.

105. *See supra* note 102.

106. *Columbia Steel*, 334 U.S. at 526.

107. FTC REPORT ON THE MERGER MOVEMENT: SUMMARY REPORT 68 (1948) [hereinafter FTC REPORT].

108. *See Columbia Steel*, 334 U.S. at 495.

109. *See* FTC REPORT, *supra* note 107.

110. Celler-Kefauver Act of December 29, 1950, ch. 1184, 64 Stat. 1125 (codified as amended at 15 U.S.C. § 18 (1988)). "The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a

lum of merger enforcement began to swing in the other direction.

B. *The Brown Shoe Decision*

The move away from leniency in merger enforcement that began with the 1950 revision to the Clayton Act gained considerable momentum in 1962 with the decision in *Brown Shoe*.[111] This was the first opportunity the Supreme Court had to interpret the Celler-Kefauver Amendments. The broad language of the amendments was used to increase the power of the Court and the federal agencies to restrict mergers.[112] The Court inferred that the "dominant theme pervading congressional consideration of the

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rising tide of economic concentration in the American economy." Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962). Eliminating the asset acquisition loophole of the original Clayton Act was the major goal behind passage of these amendments. *Id.* at 316. The Court noted that "[v]irtually every member of Congress who spoke in support of the amendments, indicated that this aspect of the legislation was its salient characteristic." *Id.* at n.29. In debates preceding the enactment of the Celler-Kefauver amendments, Representative Kefauver described the effect of the Supreme Court decisions in *Thatcher* and *Arrow-Hart & Hegeman Elec. Co.* as eliminating the federal antitrust agencies' power to police mergers. "The result of these decisions has so weakened sections 7 and 11 . . . as to give the FTC and the DOJ merely a paper sword to prevent improper mergers." United States v. Philadelphia Nat'l Bank, 374 U.S. 363, 391 (1963) (Harlan, J., dissenting); 95 CONG. REC. 11485 (1949) (statement of Rep. Kefauver)).

111. 370 U.S. 294 (1962).

112. *Id.* at 316-23. *Brown Shoe* looked at the movement behind the passage of the 1950 amendment to § 7 of the Clayton Act and assumed that the broad language of Clayton would include all of these policy concerns.

> First, there is no doubt that Congress did wish to 'plug the loophole' and to include within the coverage of the Act the acquisition of assets no less than the acquisition of stock. . . .
>
> Second, by the deletion of the "acquiring-acquired" language in the original text, it hoped to make plain that § 7 applied not only to mergers between actual competitors, but also vertical and conglomerate mergers . . . .
>
> Third, . . . Congress saw the process of concentration in American business as a dynamic force; it sought to assure the FTC and the courts the power to brake this force at its outset and before it gathered momentum.
>
> Fourth, . . . § 7 of the Clayton Act was intended to reach incipient monopolies and trade restraints outside of the Sherman Act . . . .
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> Fifth, at the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers . . . .
>
> Sixth, Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets . . .
>
> Seventh, . . . Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry . . . .
>
> Eighth, Congress used the words '*may* be substantially to lessen competition'[ ], to indicate that its concern was with probabilities, not certainties. . . . It is against this background that we return to the case before us.

Id.

1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."[113]

Brown Shoe involved the merger of two competitive shoe manufacturers, each with retail operations. Though the combined market share of the two businesses was low, the Warren Court found the merger to violate section 7 of the Clayton Act. This was due, in part, to the Court's belief that the shoe industry was already experiencing an undesirable trend toward concentration.[114] The Court expressed concern that the trend was "not the product of accident but rather the result of deliberate policies of Brown [Shoe] and other leading shoe manufacturers. . . ."[115] Even at the cost of market efficiency, the Court held that a decentralized market should be maintained, allowing smaller businesses the opportunity to compete.[116]

This logic has met great opposition from commentators, because it shifts the focus of antitrust regulation from protecting competition to protecting individual businesses.[117] While there is general agreement that concentration leads to market power, the "desirability of retaining 'local control' over industry and the protection of small businesses"[118] at the expense of efficiency is inconsistent with the Court's statement in *Brown Shoe* that Congressional concern is with the "protection of competition not competitors."[119]

Brown Shoe interpreted the amended Clayton Act as a tremendous

113. *Brown Shoe Co.*, 370 U.S. at 315. "Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *Id.* at 316 n.28 (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d. Cir. 1945)).

114. *Id.* at 346. "It is true, of course, that the [Clayton Act] prohibits a given merger only if the effect of *that* merger may be substantially to lessen competition. But the very wording of § 7 requires a prognosis of the probable *future* effect of the merger." *Id.* at 332.

115. *Id.*

116. *Id.* at 315-16.

117. *See* BORK, *supra* note 32, at 65. In criticizing the *Brown Shoe* Court for its decision, Bork contends "there is 'no credible support for the statement in *Brown Shoe* that Congress appreciated the possible efficiency cost of attempting to preserve fragmented industries and consciously resolved the competing considerations in favor of decentralization.' The Warren Court was enforcing its own social preferences, not Congress's." *Id.* at 65 (quoting Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1326 (1965)). *See also* SULLIVAN, *supra* note 5, at 594 ("If the Court [in *Columbia Steel*] had been permissive about a merger which significantly increased concentration, in *Brown [Shoe]* it was restrictive about a merger which did not."); POSNER, *supra* note 32, at 103 ("*Brown Shoe* is seen to rest on the social objection, which is that concentration involves the elimination of small firms that the Supreme Court values *although the consumer does not.*") (emphasis added).

118. *Brown Shoe Co.*, 370 U.S. at 315.

119. *Id.* at 320. Although serving the interests of both individual competitors and competition is often possible, and desirable, at times these interests conflict. United States v. Baker Hughes, 908 F.2d 981 (D.C. Cir. 1990).

source of power.[120] The Court invited the use of a wide range of factors into open-ended merger analysis, including: (1) the post-merger market share of the merging firms; (2) the concentration of the industry and trends toward concentration; (3) the significance of post-merger market share for the given industry or based on the specific firm gaining the control; (4) the history of the merging firms and whether their past growth had been because of merger; (5) whether specific competitors will be left vulnerable because of the merger; and (6) the purposes of the merging firms.[121]

Although *Brown Shoe* provided the specific factors to be used in evaluating the effects of a merger,[122] the Court offered no means for weighing these factors. The Court stated that "a merger had to be functionally viewed, in the context of its particular industry."[123] The only guidance merging businesses can take from this holding is that when contemplating merger, "all issues [are] open" to challenge.[124] Recognizing this, subsequent Supreme Court decisions have backed away from this highly subjective language.[125]

One year later, *United States v. Philadelphia National Bank*[126] attempted to supply the test for merger illegality that was lacking in *Brown Shoe*.[127] The Court did not offer a *per se* rule for analyzing mergers, providing

120. *See generally Brown Shoe Co.*, 370 U.S. at 311-46.

121. SULLIVAN, *supra* note 5, at 594. *See generally Brown Shoe Co.*, 370 U.S. at 295.

122. *See supra* notes 120-21 and accompanying text.

123. *Brown Shoe Co.*, 370 U.S. at 294-295, 321.

124. SULLIVAN, *supra* note 5, at 594.

125. *See, e.g.*, United States v. Third Nat'l Bank, 390 U.S. 171 (1968); United States v. Von's Grocery Co., 384 U.S. 270 (1966); *see also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). *But cf.* United States v. General Dynamics Corp., 415 U.S. 486 (1974). One year after the *Brown Shoe* decision, the Court in *Philadelphia Nat'l Bank* seemingly recognized the problems with the broad language in *Brown Shoe* and sought to add greater predictability to the enforcement of merger law. The Court stated that:

> Clearly, [determining whether a particular merger is anticompetitive] is not the kind of question which is susceptible of a ready and precise answer in most cases. . . . Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. *And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded.* So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. And so in any case in which it is possible, without doing violence to the congressional objective in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963) (footnotes omitted) (emphasis added). For a discussion of the *Philadelphia Nat'l Bank* decision, see *infra* notes 126-39 and accompanying text.

126. 374 U.S. 321, 363 (1963).

127. POSNER, *supra* note 32, at 105.

instead a rule of "presumptive illegality."[128] Justice Brennan stated that:

> any merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[129]

The purpose of the *Philadelphia National Bank* test was to create a standard by which the difficult burden of proving an illegal merger would be lifted from the government only in situations where the size of the merging firms makes them "inherently suspect in light of Congress's design in § 7 to prevent undue concentration."[130] Stated another way, the Court established two standards of proof for analyzing merger legality.[131] The first standard applies to firms that are not "inherently suspect" and shields them from the effects of the Clayton Act.[132] This suggests that firms not "inherently suspect" be permitted to make business decisions regarding merger without the fear of government intervention.[133] The second standard applies to firms that are within a concentrated market and where the merging firms possess a "threatening" share of the market. Such firms would come under Clayton Act scrutiny.[134] "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."[135]

The *Philadelphia National Bank* rule on merger illegality, for its time, possessed the virtues of precision and objectivity.[136] Though the sophisti-

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128. SULLIVAN, *supra* note 5, at 594.

129. *Philadelphia Nat'l Bank*, 374 U.S. at 363.

130. *Id.* In addition, "the test is fully consonant with economic theory. That 'competition is likely to be greatest when there are many sellers, none of which has any significant market share,' is common ground among most economists, and was undoubtedly a premise of congressional reasoning about the antimerger statute." *Id.* (footnotes omitted).

131. *Id.*

132. *Id.*

133. Compare the Court's rationale in *Philadelphia Nat'l Bank*, 374 U.S. at 363, with the "safe harbor" provisions of the merger guidelines, 1992 GUIDELINES, *supra* note 1, § 1.0.

134. *Philadelphia Nat'l Bank*, 374 U.S. at 364.

135. *Id.* The Court was unwilling to identify a specific market share above which would represent undue concentration. The Court stated:

> Our conclusion that these percentages raise an inference that the effect of the contemplated merger of appellees may be substantially to lessen competition is not an arbitrary one, although neither the terms of § 7 nor the legislative history suggests that any particular percentage share was deemed critical. The House Report states that the tests of illegality under amended sec. 7 'are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act.'

Id. at 365 (quoting H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1950)).

136. POSNER, *supra* note 32, at 105.

cation of its economic analysis falls short under current standards, its test was workable and derived from the fundamental purpose of the Clayton Act to encourage competitive pricing by preventing high levels of concentration.[137] Despite this, three years later in *United States v. Von's Grocery Co.*,[138] "the Court veered sharply away from the path of *Philadelphia National Bank*."[139]

Without regard to the potential benefits to consumers, the Court in *Von's Grocery* invalidated a merger between two grocery chains within a market that had seen a transition from single store operators toward retail chains.[140] As in *Brown Shoe*, the Court considered the interests of the smaller competitors to be more important than the efficiencies recognized by the merger of the larger concerns.[141] The Court held that merger of the two grocery store chains was "simply the case of two already powerful companies merging in a way which makes them even more powerful than they were before."[142]

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137. *Id.* "The stunning simplification entailed in this analysis bears emphasis." SULLIVAN, note 5, at 594 n.6. Following the decision in *Philadelphia Nat'l Bank*, the approach to merger analysis has continued to move away from the open-ended approach of *Brown Shoe*. *See supra* notes 55-64 and accompanying text.

138. 384 U.S. 270 (1966).

139. POSNER, *supra* note 32, at 105.

140. *Von's Grocery*, 384 U.S. at 282-83 (Stewart, J., dissenting). *Von's Grocery* involved a merger between two retail chains in Los Angeles. Though the market share of these merging firms was cumulatively less than 8% of the relevant market, and even though certain efficiencies would be recognized by the merger, the Court found the merger to violate § 7 of the Clayton Act. This was based on the trend in the market away from small single-store operations and toward retail chains. *Id.* at 274.

141. *Id.* at 274. Justice Black, in delivering the Court's opinion, noted:

> To arrest this 'rising tide' toward concentration into too few hands and to halt the gradual demise of the small businessmen, Congress decided to clamp down with vigor on mergers. It both revitalized § 7 of the Clayton Act by 'plugging its loophole' and broadened its scope so as not only to prohibit mergers between competitors, the effect of which 'may be to substantially to lessen competition, or to tend to create a monopoly' but to prohibit all mergers having that effect. By using these terms in § 7 which look not merely to the actual present effect of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies.

Id. at 276-277. Conversely, Justice Stewart noted in his powerful dissent:

> Section 7 was never intended by Congress for use by the Court as a charter to roll back the supermarket revolution. Yet the Court's opinion is hardly more than a requiem for the so-called 'Mom and Pop' grocery stores . . . that are now economically and technologically obsolete in many parts of the country. No action by this Court can resurrect the old single-line Los Angeles food stores that have been run over by the automobile or obliterated by the freeway.

Id. at 288 (Stewart, J., dissenting).

142. *Id.* at 278. The real tragedy with the *Von's Grocery* decision is that the merger that was held illegal had no appreciable effect on the class of single store retailers the

Even if the merger of the two firms would increase their relative market share, together the two firms only possessed 7.5% of the market in which there were 3,950 competitors.[143] The 'market power' inquiry of the Court focused specifically on the trend toward fewer competitors, ignoring important considerations such as the lack of economic concentration, the high level of competition, and the positive effects of the merger on the market.[144] The *Von's Grocery* decision also ignored the assertion in *Philadelphia National Bank* that firms which do not control an undue percentage of the market do not fall into the category of "inherently suspect"[145] Further, the Court cited no evidence that the merger would increase the 'market power' of the merging firms.[146] It is interesting that the Court's concern was not with the merger resulting in higher prices, but instead, that lower prices would result from the efficiencies recognized by the merger.[147]

Following the 1966 decision in *Von's Grocery*, it was apparent that the enforcement of merger law lacked consistency. *Brown Shoe* had created a subjective illegality test that would stand as a barrier to even efficient

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Court sought to protect. *Id.* at 287-88 (Stewart, J., dissenting).

143. *Id.* at 272-73. The Court placed emphasis on the fact that there was a decline in the number of single-store owners in the three years after the firms merged. However, the Court ignored the fact that 3590 single stores still remained. The market demonstrated all the signs of an intensely competitive market, including changes in market shares between firms, turnovers, and entries and exits of competitors. BORK, *supra* note 32, at 217-18.

144. *Von's Grocery*, 384 U.S. at 287-88 (Stewart, J., dissenting). Justice Stewart noted:

> I believe that even the most superficial analysis of the record makes plain the fallacy of the Court's syllogism that competition is necessarily reduced when the bare number of competitors has declined. In any meaningful sense, the structure of the Los Angeles grocery market remains unthreatened by concentration. Local competition is vigorous to a fault, not only among chain stores themselves but also between chain stores and single-store operators. The continuing population explosion of the Los Angeles area, which has outrun the expansion plans of even the largest chains, offers a surfeit of business opportunity for stores of all sizes.

Id. For a discussion of the elements of market power, see *supra* notes 48-54 and accompanying text.

145. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963). The fact that the merger of two grocery chains would make the merged firm the second largest competitor in the relevant market was seen as significant by the Court. "The facts of this case present exactly the threatening trend toward concentration which Congress wanted to halt.... Von's and Shopping Bag... merged to become the second largest chain in Los Angeles." *Von's Grocery*, 384 U.S. at 277. However, a firm with no market power could be the largest competitor and still not be "inherently suspect" under a *Philadelphia Nat'l Bank* analysis. *See Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963).

146. POSNER, *supra* note 32, at 107-08. The questionable analysis applied in *Von's Grocery* is "[p]erhaps the best example of Clayton [Act] § 7's disorientation." BORK, *supra* note 32, at 217.

147. POSNER, *supra* note 32, at 105-09; *see also* BORK, *supra* note 32, at 210-11.

mergers if existing competitors would be adversely affected.[148] One year later, the Court in *Philadelphia National Bank* abandoned the open-ended test of *Brown Shoe* and recognized the need for greater predictability in merger enforcement, adopting a rule of presumptive illegality for analyzing mergers.[149] *Von's Grocery* regressed from the position of *Philadelphia National Bank* that certain mergers were not "inherently suspect," introducing a *per se* standard to condemn an otherwise efficient merger.[150] The *Von's Grocery* Court held that in analyzing the anticompetitive effects of mergers, a merger that contributes to a reduction in the number of competitors can be held illegal without regard to the economic concentration of the market, the level of competition, or the positive effects of the merger on the market.[151] Justice Stewart, in his *Von's Grocery* dissent, provided the most accurate summary of the state of merger law as of 1966: "The sole consistency that I can find [in merger regulation] is that in litigation under [section] 7, the Government always wins."[152]

C. *Merger Guidelines*

In recognition of the confusion created by the Warren Court decisions, the first Merger Guidelines were released by the DOJ in 1968.[153] The stated policy of these guidelines was "to preserve and promote market structures conducive to competition."[154] Though the 1968 Guidelines did not represent a significant departure from the existing case law, they did offer a clear indication to business as to the types of mergers likely to be challenged by the DOJ.[155] Because these guidelines did not deviate drastically from the case law, the courts often utilized the logic of

148. *See supra* notes 114-16 and accompanying text.

149. *Philadelphia Nat'l Bank*, 374 U.S. at 363; *see supra* notes 76-87 and accompanying text.

150. *See supra* note 141 and accompanying text.

151. United States v. Von's Grocery, 384 U.S. 270, 276-77 (1966). Richard Posner was an assistant to the Solicitor General, arguing for the FTC in *Von's Grocery*. Commenting on the position of the government in challenging the merger, Posner notes that the government "regarded it as a frontier case seeking the furthest extension of merger law that was defensible. The Supreme Court used the case as a vehicle for announcing an even broader rule, far beyond what we advocated." Stephen F. Ross, *Interview with Judge Richard Posner, Seventh Circuit Court of Appeals*, 6 ANTITRUST MAG. 12, 4-5 (Spring 1992).

152. *Von's Grocery*, 384 U.S. at 301 (Stewart, J., dissenting).

153. 1968 GUIDELINES, *supra* note 28. These guidelines were hailed as "a milestone of antimerger doctrine." Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1525 (1984).

154. 1968 GUIDELINES, *supra* note 28, § 2 app. A. The 1968 Guidelines explain that "[m]arket structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of the market." *Id.*; *see also* United States v. Brown Shoe Co., 370 U.S. 294 (1962) (merger law seeks to protect *competition, not* individual competitors).

155. A.B.A. MONOGRAPH 7, *supra* note 91, at 69.

the 1968 Guidelines in merger cases.[156]

In 1982, the DOJ revised their Merger Guidelines.[157] These revisions introduced into the merger analysis economic concepts that had developed in antitrust law since the original guidelines.[158] That same day, the FTC released a document that complemented the DOJ's Guidelines and demonstrated a similar deference towards the economic evaluation of mergers.[159]

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156. For examples of cases making reference to the 1968 Merger Guidelines with regards to market concentration analysis, see, e.g., Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199 (D. Md. 1976); FTC v. PepsiCo, 477 F.2d 24 (2d Cir. 1973); Stanley Works v. FTC, 469 F.2d 498 (2d Cir. 1972); American Smelting & Refining Co. v. Pennzoil United, Inc., 295 F. Supp. 149 (D. Del. 1969). For examples of cases making reference to the Merger Guidelines approach to measuring market share, see e.g., United States v. Amax, Inc., 402 F. Supp. 956 (D. Conn. 1975); Bowl America, Inc. v. Fair Lanes, Inc., 299 F. Supp 1080 (D. Md. 1969).

157. 1982 GUIDELINES, *supra* note 79. The 1984 revision of the Guidelines provides a clear understanding of why the Guidelines were first revised in 1982:

> During the 14 years following the original publication of the Merger Guidelines in 1968, antitrust enforcers and the courts made great strides in improving and refining the way they analyzed mergers. Over time, the Department's merger policy changed so much that there was little similarity between that policy and the policy described in [the] 1968 Guidelines. The 1982 revisions eliminated the resulting confusion by accurately describing the Department's actual merger enforcement policy.
>
> The 1982 Guidelines did not simply clarify the Department's merger policy, however, they also represented an important advance in merger analysis. The 1982 Guidelines recognized that most mergers do not threaten competition and that many are in fact procompetitive and benefit consumers. Moreover, the 1982 Guidelines reflected for the first time the important role that foreign competition plays in the Department's merger analysis. They thus provided a flexible analysis that proscribed only those merger that "on the basis of sound economic and legal analysis" threaten competition. At the same time, the Guidelines set out clear standards enabling businesses to avoid antitrust problems when planning mergers.

Statement Preceding 1984 Guidelines, *supra* note 7.

The 1982 Guidelines were revised only two years after their release. *Id.* This should not imply, however, that these Guidelines were not sound. "Supporters contended that the [1982] Guidelines at last provided a sensible framework within which the economic effects of mergers could be assessed." A.B.A. MONOGRAPH 12, *supra* note 62, at 73.

158. Pitofsky, *supra* note 69, at 1818. Commenting on the significance of the 1982 and 1984 revisions, Pitofsky notes:

> The 1982 and 1984 Department of Justice Merger Guidelines represent a substantial departure from earlier guidelines and case law. They articulate a coherent rationale for antitrust merger law, rely on some sophisticated economic concepts, and offer far more detail about likely government reactions to proposed mergers than did previously published guidelines.

Id.

159. FTC STATEMENT, *supra* note 8, § 1. The FTC stated:

> The Federal Trade Commission . . . and the Antitrust Division of the DOJ . . . have been reexamining the legal and economic basis for horizontal merger policy. In light of enforcement experience and more recent economic re-

Two years after the release of the 1982 Guidelines, the Merger Guidelines were again revised and reissued. This was in recognition that certain areas of the 1982 Guidelines were "either ambiguous or [had] been interpreted by observers in ways . . . not fully consistent with the Department's actual policy."[160] The 1984 Guidelines stood as the framework used by the DOJ to evaluate mergers until 1992, when the DOJ and FTC, for the first time, jointly issued Merger Guidelines.[161]

Merger policy has moved away from the Warren Court's focus on the protection of competitors from more efficient rivals to a goal of deterring oligopolistic pricing or collusion.[162] The latest Merger Guidelines create consistent standards for merger enforcement, enabling firms to anticipate the actions of the antitrust agencies. Although the Merger Guidelines do not bind the courts, the importance of these guidelines should not be understated.[163] While the Supreme Court's interpretations of the antitrust laws represent the final say in whether a merger is considered "good" or "bad," often the Merger Guidelines represent the only criteria under which a particular merger is evaluated.[164]

IV. 1992 Horizontal Merger Guidelines

A. *Overview*

The 1992 Horizontal Merger Guidelines outline the current enforcement policy of both the DOJ and the FTC concerning "horizontal acquisitions and mergers."[165] The Guidelines recognize that:

> search, the two agencies have both concluded that continued reliance on the Department of Justice's Merger guidelines, promulgated in 1968 . . . is no longer appropriate. . . . [T]he Department of Justice's 1982 revisions to the 1968 Guidelines will be given considerable weight by the Commission and its staff in their evaluation of horizontal mergers and in the development of the Commission's overall approach to horizontal mergers.

Id.

160. 1984 Guidelines, *supra* note 7. Five key areas of the Merger Guidelines were revised in 1984: (1) market definition and measurement; (2) factors affecting the significance of concentration and market share data; (3) treatment of foreign competition; (4) treatment of efficiencies; and (5) treatment of failing divisions of healthy firms. *Id.*

161. *See Statement Preceding* 1992 Guidelines, *supra* note 1.

162. Hovencamp, *supra* note 15, at 300.

163. Neither the courts, the FTC, nor the DOJ are bound by the Merger Guidelines. *See* 1992 Guidelines, *supra* note 1, § 0.

164. Note, *The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers*, 94 Yale L.J. 670, 671-72 (1985). In normal circumstances, private parties do not play an important role in the enforcement of merger regulation. Hence, the antitrust enforcement agencies are usually the primary plaintiff in merger enforcement cases. Therefore, unless a merger is found to violate the merger policies of one of these two agencies, it won't get to the Court and never receives scrutiny under § 7 of the Clayton Act. *Id.*

165. *Statement Preceding* 1992 Guidelines, *supra* note 1. The guidelines apply specifically to mergers subject to Section 7 of the Clayton Act: "[m]ergers subject to section

> sound merger enforcement is an essential component of our free enterprise system benefitting the competitiveness of American firms and the welfare of American consumers. Sound merger enforcement must prevent anticompetitive mergers yet avoid deterring the universe of procompetitive or competitive neutral mergers.[166] This is facilitated by the provision of an analytical framework used to evaluate the anticompetitive effects of mergers so that businesses can avoid antitrust problems when planning mergers.[167]

The 1992 Guidelines advocate a loosening of antitrust regulation to enable firms to achieve efficiency through merger and to better compete with foreign competitors.[168]

They have been described as the "next logical step" in the analysis of mergers by the federal antitrust agencies.[169] Though both the DOJ and FTC have provided their own guidelines in the past, "[w]here as here, two agencies have concurrent enforcement responsibilities, the standards to be applied should not depend on which agency is analyzing a particular

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7 are prohibited if their effect 'may be substantially to lessen competition, or tend to create a monopoly.'" *Id.* § 0 n.1 (quoting 15 U.S.C. § 18 (1988)); Section 1 of the Sherman Act ("[m]ergers subject to Section 1 are prohibited if they constitute a 'contract, combination . . . or conspiracy in restraint of trade.'") *Id.* at n.2 (quoting 15 U.S.C. § 1 (1988)); Section 5 of the FTC Act ("[m]ergers subject to section 5 are prohibited if they constitute an 'unfair method of competition.'" *Id.* at n.3 (quoting 15 U.S.C. § 45 (1988)).

166. *Statement Preceding* 1992 GUIDELINES, *supra* note 1. This philosophy is carried over from policy of the 1982 and 1984 guidelines which recognized that "most mergers do not threaten competition and that many are in fact procompetitive and benefit consumers." *Statement Preceding* 1984 GUIDELINES, *supra* note 7.

167. *Statement Preceding* 1992 GUIDELINES, *supra* note 1.

168. President George Bush, in announcing the "unified antitrust enforcement policy for mergers and acquisitions," stated that the "common policy will provide the business community with greater certainty about the standards to be applied in enforcing the antitrust laws. And, where stiff international competition already exists, the new guidelines will make it easier for American companies to achieve the economic clout to compete effectively in the global marketplace." President George Bush, *quoted in* TRADE REG. REP. (CCH), No. 205 (April 7, 1992). This suggests that relevant markets will be broadly defined under the 1992 Guidelines.

169. *Statement Preceding* 1992 GUIDELINES, *supra* note 1.

> Both the Department and the Commission believed that their respective Guidelines and Statement presented sound frameworks for antitrust analysis of mergers, but that improvements could be made to reflect advances in legal and economic thinking. The 1992 Horizontal Merger Guidelines accomplish this objective and also clarify certain aspects of the Merger Guidelines that proved to be ambiguous or were interpreted by observers in ways that were inconsistent with the actual policy of the agencies.

Id. To the extent that the 1992 Guidelines seek to improve on federal antitrust policy, the motivation behind revising the guidelines is consistent with previous releases. When the Guidelines were revised in 1984, the DOJ explained that "certain aspects of the 1982 guidelines either are ambiguous or have been interpreted by observers in ways that are not fully consistent with the Department's actual policy." *Statement Preceding* 1984 GUIDELINES, *supra* note 7.

merger."[170] As such, the joint guidelines are "a major step forward."[171]

B. *The Market Power Inquiry*

The 1992 Guidelines define market power as the ability of a firm to maintain prices profitably above competitive levels for a significant period of time.[172] They note that "a merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured."[173] A "safe harbor" exists for firms that "either do not significantly increase concentration or do not result in a concentrated market."[174]

Establishing this "safe harbor" advances the purposes of the Guidelines by providing a framework for predicting the merger enforcement policies of the antitrust agencies.[175] To this extent, the recent guidelines do not depart from previous guidelines.[176] Since the release of the 1982 Guidelines, the analysis of market concentration has provided a "safe harbor" to businesses.[177]

C. *Significant Revisions*

Two areas of the Merger Guidelines were significantly revised in 1992. First, the 1992 Guidelines "explain more clearly how mergers may lead to adverse competitive effects and how particular market factors relate to the analysis of those effects."[178] The Guidelines recognize that competition may be adversely affected through either coordinated[179] or unilat-

170. Attorney General William P. Barr (quoted in TRADE REG. REP. (CCH), No. 205 (April 7, 1992) at 1).

171. *Id.*

172. 1992 GUIDELINES, *supra* note 1, § 0.1. "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation." 1992 GUIDELINES, *supra* note 1, § 0.1 n.6. For a discussion on the negative effects of a firm exercising market power, see *supra* notes 136-42 and accompanying text.

173. 1992 GUIDELINES, *supra* note 1, § 1.0.

174. For a discussion of market concentration, see *supra* notes 76-86 and accompanying text.

175. 1992 GUIDELINES, *supra* note 1, § 0.

176. *See supra* notes 157-59 and accompanying text.

177. The 1992 Merger Guidelines appear to have dropped the language of previous guidelines suggesting that even mergers that pass the HHI test are likely to be challenged if the merger involves a leading firm in a market and a competitor with at least a one percent market share. *Compare* 1992 GUIDELINES, *supra* note 1, § 1.51 *with* 1982 GUIDELINES, *supra* note 79, § 3.12 ("Leading Firm Provisio").

178. *Statement Preceding* 1992 GUIDELINES, *supra* note 1.

179. 1992 GUIDELINES, *supra* note 1, § 2.1. The Guidelines acknowledge that:

> [A] merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers. Coordinated interaction is comprised of actions by a group of firms that are profitable for each of them only

eral activities.[180]

All things being equal, the higher the concentration of a market, the more likely a firm, or group of firms, could exercise market power to lessen competition.[181] Although industries with post-merger HHIs of 1,900 and 9,900 might each be considered highly concentrated under the Guidelines,[182] the latter clearly poses a much greater threat to the market.[183] The 1992 Guidelines recognize that within the HHI subgroups the dangers of anticompetitive effect may vary. These differences are accounted for by increasing the burden of persuasion necessary to rebut the presumption that a merger will have anticompetitive effects as the HHI increases.[184]

Second, the 1992 Guidelines "sharpen the distinction between the treatment of various types of supply responses and articulate the framework for analyzing the timeliness, likelihood and sufficiency of entry."[185]

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as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion, and may or may not be lawful in and of itself.

Id.

180. *Id.* § 2.2. The concept of lessening competition through unilateral effects recognizes that:

> A merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output. Unilateral competitive effects can arise in a variety of different settings. In each setting, particular other factors describing the relevant market affect the likelihood of unilateral competitive effects. The settings differ by the primary characteristics that distinguish firms and shape the nature of their competition.

Id. For a discussion of the economic effects of elevating prices and suppressing output, see *supra* notes 44-46 and accompanying text.

181. 1992 GUIDELINES *supra* note 1, § 2.0. Another way to state this premise is to say that:

> the smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase. . . . If collective action is necessary for the exercise of market power, as the number of firms necessary to control a given percentage of total supply decreases, the difficulties and costs of reaching and enforcing an understanding with respect to the control of that supply might be reduced.

Id. For an understanding of the ways in which a firm might restrict output to increase price, see the discussion of monopolies and market power, *supra* note 41-48 and accompanying text.

182. *See supra* note 86 and accompanying text.

183. Kevin J. Arquit, *Perspectives on the 1992 U.S. Government Horizontal Merger Guidelines*, 61 ANTITRUST L.J. 121, 127 (1992).

184. *Id.*

185. The merger guidelines have varied somewhat from the traditional common law approach to defining relevant markets. A.B.A. MONOGRAPH 12, *supra* note 62, at 79. Under the guidelines, relevant markets are defined as a group of products and an associated geographic area in which the exercise of market power would be feasible. *Id.*; *see also* 1992 GUIDELINES, *supra* note 1, § 1.0.

This relates directly to the relevant market definition.[186] Given the import of accurately stating the relevant market,[187] it is not surprising that the antitrust agencies have focused on this area.[188] The 1992 Guidelines attempt to better articulate when a firm not currently competing in a given market should be considered within that relevant market for antitrust purposes.[189]

D. *The Power of Federal Agencies to Regulate*

Lacking the force of law which properly promulgated regulations would possess, the 1992 Guidelines do not bind the Courts, the legislature, or the anti-trust agencies themselves.[190] Nonetheless, these guidelines have purpose. In practicality, they seem to define to what extent the DOJ and FTC will enforce the antitrust statutes, as interpreted by the courts.[191]

The federal agencies act as a barrier to the regulation of merger

186. Market definition is a crucial step in analyzing the potential anticompetitive effects of a merger. *See supra* note 162.

The Guidelines, however, have varied somewhat from the traditional common law approach to defining relevant markets. A.B.A. MONOGRAPH 12, *supra* note 62, at 79. Under the guidelines, relevant markets are defined as a group of products and an associated geographic area in which the exercise of market power be feasible. *Id. See* 1992 GUIDELINES, *supra* note 1, § 1.0.

187. *See supra* notes 65-75 and accompanying text.

188. *Statement Preceding* 1992 GUIDELINES, *supra* note 1, (noting one of the principal revisions of the revised Guidelines as "sharpen[ing] the distinction between the treatment of various types of supply responses and to articulate the framework for analyzing the timeliness, likelihood and sufficiency of entry of competition.").

189. 1992 GUIDELINES, *supra* note 1, § 1.0. "Fringe" competitors represent those firms that are "not currently producing or selling the relevant product in the relevant area" who would be likely to enter and compete in the market "within one year and without the expenditure of significant sunk costs of entry and exit, in response to a 'small but significant and nontransitory' price increase." 1992 GUIDELINES, *supra* note 1, § 1.32. For a discussion of these "fringe" firms, referred to by the Guidelines as "firms that participate through supply response" or "uncommitted entrants," see *supra* notes 67-68 and accompanying text.

190. *Statement Preceding* 1992 GUIDELINES, *supra* note 1. *See also* Arquit, *supra* note 183.

191. For an example of how the Guidelines have relaxed the restrictions on merging businesses, note that there is no reference to 'the protection of small business at the expense of efficiency' in the 1992 Guidelines. The Guidelines explain: "[t]he process of assessing market concentration, potential adverse competitive effects, entry, efficiency and failure is a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power . . . ." 1992 GUIDELINES, *supra* note 1, § 0.2. *Compare with* Brown Shoe Co. v. United States, 370 U.S. 294, 315-16 (1962) (noting a consideration of merger regulation in retaining "local control" over industries and protecting small business even at the cost of efficiency). *See also* United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945) (stating that one of the purposes of antitrust law is to "preserve, for its own sake and in spite of possible costs, and organization of industry in small units").

law.[192] Before a merger challenge reaches the courts, it must first be deemed anticompetitive by an antitrust agency or brought by a third party.[193] Given the limited standing of third parties as a result of the *Monfort*[194] decision, if the DOJ or FTC does not challenge a merger, the merger will likely go unopposed. At the same time, the DOJ and FTC have broad discretion to determine whether a merger will be challenged. The limited standing of third parties, coupled with this broad discretion, enables the DOJ and FTC to choose which aspects of the antitrust merger laws will be enforced.[195]

V. CONCLUSION

It is possible that the non-legal impact of mergers is so great that the regulation of mergers should give deference to changing political views. If this is true, then the 1992 Merger Guidelines provide a streamlined method which allows mergers law to proceed functionally at pace with changes in the business environment. The alternative would be to require Congress to amend the Clayton Act and other antitrust laws to respond to these changes. Further, the Supreme Court would be forced to overturn cases that contradict contemporary merger and economic theory, something it has been reluctant to do in the past.[196]

A major criticism of court decisions governing merger regulation is that the decisions are seemingly inconsistent, offering little guidance to the business community when contemplating merger.[197] This may be attributed to the fact that the antitrust statutes are intentionally vague and leave a great deal to the interpretation of the courts.[198] This ambiguity invites courts to incorporate personal views and policy concerns into merger decisions.[199] And as hindsight shows, the earlier case law fell short of fully weighing the anticompetitive effects of merger by applying underdeveloped economic analysis, if any economic analysis at all.

To this extent, the 1992 Merger Guidelines truly represent the "next logical step" in merger analysis.[200] The analysis by the agencies of the economic impact of mergers is far more developed than that of the com-

192. *See infra* notes 198-200 and accompanying text.
193. Monfort Co. v. Cargill, 761 F.2d 570 (10th Cir. 1985).
194. *Id.*
195. Certain procedural concerns are raised by these quasi-judicial, quasi-legislative powers of these agencies. The regulatory agencies have discretion as to whether a merger should be challenged, acting as a barrier to the courts. *See supra* notes 197-199 and accompanying text. As such, the case law, inconsistent as it may be, is seemingly outside the body of merger regulation. Instead, the merger guidelines represent a framework which adopt some, but not all of the Court's concerns.
196. *See supra* notes 111-12 and accompanying text.
197. *See supra* notes 148-52 and accompanying text.
198. *See supra* note 164.
199. *See supra* notes 87-152 and accompanying text.
200. *See supra* notes 169-71 and accompanying text.

mon law.[201] It is clear that, through this analysis, the DOJ and FTC seek to protect competition, but ignore the Warren Court's concern for inefficient competitors that may be negatively impacted by efficient mergers. This begs the question of whether the impact of the antitrust statutes have any effect on merging businesses without the support of the DOJ and FTC.

The change from Republican to Democratic administrations may affect the attitude of the regulatory agencies toward mergers. However, even if the DOJ and FTC decide to toughen the standards for merging businesses, the courts still maintain the final say as to whether a merger will be blocked.[202] And, given the current conservative majority of the Court, it is unlikely that concerns for the welfare of individual competitors will motivate this Court to block mergers that would otherwise be considered efficient.[203]

*Brian Golden**

201. *See* Pitofsky, *supra* note 69, at 1818.

202. It should be pointed out that the DOJ and FTC possess the ability to prevent a merger challenge from reaching the courts. However, once a challenge is brought, the courts determine whether the merger is anticompetitive.

203. If Justice Thomas's 1990 opinion in United States v. Baker Hughes, 908 F.2d 981 (D.C. Cir. 1990), is indicative of the position of the conservative majority towards merger, it is likely that efficient mergers will still be permitted to occur. Justice Thomas agrees that "the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws. . . ." *Id.* at 991 (quoting Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986)). Referring to the Warren Court decisions, Justice Thomas notes that "although the Supreme Court has not overruled these section 7 precedents, it cut them back sharply." *Id.* at 990. *But see* Eastman Kodak Company v. Image Technical Services, 112 S. Ct. 2072 (1992) (narrowly defining relevant market to include only a single brand of machine parts).

* To my wife, Karen.

The Evolution of Accord and Satisfaction: Common Law; U.C.C. Section 1-207; U.C.C. Section 3-311

I. INTRODUCTION

A good faith dispute exists between a debtor and creditor. The debtor claims that $2,000 is owed, while the creditor demands $2,400. The debtor mails a check for $2,200 in an attempt to settle the dispute. On the check the debtor conspicuously writes *"payment in full."* Upon receipt of the check, the creditor is faced with the question: what are the consequences of cashing the full settlement check?[1]

The law governing the doctrine of accord and satisfaction is in a state of flux, producing different results in different states.[2] Until recently, the common law doctrine was almost universally accepted as the majority position throughout the United States.[3] When a creditor cashed a "full payment" check concerning a bona fide dispute of an unliquidated or disputed claim, the debtor was released from any legal obligations under

1. The full settlement check is also referred to as a full payment check, a conditional check, or a full satisfaction check. Robinson v. Garcia, 504 S.W.2d 238, 241 n.2 (Tex. Ct. App. 1991). A full payment check is used by a debtor to settle an honest, bona fide dispute over an unliquidated debt by sending a check to the creditor for an amount less than allegedly owed in order to settle the claim extra-judicially. *Id.* at 241. Full settlement "[i]mplies an adjustment of all pending matters, the mutual release of all prior obligations between parties." BLACK'S LAW DICTIONARY 672 (6th ed. 1990).

2. For a discussion of U.C.C. § 1-207 and the full settlement check, see generally *Robinson*, 504 S.W.2d 238 (Tex. Ct. App. 1991); AFC Interiors v. Dicello, 544 N.E.2d 869 (Ohio 1989); County Fire Door Corp. v. C.F. Wooding Co., 520 A.2d 1028 (Conn. 1987); Cass Constr. Co. v. Brennan, 382 N.W.2d 313 (Neb. 1986); Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., 488 N.E.2d 56 (N.Y. 1985); Flambeau Prod. v. Honeywell Info. Sys., 341 N.W.2d 655 (Wis. 1984); JAMES WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (1988) [hereinafter WHITE & SUMMERS]; ARTHUR CORBIN, CORBIN ON CONTRACTS (1962) [hereinafter CORBIN]; Albert J. Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 COLUM. L. REV. 48 (1978); W. Jack Grosse & Edward P. Groggin, *Accord and Satisfaction and the 1-207 Dilemma*, 89 COM. L.J. 537 (1984) [hereinafter *Dilemma*]; W. Jack Grosse & Edward P. Groggin, *The 1-207 Dilemma Revisited*, 16 N. KY. L. REV. 425 [hereinafter *Dilemma Revisited*]; William D. Hawkland, *The Effect of U.C.C § 1-207 on the Doctrine of Accord and Satisfaction*, 74 COM. L.J. 329 (1969). The Uniform Commercial Code will be referred to as the U.C.C., or the Code. Unless otherwise stated, all references are to the 1990 official version.

3. Kim Massengill, *U.C.C. Section 1-207 and the Doctrine of Accord and Satisfaction: Ohio's About-Face in* AFC Interiors v. Dicello, 52 OHIO ST. L.J. 1617, 1617 (1989).

the common law.[4] But the common law doctrine is no longer the majority view. Instead, there are three competing positions: (1) Common Law,[5] (2) U.C.C. section 1-207,[6] and (3) U.C.C. section 3-311.[7]

Within the last decade, a number of states have permitted creditors who have already cashed full settlement checks to sue debtors for the balance of an unliquidated or disputed claim, despite the common law doctrine of accord and satisfaction.[8] This result prevents the debtor from being the master of his or her offer and eliminates a useful extra-judicial settlement device.[9] The common law doctrine has been altered by state courts, state legislatures, and by the drafters of the Uniform Commercial Code (U.C.C.).[10] In 1989, the Ohio Supreme Court became the fourth state supreme court to adopt the position that U.C.C. section 1-207 alters the common law.[11] In addition, a number of state appellate and lower courts have either endorsed or adopted the rule of U.C.C. section 1-207.[12] Meanwhile, as of January 1, 1993, California has two overlapping statutes that abandon the common law rule.[13] In 1987, California passed section 1526 of the California Civil Code[14] and in December 1992 it also adopted section 3-311 when it adopted revised Articles 3 and 4 of the U.C.C.[15] As of March, 1993, nineteen states have adopted the newly drafted U.C.C. section 3-311[16] which significantly alters the common law

4. *See, e.g.*, CORBIN, *supra* note 2, § 1276.

5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part VI.

8. Robinson v. Garcia, 504 S.W.2d 238, 241 (Tex Ct. App. 1991).

9. *See infra* text accompanying notes 62-70 and 162-67.

10. *See infra* Parts III, IV, V.

11. *See* AFC Interiors v. Dicello, 544 N.E.2d 869 (Ohio 1989) (a 4-3 opinion with vigorous dissent). The four states are New York, Ohio, South Dakota, and West Virginia. *Robinson*, 504 S.W.2d at 245. New York was the first large state to adopt the minority position. Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., 488 N.E.2d 56, 61 (N.Y. 1985).

12. These states are: Alabama (Biven v. White Dairy, 378 So. 2d 1122 (Ala. App. 1979)); Kentucky (Ditch Witch Trenching v. C & S Carpentry, 812 S.W.2d 171 (Ky. Ct. App. 1991)); Georgia (American Food Purveyors v. Lindsay Meats Inc., 265 S.E.2d 325 (Ga. App. 1980)); Rhode Island (Strauss, Factor, Hillman & Lopes v. General Corp., 3 U.C.C. Rep. Serv. 2d (Callaghan) 467 (R.I. 1987)); Texas (Robinson v. Garcia, 504 S.W.2d 238, 246 (Tex. Ct. App. 1991)).

13. CAL. CIV. CODE § 1526 (West 1990); CAL. BUS. CODE § 3311 (West 1992).

14. January 1, 1988 was the effective date of § 1526. CAL. CIV. CODE § 1526 (West 1990); *see infra* notes 274-78 and accompanying text.

15. CAL. BUS. CODE § 3311 (West 1992) (January 1, 1993 was the effective date of § 3311); *see infra* note 279 and accompanying text.

16. Telephone Interview with John McCabeb, Legislative Director and Legal Counsel, National Conference of Commissioners on Uniform State Laws (March 16, 1993) [hereinafter Telephone Interview]. (These states include Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Virginia, and Wyoming).

doctrine in two aspects.[17] First, a party may avoid an accord and satisfaction by returning the settlement offer (i.e., money) within ninety days.[18] Second, a creditor may require that any attempted accord and satisfaction be sent to a particular office to be effective.[19]

This Note analyzes the doctrine of accord and satisfaction, section 1-207, and section 3-311. Part II provides the elements of the common law doctrine.[20] Part III explains how section 1-207 alters the common law when certain conditions are met.[21] Parts IV and V present the arguments in favor of and against the common law interpretation.[22] Part VI sets forth the states that have addressed the impact of section 1-207 or section 3-311, but it remains unclear which rule these states will adopt.[23] Part VII discusses the Code's new solution, section 3-311.[24] In conclusion, it is proposed that section 1-207 and section 3-311 are basically flawed and the common law doctrine is the best rule.[25]

II. THE MECHANICS OF THE COMMON LAW DOCTRINE OF ACCORD AND SATISFACTION

The common law doctrine of accord and satisfaction enables the parties to a contract to settle a dispute without judicial intervention.[26] The common law defines an accord and satisfaction as a substitute contract between a debtor and a creditor for the settlement of a debt by some alternative performance other than payment in full.[27] Since an accord and satisfaction is a contract, it must satisfy the formal requirements of

17. *See infra* notes 280-316 and accompanying text.

18. U.C.C. § 3-311(c)(2) (1990); *see infra* text accompanying notes 317-21.

19. U.C.C. § 3-311(c)(1) (1990); *see infra* notes 290, 294-97 and accompanying text.

20. *See infra* notes 26-41 and accompanying text (Part II).

21. *See infra* notes 42-61 and accompanying text (Part III).

22. *See infra* notes 62-256 and accompanying text (Parts IV & V).

23. *See infra* notes 257-73 and accompanying text.

24. *See infra* notes 280-316 and accompanying text.

25. *See infra* notes 330-53 and accompanying text.

26. *See, e.g.*, Flambeau Prod. v. Honeywell Info. Sys., 341 N.W.2d 655, 659 (Wis. 1984).

27. RESTATEMENT (SECOND) OF CONTRACTS § 281 (1981).

> (1) An accord is a contract under which an obligee promises to accepts stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty.
>
> (2) Until performance of the accord, the original duty is suspended unless there is such a breach of the accord by the obligor as discharges the new duty of the obligee to accept the performance in satisfaction. If there is such a breach, the obligee may enforce either the original duty or any duty under the accord.
>
> (3) Breach of the accord by the obligee does not discharge the original duty, but the obligor may maintain a suit for specific performance of the accord, in addition to any claim for damages for partial breach.

Id.

contract formation: there must be an offer, acceptance, and consideration.[28]

The accord is the offer of the full settlement check.[29] To qualify as an offer, the debtor must conspicuously[30] indicate on the check or accompanying memorandum, through the use of the appropriate wording, such as "paid in full," that this check is intended to resolve the dispute.[31] Satisfaction occurs when the creditor accepts the accord.[32] When the creditor cashes a full payment check or otherwise exercises control over it, such as negotiating the check, the creditor assents to the offer.[33] An accord and satisfaction acts as an affirmative defense to any subsequent suit by the creditor to collect the balance of the claim.[34] The common law provides a creditor who receives a full settlement check with two options: (1) reject the offer by returning or destroying the check; or (2) cash the check and accept the accord.[35] The creditor cannot avoid an accord and satisfaction by either reserving his or her rights on the check or by "crossing out" the full settlement language on the check.[36]

In addition to mutual assent, a contract must be supported by "fresh" consideration or an effectively recognized substitute.[37] Fresh consideration is supported by the existence of an unliquidated claim or a bona fide

28. *See id.* §§ 18, 273 (requirements of a bargain); *see also* John D. Calamari & Joseph M. Perillo, The Law of Contracts § 1-1 (1987). A contract must have legal consequences, and the contracting parties must be competent and possess the capacity to enter into the contract. *Id.*

29. CORBIN, *supra* note 2, § 1276.

30. *See, e.g.*, Sullivan v. Contant Valley Assoc., 560 N.Y.S.2d 617, 618 (N.Y. 1990); *see infra* note 58 and accompanying text. 'Conspicuous' is defined as being "so written that a reasonable person against whom it is to operate ought to have noticed it." U.C.C. § 1-201(10) (1990).

31. *Dilemma, supra* note 2, at 542.

32. CORBIN, *supra* note 2, § 1276.

33. County Fire Door Corp. v. C.F. Wooding Co., 520 A.2d 1028, 1030 (Conn. 1987); *see also* Hawkland, *supra* note 2, at 330.

34. *County Fire Door Corp.*, 520 A.2d at 1030; Flambeau Products v. Honeywell Info. Sys., 341 N.W.2d 655, 664 (Wis. 1984); CORBIN, *supra* note 2, § 1276.

35. Hawkland, *supra* note 2, at 329.

36. *County Fire Door Corp.*, 520 A.2d at 1031.

37. *Dilemma Revisited, supra* note 2, at 425. The need for consideration when making an accord and satisfaction traces its origin back to English common law. In Foakes v. Beer, L.R. A.C. 605 (1884), Lord Blackman of the House of Lords (England's highest court) cited to Lord Coke's dictum in Pinnel's Case, 5 Coke's Rep. 117a, 77 Eng. Rep. 237 (Com. Pl. 1602), and asserted what later became known as the Rule of Foakes v. Beer:

> that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, or robe & c, in satisfaction is good.

GRANT GILMORE, THE DEATH OF CONTRACT 32 (1974) (citing Foakes v. Beer, L.R. A.C. 605 (1884)). In modern terms, Lord Blackman's point was that, due to the pre-existing duty rule, a contract modification was unenforceable without new consideration. CALAMARI & PERILLO, *supra* note 28, §§ 4-10.

dispute as to the amount due.[38] In addition, "[p]ayment must be tendered in full settlement of the entire dispute and not in satisfaction of a separate undisputed obligation."[39] The honest dispute or unliquidated claim[40] provides consideration, because the creditor is forbearing the right to assert a claim in court for the full amount in exchange for settling the dispute extra-judicially for a lesser sum.[41]

III. The Relationship of Section 1-207 to the Doctrine of Accord and Satisfaction

A. *Background of Section 1-207*

Presently there are two versions of section 1-207[42] in force throughout the fifty states: (1) the pre-1990 version and (2) the 1990 version. The 1990 version of section 1-207, adopted in twenty states,[43] declares that it is

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38. Michaela White, Note, *Does U.C.C. Section 1-207 Apply to the Doctrine of Accord and Satisfaction By Conditional Check?* 11 Creighton L. Rev. 515, 517 n.9 (1977).

> A claim is 'unliquidated' or disputed when there is a bona fide contention that the debtor is not liable for the full amount. Corbin describes several types of unliquidated claims: (1) where the original claim had not been determined by agreement of the parties; (2) where an amount per unit of performance has been agreed by the parties, but the number of units to be performed has been undetermined; (3) amount to be paid has been agreed but the duty to pay is dependent on a questionable fact or event; (4) where the method of payment is unascertained; [and] (5) where the debtor asserts a reduction in a previously decided amount because of a defective performance by the creditor.

Id. (quoting in part Corbin, *supra* note 2, § 1290); *see also* Marton Remodeling v. Jensen, 706 P.2d 607, 609 (Utah 1985); *County Fire Door Corp.*, 520 A.2d at 1031.

39. *Marton Remodeling*, 706 P.2d at 609. A single claim "including both the disputed and undisputed elements, is unitary and not subject to division so long as the whole claim is unliquidated." Air Van Airlines v. Buster, 673 P.2d 774, 778 (Alaska 1983). *See contra Horn Waterproofing Corp.*, 488 N.E.2d at 56 (quoting White and Summers, *supra* note 2, at 544-47). In some instances it may difficult to determine whether a debt is liquidated. This problem can be often resolved by applying the doctrine of "Account Stated" which means "that a debt may become liquidated when it goes unchallenged by the debtor for a period of time." Scott J. Burnham, *Accord And Satisfaction In California: A Trap For The Unwary*, 30 Santa Clara L. Rev. 473, 475-76 & n.13 (1989) (citing Restatement (Second) of Contracts § 282(1) (1981)); *see, e.g.*, Gleason v. Klamer, 103 Cal. App. 3d 782 (1980).

40. It is apparent that "eight jurisdictions do not appear to require an unliquidated or disputed debt for application of the doctrine of accord and satisfaction. (Arkansas, California, Georgia, Maine, Mississippi, New Hampshire, North Dakota, and Virginia)." *Dilemma Revisited*, *supra* note 2, at n.6.

41. Hawkland, *supra* note 2, at 329-30; *see* Flambeau Prod. v. Honeywell Info. Sys., 341 N.W.2d 655, 664 (Wis. 1984). If the debt is liquidated, however, no reasonable dispute exists and the payment of a lesser sum by a full payment check is insufficient to settle the dispute; the creditor may sue the debtor for the balance. *Id.*; *see* Hawkland, *supra* note 2, at 330; *see also supra* note 37 (Foakes v. Beer Rule).

42. *See* app. I (both versions provided).

43. *See supra* note 16.

no longer applicable to the doctrine of accord and satisfaction.[44] Meanwhile, the pre-1990 version is still in force in the remaining thirty states,[45] including the major commercial law states of New York, Ohio, and Massachusetts.[46] The impact of the pre-1990 version of section 1-207 on the common law doctrine has been debated by legal scholars, state courts, and state legislatures.[47]

When the Code was enacted by many states in the 1950s, it was not immediately recognized that section 1-207 altered the common law doctrine of accord and satisfaction.[48] In 1965, a New York trial court[49] first suggested such an interpretation in its dictum, but it was not until 1976 that a state supreme court held that section 1-207 had modified the common law.[50] The pre-1990 version of section 1-207 stated that:

> [a] party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest" or the like are sufficient.[51]

Prior to the adoption of section 1-207, a debtor offering a full-settlement check understood that the creditor only had two options: accept the accord or reject it.[52] However, four state supreme courts, four appellate courts, and one lower court have since concluded that section 1-207 alters the common law and provides a third option to a creditor who has correctly reserved his or her rights under section 1-207, i.e., the right to cash the check and to sue for the disputed balance.[53]

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44. U.C.C. § 1-207(2) (1990) (U.C.C. § 1-207 will hereinafter refer to the pre-1990 version of U.C.C. § 1-207). As of 1990, § 1-207 no longer applies to the doctrine of accord and satisfaction. Instead, § 3-311 now addresses the doctrine.

45. *See supra* note 16. The following states are *not included* in the listing of states who have adopted the 1990 version of § 1-207: Alabama, Alaska, Arizona, Colorado, Delaware, Georgia, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin. *Id.*

46. *See* N.Y. U.C.C. § 1-207 (McKinney 1991); OHIO REV. CODE ANN. § 1301.13 (Anderson 1992); MASS. GEN. LAWS ANN. ch. 16, § 1-207 (West 1992).

47. *See generally supra* note 2.

48. *Dilemma Revisited, supra* note 2, at 429.

49. Hanna v. Perkins, 2 U.C.C. Rep. Serv. (Callaghan) 1044, 1046 (N.Y.S. 1965).

50. Scholl v. Tallman, 247 N.W.2d 490 (S.D. 1976).

51. U.C.C. § 1-207 (1987).

52. *See supra* notes 30-33 and accompanying text.

53. Presently, nine state courts have concluded that § 1-207 alters the common law. Supreme courts: New York (Horn Waterproofing Co. v. Bushwick Iron & Steel, 488 N.E.2d 56 (N.Y. 1985)); Ohio (AFC Interiors v. DiCello, 544 N.E.2d 869 (Ohio 1989)); South Dakota (School v. Tallman, 247 N.W.2d 940 (S.D. 1976)); West Virginia (Charleston Urban Renewal Auth. v. Stanley, 346 S.E.2d 740 (W. Va. 1985) (dicta only)); Appellate courts: Alabama (Bivins v. White Dairy, 378 So. 2d 1122 (Ala. App. 1979)); Kentucky (Ditch Witch Trenching v. C & S Carpentry, 812 S.W.2d 171 (Ky. Ct. App. 1991)); Georgia (American Food Purveyors, Inc. v. Lindsay Meats, 265 S.E.2d

The following five requirements must occur for a model case to fall within both the doctrine of accord and satisfaction and section 1-207. First, the case almost always[54] has to fall within the Code.[55] Second, the essential elements of an accord and satisfaction must have been fulfilled.[56] Third, the creditor must provide an "explicit" reservation of rights as defined in section 1-207.[57] Fourth, the creditor must properly reserve these rights in a judicially accepted manner which is not later held to be inadequate.[58] Finally, the "court [must not] distinguish between an ongoing transaction and one which, except for final payment, would be fully executed."[59] If these five requirements are present, a creditor is permitted to sue the debtor for the remainder of the disputed balance. While it is feasible that section 1-207 enables a creditor to avoid an accord and satisfaction,[60] statutory analysis, legislative history, case law, and public policy reject this interpretation.[61]

IV. Arguments Supporting the Conclusion That Section 1-207 Does Not Alter the Common Law Rule

A. *Statutory analysis of the arguments supporting the position that the common law doctrine has not been altered by section 1-207—an interpretation consistent with the rules of contract formation*

The prevailing view is that section 1-207 was designed to enable parties to continue the performance of an ongoing original contract without the fear of waiver.[62] The Official Comments[63] state that:

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325 (Ga. Ct. App. 1980)); Texas (Robinson v. Garcia, 504 S.W.2d 238 (Tex. App. 1991)); District court: Rhode Island (Strauss, Factor, Hillman & Lopes v. General Corp., 3 U.C.C. Rep. Serv. 2d. (Callaghan) 467 (D.R.I. 1987); *see also infra* notes 197-256 and accompanying text.

54. A New York state supreme court has applied § 1-207 by analogy to a contract involving services. *See Horn Waterproofing*, 488 N.E.2d. at 56; *see also Dilemma*, *supra* note 2, at 542.

55. *Dilemma*, *supra* note 2, at 542.

56. *Id.*; *see supra* notes 29-41 and accompanying text.

57. *Dilemma*, *supra* note 2, at 542. "The emphasis is on 'explicit' because some courts are unwilling to imply 'implicit' reservation." *Id.* at n.69 (citations omitted); *see supra* note 30 and accompanying text.

58. *Dilemma*, *supra* note 2, at 542. Some courts avoid the issue by ruling that the creditor did not properly reserve his rights as described under § 1-207. *See, e.g.*, Air Van Airlines v. Buster, 774 P.2d 774, 778 (Alaska 1983).

59. *Dilemma*, *supra* note 2, at 542.

60. *See infra* notes 197-247 and accompanying text.

61. *See infra* notes 197-202 and accompanying text.

62. Cass Constr. Co. v. Brennan, 382 N.W.2d 313 (Neb. 1986); *see* Hawkland, *supra* note 2, at 330; Rosenthal, *supra* note 2, at 48.

63. The Official Comments are not law, but provide helpful guidance in interpreting the U.C.C. In fact, many Official Comments were added in later versions of the Code to aid in its interpretation. White & Summers, *supra* note 2, at 12. Thus,

> This section provides [the] machinery for the continuation of performance along the lines contemplated by the contract despite the pending dispute. . . . [Section 1-207] merely provides the specific measure on which a party can rely as he makes or concurs in any interim adjustment in the course of performance.[64]

In *County Fire Door Corp. v. C.F. Wooding Co.*,[65] the Connecticut Supreme Court explained that:

> in circumstances like the present, when performance of a sales contract has come to an end, [section 1-207] was not intended to empower a seller . . . to alter that instrument by adding words of protest to a check tendered by a buyer on condition that it be accepted in full satisfaction of an unliquidated debt.[66]

This section is designed to minimize the scope of conflict between the contracting parties by enabling them to complete their obligations without prejudicing their rights with respect to any breach of contract.[67]

Professor William Hawkland asserts that section 1-207 should apply to the following cases: (1) buyer makes payment under an installment contract in which buyer thinks the seller has breached; (2) buyer accepts delivery, although it is believed that the goods do not conform to the contract; or (3) seller proceeds with the performance, in spite of an anticipatory repudiation by the buyer.[68] By using a full payment check to settle a dispute, the debtor is "seeking to fulfill, not continue, his duty to pay."[69] Thus, the language of the Official Comments strongly suggests that section 1-207 was designed to address the problems of waiver, election of remedies, and estoppel. Section 1-207 was not intended to alter the common law.[70]

B. *The conflict between section 1-207 and the concept of contract formation under section 2-204: the need for mutual assent*

A popular argument used to justify the common law rule is that the act of reserving one's rights as described in section 1-207 and the subse-

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the parties who drafted the statutory sections were in many cases not the same parties who drafted the Official Comments. *Id.*

64. U.C.C. § 1-207 cmts. 1-2 (1990). *See also supra* text accompanying note 55. When a court distinguishes between performance and payment, § 1-207 is held inapplicable to the doctrine of accord and satisfaction. *Dilemma, supra* note 2, at 542.

65. 520 A.2d. 1028 (Conn. 1987).

66. *Id.* at 1035.

67. KCF Constr. Inc. v. Amper, 36 U.C.C. Rep. Serv. (Callaghan) 369, 372 (Pa. Commw. Ct. 1983).

68. Hawkland, *supra* note 2, at 331.

69. Chancellor, Inc. v. Hamilton Appliance Co., 418 A.2d 1326, 1329 (N.J. Dist Ct. 1980); *see* Hawkland, *supra* note 2, at 331 (1969); Rosenthal, *supra* note 2, at 63; *Dilemma Revisited, supra* note 2, at 432.

70. Cass Constr. Co. v. Brennan, 382 N.W.2d 319 (Neb. 1986); *see also* Julian B. McDonnell, *Purposeful Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence,* 126 U. PA. L. REV. 795, 828 (1978); Rosenthal, *supra* note 2, at 62-63.

quent cashing of the full payment check constitutes a rejection of the offer by the creditor.[71] In *KCF Construction, Inc. v. Amper*[72] the court stated:

> The party receiving a full payment check is neither performing nor promising performance, and is disowning the condition upon which the check was tendered, this party according to several authorities, is not assenting to the performance in the manner demanded or offered by the other party but, to the contrary, is rejecting performance in the manner demanded or offered by the other party.[73]

Consequently, section 1-207 prevents the offeror from controlling the offer.[74] Judge Benjamin Cardozo agreed with this argument when confronted by the dilemma in a pre-Code case and stated that "[w]hat is said is overridden by what is done, and assent is imputed as an inference of law."[75] Since mutual assent is lacking, as prescribed under the rules of contract formation and section 2-204,[76] an accord and satisfaction should not occur.[77]

C. *The Code stresses the need for explicit notice to effectuate changes in the contractual obligations of the parties during the course of performance*

Notice plays a key role in contract formation, performance, repudiation, rejection, and excuse.[78] For mutual assent and contract formation to occur, notice must be given by both sides as to what terms control the agreement.[79] In *County Fire Door Corp. v. C.F. Wooding Co.*,[80] the Connecticut Supreme Court asserted that Article 2 "recurrently draws inferences from acquiescence in, or objection to, the performance tendered by one of the contracting parties."[81] For example, section 2-208 allows modification to the existing contract through the course of performance as long

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71. KCF Constr. v. Amper, 36 U.C.C. Rep. Serv. (Callaghan) 369, 371 (Pa. Commw. Ct. 1983); *see Dilemma Revisited, supra* note 2, at 431.

72. 36 U.C.C. Rep. Serv. (Callaghan) 369 (Pa. Commw. Ct. 1983).

73. *Id.* at 371; *see* Cass Constr. Co. v. Brennan, 382 N.W.2d 313, 316 (Neb. 1986); Les Schwab Tire Centers v. Ivory, 664 P.2d 419, 421 (Or. Ct. App. 1983). *See also* U.C.C. § 2-204 (1990).

74. Flambeau Prod. v. Honeywell Info. Sys., 341 N.W.2d 655, 663 (Wis. 1984); *see Dilemma Revisited, supra* note 2, at 425; CORBIN, *supra* note 2, § 1279.

75. Rosenthal, supra note 2, at 54 (quoting Hudson v. Yonkers Furniture Co., 179 N.E. 373, 374 (N.Y. 1932)).

76. U.C.C. § 2-204 (1990). "A contract . . . may be made in any manner sufficient to show agreement, including conduct by the parties which recognizes the existence of such a contract." *Id.* § (1) (mutual assent implied).

77. *Id.*; *see supra* notes 26-28 and accompanying text.

78. *See* U.C.C. §§ 2-504, 2-508, 2-602(1), 2-606(1), 2-607(3), 2-608, 2-612(3), 2-616(1)-(2) (1990).

79. *See supra* notes 30-31 and accompanying text.

80. 520 A.2d 1028 (Conn. 1987).

81. *Id.* at 1033.

as such performance is accepted or acquiesced in without objection.[82] Section 2-207(2) permits contract modification between merchants unless timely notification of the objection is provided.[83] In addition, section 2-607(2)[84] requires that "a buyer who is confronted by a defective tender of goods must make a seasonable objection or lose his right of rejection."[85] Furthermore, the following sections of Article 2, sections 2-504, 2-508, 2-602(1), 2-605, 2-606(1), 2-612(3), and 2-616(1)-(2), dealing with performance, breach, cure, rejection, repudiation, and excuse, all "[urge] the contracting parties to engage in a continuing dialogue about what constitutes acceptable performance."[86] Thus, these sections of the Code require notice to the other party before any contract altering acts becomes effective.[87] It seems unlikely that the drafters of the Code would be silent on the issue of unilateral contract modification, but vocal on bilateral contract modification.

D. *Section 1-207 and the duty of "good faith" imposed by the Code*

"Could it not be argued that a creditor acts in bad faith by cashing a check and reserving his rights when the check is marked 'paid in full'?"[88] The act appears on its face to be inconsistent with the duty of good faith required by sections 1-203, 1-102(3), and 1-201(19).[89] First, "[e]very contract or duty within the Code imposes an obligation of good faith in its performance or enforcement."[90] Second, "[g]ood faith is [narrowly] defined as honesty in fact in the conduct or transaction concerned."[91] Third, "[t]he parties cannot disclaim the obligation of good faith by agreement."[92] Based on these sections, it can be inferred that "[o]ne party cannot unilaterally disclaim an obligation of good faith."[93]

If an attempt to reserve one's rights violates the good faith requirement, this act would be struck down by the courts.[94] Since section 1-201(19) defines 'good faith' narrowly as 'honesty in fact,' a creditor behaving in this manner should not necessarily be characterized as dishonest.[95] Most courts avoid using the 'good faith concept' to void a creditor's act of cashing a check under protest since the court would be

82. U.C.C. § 2-208(1) (1990); *see* County Fire Door Corp. v. C.F. Wooding Co., 520 A.2d 1028, 1033 (Conn. 1987).
83. U.C.C. § 2-207(2) (1990); *see County Fire Door Corp.*, 520 A.2d at 1033.
84. U.C.C. § 2-607(2); *see County Fire Door Corp.*, 520 A.2d at 1034.
85. *County Fire Door Corp.*, 520 A.2d at 1033; *Dilemma, supra* note 2, at 551.
86. *County Fire Door Corp.*, 520 A.2d at 1034.
87. *Dilemma, supra* note 2, at 551.
88. Hawkland, *supra* note 2, at 332.
89. U.C.C. §§ 1-203, 1-102(3), 1-201(19) (1990).
90. *Id.* § 1-203.
91. *Id.* § 1-201(19).
92. *Id.* § 1-102(3).
93. *Dilemma, supra* note 2, at 550.
94. Hawkland, *supra* note 2, at 332.
95. *Id.*

substituting its own judgment in place of a questionable "legislative mandate" found in section 1-207.[96] "After all, it is difficult to find a person acting in bad faith when . . . merely exercising a right given . . . him by the legislature."[97]

E. *Wording of section 1-207*

In rejecting the position that section 1-207 alters the common law, some state courts based their conclusion, in part, on the fact that the term "payment" is omitted from the text[98] and Official Comments.[99] In *KCF Construction, Inc. v. Amper*,[100] the court stated that this omission is significant because the Code distinguishes between "payment" and "performance" in section 1-208.[101] Yet, this argument is not conclusive proof that section 1-207 does not alter the common law, because some courts have held in other circumstances involving the Code that an omission does not necessarily mean exclusion.[102] For example, section 2-201, dealing with the statute of frauds, lists three exceptions to the writing requirement.[103] Although promissory estoppel, a pre-Code exception, is not mentioned as an exception to the writing requirement, some courts still hold that promissory estoppel applies to section 2-201 through section 1-103.[104] Courts and legal scholars continually debate whether omission of a term means exclusion or inclusion of the term.[105] Often the courts base their opinions on other factors such as equity under section 1-103.[106]

F. *Does section 1-207 create an exception to the common law requirements of contract formation: a comparative analysis of section 2-207*

As stated earlier, an interpretation holding that section 1-207 alters the doctrine of accord and satisfaction is inconsistent with the traditional requirements of contract formation, particularly with the theory of notice

96. *Id.*
97. *Id.*
98. U.C.C. § 1-207 (1987).
99. *See, e.g.*, County Fire Door Corp. v. C.F. Wooding Co., 520 A.2d 1028 (Conn. 1987); Cass Constr. Co. v. Brennan, 382 N.W.2d 313 (Neb. 1986); Jahn v. Burns, 593 P.2d. 828, 830 (Wyo. 1979).
100. 36 U.C.C. Rep. Serv. (Callaghan) 369, 371 (Pa. Commw. Ct. 1983).
101. *Id.* Section 1-208 states: "[A] term providing that one party or his successor in interest may accelerate payment or performance . . . ." U.C.C. § 1-208 (1990); *see also Jahn*, 593 P.2d at 830.
102. WHITE & SUMMERS, *supra* note 2, § 2-6.
103. *Id.*
104. *See, e.g.*, MacIntosh v. Murphy, 469 P.2d 177 (Haw. 1970); Northwest Potato Sales, Inc. v. Beck, 678 P.2d 1138 (Mont. 1984); *see also* WHITE & SUMMERS, *supra* note 2, § 2-6; U.C.C. § 1-103 (1990).
105. WHITE & SUMMERS, *supra* note 2, § 2-6. Pre-Code exceptions may still be implied through § 1-103 which incorporates the common law. U.C.C. § 1-103.
106. U.C.C. § 1-103. *Cf.* WHITE & SUMMERS, *supra* note 2, § 2-6.

and mutual assent.[107] However, the traditional rules of contract formation are displaced by the U.C.C. in three sections: 2-205, 2-207, and 2-209. Section 2-205 permits the creation of an irrevocable offer between merchants, called a "firm offer," in which the need for consideration is eliminated.[108] Section 2-209 eliminates the need for consideration for contract modification, if it is in writing and modified in good faith.[109]

The third section modifying the common law principles of contract formation is section 2-207, which deals with the situation where the terms of the offer and acceptance are different.[110] Under the common law, an acceptance had to be the "mirror image" of the offer.[111] An acceptance that "adds [even trivial] qualifications or conditions operates as a counter-offer and thereby [becomes] a rejection of the offer."[112] Thus, when the offer and acceptance are different, no contract is formed. If the parties later performed, the terms of the contract would be controlled by the terms of the counter-offer.[113]

In contrast, section 2-207, commonly known as the "Battle of the Forms" section, changes the common law rule because the first offer controls the agreement.[114] If the acceptance contains additional or different terms, there is a contract as to the terms agreed upon.[115] The additional or different terms are merely proposals. Additional terms may become part of the contract in certain situations under section 2-207(2) (contracts between merchants).[116]

A creditor's attempt to add words of reservation or to "cross-out" the full settlement proposal would be an attempt to change the offer and

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107. *See supra* notes 71-77 and accompanying text.

108. U.C.C. § 2-205 (1990).

109. U.C.C. § 2-209 (1990). *See also* U.C.C. §§ 1-203, 2-103(1)(b) (1990) (obligation of good faith).

110. WHITE & SUMMERS, *supra* note 2, § 1-3.

111. CALAMARI & PERILLO, *supra* note 28, § 2-21.

112. *Id.* "An acceptance must be unconditional, identitical to the offer, and must not modify, delete or introduce any new items into the offer." Gyurkey v. Babler, 651 P.2d 928 (1982); *see also* Wagner v. Rainier Mfg. Co., 371 P.2d 74 (1962).

113. CALAMARI & PERILLO, *supra* note 28, § 2-21 (describing the "last shot" effect).

114. *Id.*; U.C.C. § 2-207 (1990) (referring to the first shot effect).

115. There is no contract if acceptance is expressly made conditional on assent to the additional or different terms. U.C.C. § 2-207(1) (1990).

116. U.C.C. § 2-207(2):

> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants, such terms become part of the contract unless:
>
> (a) the offer expressly limits acceptance to the terms of the offer;
>
> (b) they materially alter it; or
>
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Id. Massachusetts has revised § 2-207(2) to include both "additional or different" terms. *See* MASS. GEN. LAWS ANN. ch. 106, § 2-207(2) (West 1992).

thus, would be treated as an additional or different term.[117] In contracts between merchants, section 2-207(2) is incompatible with section 1-207 "if it is agreed that a reservation of rights by the payee on a full settlement check is a material alteration or that the full payment language on the check by the debtor constitutes an express limitation as to the acceptance."[118] When section 2-207(2) is applied to an accord and satisfaction, a significant inequity is created: the offeror never learns of the rejection until it is too late. The creditor has materially altered the debtor's offer without the debtor's consent, an act prohibited by section 2-207(2).[119] In cases involving a non-merchant, if the offer does not match the acceptance, the additional or different terms (i.e., reservations of rights) are mere proposals and not part of the agreement, and the contract consists of only agreed upon terms.[120] Section 2-207 does not contain any provision which permits one party to unilaterally alter the terms of the offer.[121] Thus, section 2-207 effectuates an accord and satisfaction when the full settlement check is cashed.

Since the proposed interpretation of section 1-207 conflicts with section 2-207 for the purposes of contract formation, it is unreasonable to conclude that both sections are intended to deal with contract formation.[122] The Official Comments of both sections fail to indicate the nature of the conflict or a possible solution. This conflict contradicts section 1-102(2), which states that the "[u]nderlying purposes and policies of this Act are . . . to simplify, clarify and modernize the law governing commercial transactions."[123] Section 1-207 does not function consistently with the requirements of contract formation or an accord and satisfaction, but works best at solving problems that transpire during the ongoing performance of a contract.[124] Its purpose is to address "situations where a non-breaching party elects to continue performance of the contract even though he believes that the other party has committed a non-material or material breach."[125]

G. *Interpreting the Code: promoting its underlying policies*

When two conflicting interpretations exist, an important question is: does either interpretation serve or hinder the underlying purposes and

117. U.C.C. § 2-207.

118. *Dilemma, supra* note 2, at 550-51.

119. U.C.C. § 2-207(2).

120. *Id.*

121. *Dilemma, supra* note 2, at 551; *see also* WHITE & SUMMERS, *supra* note 2, § 1-3.

122. U.C.C. § 1-102; *Dilemma, supra* note 2, at 551.

123. U.C.C. § 1-102(2)(a); *see also Dilemma, supra* note 2, at 551.

124. *See supra* text accompanying notes 62-70. "This section provides the machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute." U.C.C. § 1-207 cmt. 1 (1990).

125. *Dilemma, supra* note 2, at 551; *see* text accompanying note 67.

policies of the U.C.C.?[126] Section 1-102 and its Official Comments state that the Code is to be interpreted liberally and broadly so that it may cope with new or unforeseen circumstances or practices that occur after its enactment.[127] Accordingly, this section can arguably be manipulated to support either interpretation of section 1-207.[128] For example, section 1-102(1) has been interpreted by New York state courts as supporting the proposition that section 1-207 modifies the common law.[129] One appellate court has stated that nothing in the language of section 1-207 requires a narrow interpretation of the section, nor is there any language that prohibits applying section 1-207 to the doctrine of accord and satisfaction.[130] Conversely, other state courts have used section 1-102 to conclude that section 1-207 does not apply to the doctrine of accord and satisfaction.[131] In *Flambeau Products Corp. v. Honeywell Information Systems, Inc.*,[132] the Supreme Court of Wisconsin asserted that:

> [A]pplying [section 1-207] to the full payment check would not necessarily serve to 'simplify' or 'clarify' or 'modernize' the law governing commercial transaction. 'Nor would an application of [section 1-207] promote the purpose and policy of the U.C.C. of permitting the continued expansion of commercial practice through . . . agreement of the parties. All that would be accomplished would be the elimination of the simple technique of the full payment check.[133]

The Supreme Court of Nebraska agreed with this conclusion, and stated in *Cass Construction Co. v. Brennan*[134] that "this interpretation of

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126. U.C.C. § 1-102(1)-(2) (describing the purposes and policies of the Code).

> (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
>
> (2) Underlying purposes and policies of this Act are
>
> (a) to simplify, clarify and modernize the law governing commercial transactions;
>
> (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
>
> (c) to make uniform the law among the various jurisdictions.

Id.

127. *Id.* The drafters desired a flexible code to endure through the ages. U.C.C. § 1-102 cmt. 1.

128. *See infra* text accompanying notes 197-256 (arguments supporting the position that § 1-207 alters the common law).

129. Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., 488 N.E.2d 55, 61 (N.Y. 1985); Continental Info. Sys. Corp. v. Mutual Life Ins. Co., 432 N.Y.S.2d 952, 955 (N.Y. App. Div. 1980); *see also Dilemma, supra* note 2, at 551.

130. *Continental Info. Sys. Corp.*, 432 N.Y.S.2d at 955.

131. *E.g.*, Flambeau Prod. Corp. v. Honeywell Info. Sys., 341 N.W.2d 655, 662-63 (Wis. 1984); Cass Constr. Co. v. Brennan, 382 N.W.2d 313, 320 (Neb. 1986).

132. 341 N.W.2d 655 (Wis. 1984).

133. *Id.* at 663.

134. 382 N.W.2d 313 (Neb. 1986).

section 1-207 negates or certainly complicates a convenient and valuable means of settling disputes informally."[135]

Interpreting section 1-102 in conjunction with section 1-103 suggests that section 1-207 was not intended to displace the common law.[136] While the Official Comments do not prohibit an interpretation that section 1-207 alters the common law, little evidence supports this conclusion.[137] As a general practice, the Official Comments point out significant departures from the common law.[138] Section 1-103 states that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including . . . the law relative to capacity to contract, . . . estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."[139] Nevertheless, the Official Comments to section 1-207 conspicuously omit any reference to displacing the common law.[140] "Section 1-102 was not intended to conflict with the older and firmly entrenched common law concepts such as accord and satisfaction."[141] In addition, Official Comment 1 of section 1-102 confirms such an assertion when defining the meaning of the term "liberally construed":

> The text of each section should be read in light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.[142]

Accordingly, a liberal interpretation could take the form of a narrow construction of section 1-207 due to the firm entrenchment of the common law doctrine of accord and satisfaction and section 1-103, which preserves the common law, unless displaced by the Code.[143] When analyzing

135. *Id.* at 320. In addition, the Colorado Supreme Court supported this conclusion by quoting the RESTATEMENT (SECOND) OF CONTRACTS § 281 cmt. d, which states that § 1-207 "need not be read as changing this well established rule of accord and satisfaction." Anderson v. Rosebrook, 737 P.2d 417, 420 (Colo. 1987) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 281 cmt. d (1978)).

136. *Dilemma, supra* note 2, at 548.

137. *E.g.*, Stultz Elec. Works v. Marine Hydraulic Eng'g Co., 484 A.2d 1008, 1010-11 (Me. 1984).

138. *E.g.*, Hawkland, *supra* note 2, at 331.

139. U.C.C. § 1-103.

140. *Stultz Elec. Works*, 484 A.2d at 1010; KCF Constr. v. Amper, 36 U.C.C. Rep. Serv. (Callaghan) 369, 372 (Pa. Commw. Ct. 1983); John Grier Constr. v. Jones Welding, 383 S.E.2d 719, 722 (Va. 1989); see Hawkland, *supra* note 2, at 331.

141. *Dilemma, supra* note 2, at 548.

142. U.C.C. § 1-102 cmt. 1.

143. *Dilemma, supra* note 2, at 548. The Code policies include "permit[ting] the continued expansion of commercial practices through custom, usage, and agreement of the parties. . . ." § 1-102(2). An application of section 1-207 to bar an accord and satisfaction would certainly hinder the development of sound commercial practices by rendering "agreement of the parties" meaningless. *Stultz Elec. Works*, 484 A.2d. at 1012.

the impact of section 1-102 alone, it could support either position. However, when examining section 1-102 with section 1-103, as well as with the other sections of the Code previously discussed, a strong argument can be made that section 1-207 does not alter the common law doctrine of accord and satisfaction.[144]

H. *Legislative/statutory history supporting the common law rule*

Section 1-207 did not appear in the earlier forms of the Code. The precursor of section 1-207 first appeared in Article 2 of the Uniform Sales Act.[145] Professor Karl Llewellyn, one of the principal drafters of the Uniform Commercial Code, included the provision in the Revised Uniform Sales Act[146] where it was intended to be "part of a series of sections aimed 'at smoothing the course of performance.'"[147] When section 1-207 first appeared in the U.C.C., it was placed within Article 3 and co-existed with later deleted section 3-802(3).[148] Section 3-802(3) substantially codified the common law rule of the full settlement, stating that "[w]here a check or similar payment instrument provides that it is in full satisfaction of an obligation, the payee discharges the underlying obligation by obtaining payment of the instrument unless he established that the obligor has taken unconscionable advantage of the circumstances."[149] In addition, Official Comment 5 to section 3-802(3) provided detailed examples of situations in which full settlement checks were applied to the doctrine of accord and satisfaction.[150] In 1950, section 1-207 was transferred from Article 3 to Article 1, the introductory article.[151] Thus, from 1950 to 1956, section 1-207 co-existed independently of section 3-802(3), each section serving a different role.[152]

Section 3-802(3) and its Official Comments significantly altered the common law rule.[153] In *Cass Construction Co. v. Brennan*,[154] the Nebraska Supreme Court explained that section 3-802(3) "expanded the common law by permitting an accord and satisfaction when the obligation was undisputed and liquidated. Because . . . [section 3-803(3)] might have been

144. County Fire Door Corp. v. C.F. Wooding Co., 520 A.2d 1028, 1032-34 (Conn. 1987).

145. Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 827 (1978).

146. Uniform Sales Act § 49, 1a U.L.A 99 (1950), *repealed by* the U.C.C.

147. McDonnell, *supra* note 145, at 828 (citing A.L.I. REVISED UNIFORM SALES ACT, Intro. Cmt. to Part IV—Performance § 71-90, at 237 (Proposed Final Draft No. 1, 1944)).

148. U.C.C. § 3-802(3) (1950) (*repealed* 1969).

149. *Id.*

150. Flambeau Prod. v. Honeywell Info. Sys., 341 N.W.2d 655, 661-62 (Wis. 1984) (quoting U.C.C. § 3-803(3) cmt. 5 (*repealed*, 1956)).

151. McDonnell, *supra* note 145, at 827.

152. *Id.*

153. *Flambeau Products*, 341 N.W.2d at 661.

154. 382 N.W.2d 313 (Neb. 1986).

open to abuse, it was deleted in the 1957 official draft."[155] The court asserted that "the significance of 3-802(3) was that it existed entirely without reference to section 1-207."[156] In addition, section 3-112(f) in the 1952 version of the Code, which refered to the negotiability of full settlement checks, failed to refer to section 1-207, and instead only cross-referenced with section 3-802(3).[157] The Oregon Appellate Court arrived at the same conclusion in *Les Schwab Tire Centers.*[158] Sections 1-207 and 3-802(3) could arguably be interpreted as complementing each other, with section 3-802(3) "providing presumptively for discharge of the obligation but subject to a grant by the payee by . . . [section 1-207] of the power to override this result by use of the appropriate language."[159] However, Professor Rosenthal considers this interpretation highly unlikely:[160]

> If this [result] had been meant, however, it seems inconceivable that it would not have been expressed somewhere. Moreover, even apart from the effects of section 3-802(3), and especially in light of the attention and criticism given section 1-207, if so fundamental a change in the law of accord and satisfaction had been intended it seems likely that it would have been articulated—particularly during the critical years in the mid-fifties, when the fate of the Code hung in precarious balance, dependent upon the actions of the New York State Law Revision Commission and the responses thereto of the Code's proponents.[161]

After section 3-802(3) was dropped from the Code in 1956, Article 3 provided little support to the conclusion that section 1-207 altered the common law, permitting a party to unilaterally alter the terms of an accord.[162] For example, section 3-407 takes an unfavorable position on the unauthorized alteration of an instrument.[163]

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155. Cass Constr. Co. v. Brennan, 382 N.W.2d 313, 319 (Neb. 1986).

156. *Id.* (citing U.C.C. §§ 1-207 (1987), 3-802(3) (1950), (Official draft 1952)); *see Flambeau Prod.*, 341 N.W.2d at 662; Rosenthal, *supra* note 2, at 60-61; *see also Dilemma Revisited, supra* note 2, at 434.

157. *Cass Constr. Co.*, 382 N.W.2d at 319.

158. 664 P.2d 419 (Or. Ct. App. 1983). The court stated:

> The instructive value in Section 3-802(3) is that it existed entirely without reference to Section 1-207. The comments to neither section referenced the other. Similarly, the comment to Section 3-112(f), which speaks of the negotiability of checks tendered as payment in full, omits reference to Section 1-207 and instead cross-references only Section 3-802(3). This background indicates that the drafters of Sections 1-207 and 3-802(3) probably did not intend to write overlapping sections regarding accord and satisfaction but, rather, conceived of them as unrelated.

Id. at 422.

159. Rosenthal, *supra* note 2, at 61 (1978).

160. *Id.*

161. *Id.*

162. County Fire Door Corp. v. C.F. Wooding Co., 520 A.2d 1028, 1032 (Conn. 1987).

163. U.C.C. § 3-407 (1987); *see also Dilemma Revisited, supra* note 2, at 436.

> [A]ny alteration of an instrument is material which changes the contract of any party thereto in any respect . . . . The effect of the material alteration of a completed instrument is either to discharge the liability, on the instrument, of "any party whose contract is thereby changed," or to continue the enforceability of the instrument "according to its original tenor."[164]

Section 3-802(1)(b)[165] also supports this reasoning.[166] Consequently, the Supreme Court of Connecticut concluded that "[b]ecause the check tendered by the defendant was only enforceable 'according to its original tenor,' the plaintiff, by receiving 'payment or satisfaction,' discharged the defendant not only on the instrument but also on the underlying obligation."[167] Thus, from this analysis of Article 3, the evidence supports the conclusion that section 1-207 was not intended to alter the common law doctrine of accord and satisfaction.

Finally, this section should not be construed as altering the common law because the drafters of the Code officially and explicitly asserted that section 1-207 does not apply to the doctrine of accord and satisfaction in its 1990 revision of the Code.[168] Although the revised version has not been adopted in every state, it is clearly persuasive authority reflecting the intent of the Code's drafters.[169] By rejecting the common law rule, a court would be disregarding the past and present intent of the statutory history of this section.[170]

I. *Policy reasons supporting the common law*

The law favors settlement, and the doctrine of accord and satisfaction significantly furthers this goal.[171] If the courts permit a creditor to cash the check and sue on the balance of a disputed claim, out-of-court settlements will be severely discouraged and more suits may be filed.[172] Debtors will avoid settling and instead will seek judicially binding results.

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164. *County Fire Door Corp.*, 520 A.2d at 1032 (quoting in part § 3-407).

165. U.C.C. § 3-802(1)(b) (1987). In 1990 the U.C.C. eliminated § 3-802, a section used by many courts to support the majority rule, and replaced it with § 3-310.

166. *County Fire Door Corp.*, 520 A.2d at 1032 (citing § 3-802(1)(b)).

167. *Id.* (quoting in part § 3-407).

168. U.C.C. § 1-207(2) (1990); *see also id.* cmts. 1-3; *see infra* text accompanying notes 280-84.

169. *See* Burke Co. v. Hilton Department Co., 802 F. Supp. 434, 438 (D. Fla. 1992).

170. U.C.C. § 3-803(2) (1950); U.C.C. § 1-207(2); *see supra* text accompanying notes 145-67 (reviewing past intent); *see infra* text accompanying notes 280-84 (reviewing present intent).

171. *See, e.g.*, Teledyne Mid-America Corp. v. HOH Corp., 486 F.2d 987, 994 (9th Cir. 1973); Stultz Electric Works v. Marine Hydraulic Eng'g Co., 484 A.2d. 1008, 1012 (Me. 1984); Marton Remodeling v. Jenson, 706 P.2d 607, 610 (Utah 1985).

172. *Stultz Elec. Works*, 484 A.2d at 1012; McKee Constr. v. Stanley Plumbing, 828 S.W.2d 700, 705 (Mo. Ct. App. 1992); *Marton Remodeling*, 706 P.2d at 610; Flambeau Prod. v. Honeywell Info. Sys., 341 N.W.2d 655, 663-64 (Wis. 1984).

Adopting the minority rule is judicially and commercially unwise.[173] "An offer of compromise is not an admission that anything is due . . . [and] constitutes no proof of liability."[174] If a creditor sues for the remainder of the debt, the debtor will most likely counterclaim and allege that the debt is less than the settlement offer.[175] If the check is cashed, the debtor should have a claim for restitution under section 2-711(1).[176] In addition, the debtor may claim that due to prior course of dealings or trade usage, cashing a check constitutes an accord and satisfaction.[177] Although the drafters of the Code intended that remedies be administered liberally,[178] the courts should avoid judicial activism and not usurp the rights of the parties to contract at "arms-length" unless the contracting process is substantially inhibited due to unconscionability, duress, or any other legally recognized excuse.[179] By permitting a creditor to avoid an accord and satisfaction, the courts are exploiting a broadly worded statute to create a new defense without the legislature's approval. Since the judicial system is already overburdened, equitable devices to settle disputes extra-judicially should be encouraged.[180] Interpreting section 1-207 as altering the common law rule is judicially inefficient because it promotes more litigation.[181]

A rejection of the common law rule position would "lead to an unduly complicated procedure in which debtors would have to add to the customary term 'payment in full' a further statement that endorsement of the check also constitutes an agreement to forego the reservation of rights under section 1-207 . . . [and a] new 'battle of the forms' would thus be created."[182] This result defeats an important goal of accord and satisfaction: to settle disputes informally in a convenient and useful manner.

Also, as Corbin argues, it is unfair that a creditor can alter the agreement without the debtor's knowledge.[183]

> It is unfair to the party who writes the check thinking that he will be spending his money only if the whole dispute is over, to allow the other

173. Milligram Food Stores, Inc. v. Gelco Corp., 550 F. Supp. 992, 997 (W.D. Mo. 1982); Pillow v. Thermogas Co., 644 S.W.2d 292 (Ark. Ct. App. 1982).

174. Potter v. Pacific Coast Lumber Co., 234 P.2d 16, 20 (Cal. 1951). Offers of compromise are inadmissible evidence. FED. R. EVID. 408.

175. AFC Interiors v. Dicello, 544 N.E.2d 869, 872 (Ohio 1989) (a 4-3 opinion with vigorous dissent).

176. U.C.C. § 2-711(1) (1990).

177. U.C.C. §§ 1-205, 2-208 (1990).

178. U.C.C. § 1-106(1) (1990).

179. U.C.C. §§ 1-103, 2-302 (1990) (providing common law and statutory defenses).

180. McKee Constr. v. Stanley Plumbing, 828 S.W.2d 700, 706 (Mo. Ct. App. 1992).

181. Milligram Food Stores, Inc. v. Gelco Corp., 550 F. Supp. 992, 997 (W.D. Mo. 1982).

182. Cass Constr. Co. v. Brennan, 382 N.W.2d 313, 320 (Neb. 1986).

183. CORBIN, *supra* note 2, § 1279 (commonly referred to as the dilemma of § 1-207).

> party, knowing of that reasonable expectation, to weasel around the deal by putting his own markings on the other person's check. There is no reason why section 1-207 should be interpreted as an exception to the basic duty of good faith . . . [nor] justify licensing the recipient of the check to deceive the drawer.[184]

Thus, applying section 1-207 to the common law rule contradicts the concept of equity imposed by section 1-103.[185] Since it is almost universally accepted that the offeror is the owner of his or her offer, this interpretation is contrary to the expectations of the parties involved in the dispute.[186] "The common law doctrine of accord and satisfaction promotes fairness by protecting the bona fide expectations of the debtor who tenders payment on condition that it will be accepted as payment in full, ending the dispute."[187]

J. *Summary of the case law supporting the common law rule*

In adopting the common law doctrine, courts generally base their decision on a combination of four arguments. First, the text of section 1-207 is intended to apply to the continued performance of an ongoing contract, not to the payment of debt once performance is completed.[188] Second, since section 1-207 does not mention displacing the common law, the common law doctrine of accord and satisfaction is still recognized under section 1-103.[189] Third, since deleted section 3-802(3) was specifically designed to deal with accord and satisfaction, section 1-207 cannot apply to the same situation because the two sections failed to refer to one another during their co-existence.[190] Fourth, applying section 1-207 to an accord and satisfaction defeats the policy of the Code to simplify and clarify commercial transactions as well as the concept that the law favors settlement.[191]

The case law indicates that the common law rule is firmly supported by statutory analysis, statutory history, public policy, and basic contract law. Despite the fact that there is little uniformity in the arguments used to preserve the common law, the courts addressing the issue have reached a consensus that the common law rule should control.[192] At one

184. *Id.*

185. U.C.C. § 1-103.

186. *See supra* notes 71-73 and accompanying text.

187. McKee Constr. v. Stanley Plumbing, 828 S.W.2d 700, 705 (Mo. Ct. App. 1992); Flambeau Prod. v. Honeywell Info. Sys., 341 N.W.2d 655, 658-59 (Wis. 1984).

188. *See, e.g.*, Cass Constr. Co. v. Brennan, 382 N.W.2d 313, 318 (Neb. 1986).

189. *See, e.g.*, John Grier Constr. v. Jones Welding, 383 S.E.2d 719, 722 (Va. 1989).

190. *See, e.g., Cass Constr.*, 382 N.W.2d at 319.

191. *See supra* notes 132-35 and accompanying text; *see, e.g.*, Teledyne Mid-America Corp. v. HOH Corp., 486 F.2d 987, 994 (9th Cir. 1973); Marton Remodeling v. Jenson, 706 P.2d. 607, 610 (Utah 1985).

192. *McKee Constr.*, 828 S.W.2d at 704; AFC Interiors v. Dicello, 544 N.E.2d 869, 874 (Ohio 1989) (Brown, J., dissenting) (a 4-3 opinion with a vigorous dissent). Almost all legal scholars agree that § 1-207 does not alter the common law. *Id.*

time, ten state supreme courts and eleven appellate level courts firmly upheld the common law.[193] Unfortunately, the state legislatures and the state courts are not in agreement. Nine of these state legislatures[194] have now adopted section 3-311, superseding the state's case law supporting the common law rule.[195] Presently, only five state supreme courts and six state appellate courts still follow the common law rule.[196]

193. The supreme courts include: Alaska (Air Van Lines v. Buster, 673 P.2d 774 (Alaska 1983)); Colorado (Anderson v. Rosebrook, 737 P.2d 417 (Colo. 1987)); Connecticut (County Fire Door Corp. v. C.F. Wooding Co., 520 A.2d 1028, 1030 (Conn. 1987)); Maine (Stultz Elec. Works v. Marine Hydraulic Eng'g Co., 484 A.2d 1008 (Me. 1984)); Nebraska (Cass Const. Co. v. Brennan, 382 N.W.2d 313 (Neb. 1986)); Utah (Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985)); Vermont (Gallagher Lumber Co. v. Shapiro, 400 A.2d 984 (Vt. 1979)); Virginia (John Grier Const. Co. v. Jones Welding Co., 383 S.E.2d 719 (Va. 1989)); Wisconsin (Flambeau Prod. v. Honeywell Info. Sys., 341 N.W.2d 655 (Wis. 1984)); Wyoming (Jahn v. Burn, 593 P.2d 828 (Wyo. 1979)). The appellate courts include: Arkansas (Pillow v. Thermoggs, 644 S.W.2d 292 (Ark. Ct. App. 1982)); California (Connecticut Printers v. Gus Krosen, Inc., 134 Cal. App. 3d 54 (Cal. Ct. App. 1982)); Idaho (Perkins v. Highland Enterprises, WL 115736 (Idaho Ct. App. 1991)); Kansas (Weidensaul v. Greenhouse Restaurant, 762 Kan. App. 196 (Kan. App. 1988)); Louisiana (Ingraham Concrete Structures v. Champion Shipyards, 423 So. 2d 752 (La. Ct. App. 1982)); Missouri (McKee Constr. v. Stanley Plumbing & Heating Co., 828 S.W.2d 700, 706 (Mo. Ct. App. 1992)); New Jersey (Chancellor, Inc. v. Hamilton Appliance Co., 418 A.2d 1326 (N.J. Sup. Ct. 1980)); North Carolina (Brown v. Coastal Truckways, 261 S.E.2d 266 (N.C. Ct. App. 1980)); Oregon (Les Schwab Tire Centers v. Ivory Ranch, 664 P.2d 419 (Or. Ct. App. 1983)); Washington (State Dep't of Fisheries v. J-Z Sales, 610 P.2d 390 (Wash. Ct. App. 1980)); Texas (Hixon v. Cox, 633 S.W.2d 330 (Tex. Ct. App. 1982); *see also* Pileco Inc. v. HCI Inc., 735 S.W.2d 561 (Tex. Ct. App. 1987)).

194. Arkansas (ARK. CODE ANN. § 4-3-311 (Michie 1992)); California (CAL. BUS. CODE § 3311 (West 1992)); Connecticut (CONN. GEN STAT. § 42a-3-311 (1993)); Kansas (KAN. U.C.C. ANN. § 84-3-311 (Vernon 1992)); Louisiana (LA. REV. STAT. ANN. § 10-3-311 (West 1992)); Missouri (MO. REV. STAT. § 400-3-311 (1992)); Nebraska (NEB. REV. STAT. § 3-311 (1992)); Wyoming (WYO. STAT. § 34.1-3-311 (1992)).

195. *See supra* note 193.

196. State supreme courts: Alaska (Air Van Lines v. Buster, 673 P.2d 774 (Alaska 1983)); Colorado (Anderson v. Rosebrook, 737 P.2d 417 (Colo. 1987)); Maine (Stultz Elec. Works v. Marine Hydraulic Eng'g Co., 484 A.2d 1008 (Me. 1984)); Vermont (Gallagher Lumber Co. v. Shapiro, 400 A.2d 984 (Vt. 1979)); Wisconsin (Flambeau Prod. v. Honeywell Info. Sys., 341 N.W.2d 655 (Wis. 1984)). The appellate courts: Idaho (Perkins v. Highland Enter., WL 115736 (Idaho Ct. App. 1991)); New Jersey (Chancellor, Inc. v. Hamilton Appliance Co., 418 A.2d 1326 (Passaic Ct. 1980)); North Carolina (Brown v. Coastal Truckways, 261 S.E.2d 266 (N.C. Ct. App. 1980)); Oregon (Les Schwab Tire Ctrs. v. Ivory Ranch, 664 P.2d 419 (Or. Ct. App. 1983)); Texas (Hiton v. Cox, 633 S.W.2d 330 (Tex. Ct. App. 1980), (Pileco v. HCI Inc., 735 S.W.2d 561 (Tex. Ct. App. 1987)); Washington (State Dept. of Fisheries v. J-Z Sales Corp., 610 P.2d 390 (Wash. Ct. App. 1980)).

V. Arguments Supporting the Position That Section 1-207 Alters the Common Law

A. *Public policy*

Courts adopting the position that section 1-207 alters the common law have concluded that the creditor was in an unfair and disadvantageous position when offered a full settlement check.[197] The common law doctrine of accord and satisfaction was an imperfect device and failed to remedy a major modern dilemma: debtor extortion.[198]

> Offering a check for less than the contract amount, but 'in full settlement' inflicts an exquisite form of commercial torture on the [creditor]. If the offer is reasonable it creates a marvelous anxiety in some recipients: "Shall I risk the loss of the $9000 for an additional $1000 that the bloke really owes me?"[199]

These courts desire to protect the expectations of the creditor who "has good cause to believe that he is fully entitled to retain the partial payment that is rightfully his and presently in his possession, without having to forfeit entitlement to whatever else is his due."[200] Proponents of this position appear to conclude that the debt can be divided between the disputed and undisputed amount, with the full settlement offer equaling the amount of the undisputed portion of the debt.[201] This reasoning is contrary to the generally accepted view that "[a]n offer of compromise is not an admission that anything is due . . . [and] constitutes no proof of liability."[202]

B. *The Code does not prohibit section 1-207 from altering the common law*

Courts adopting this position state that the text and the Official Comments to section 1-207 do not prohibit such an interpretation and that a liberal interpretation of the Code is supported by section 1-102(a).[203] To reinforce this interpretation of section 1-207, these courts often cite to

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197. Robinson v. Garcia, 504 S.W.2d 238, 247 (Tex. Ct. App. 1991); *see supra* note 53 (listing courts holding that § 1-207 alters the common law).

198. Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., 488 N.E.2d 56, 59 (N.Y. 1985). The Ohio Supreme Court stated that § 1-207 was intended "to apply to the situation confronting us in the case *sub justice*." AFC Interiors v. Dicello, 544 N.E.2d 869, 872 (Ohio 1989) (a 4-3 opinion with a vigorous dissent).

199. *Horn Waterproofing Corp.*, 488 N.E.2d at 59 (quoting White & Summers, *supra* note 2, §§ 13-21, at 544-47).

200. *Id.* at 58-59 (citation omitted).

201. But does the settlement offer actually equal the disputed amount? It may be less. This argument is rejected by courts adopting the common law position. *E.g.*, Air Van Airlines v. Buster, 673 P.2d. 774, 778 (1983); *see supra* note 37.

202. Potter v. Pacific Coast Lumber Co., 234 P.2d 16, 20 (Cal. 1951).

203. *Horn Waterproofing Corp.*, 498 N.E.2d at 62; Ditch Witch Trenching Co. v. C & S Carpentry, 812 S.W.2d 171 (Ky. Ct. App. 1991); Robinson v. Garcia, 504 S.W.2d 238, 244-45 (Tex. Ct. App. 1991). *See* Rosenthal, *supra* note 2, at 64; *see supra* notes 126-27 and accompanying text.

three sources of legislative history: (1) the 1961 Report of the Commission on Uniform State Laws to New York State Legislature; (2) the 1955 Report by the New York State Law Revision Commission: Study of the Uniform Commercial Code; and (3) Uniform Sales Act section 49 (1950).[204]

A most convincing source of legislative history cited is the 1961 Report of the Commission on Uniform State Laws to the New York State Legislature.[205]

> This section permits a party involved in a Code-covered transactions to accept whatever he can get by way of payment, performance, etc. without losing his rights to demand the remainder of the goods to set-off a failure of quality, or to sue for the balance of the payment, so long as he explicitly reserves his rights.[206]

This report cited to *Nassoiy v. Tomlinson*,[207] and stated "[t]he Code rule would permit, in Code-covered transactions, the acceptance of part performance or payment tendered in full settlement without requiring the acceptor to gamble with his legal right to demand his balance of the performance or payment."[208] This statement deals with an offered compromise for an unliquidated and disputed claim, because at common law losing the right to sue for the balance of a liquidated claim was never a risk.[209]

The second source of legislative history used by the courts to conclude that section 1-207 alters the common law rule is the 1955 Report by the New York State Law Revision Commission: Study of the Uniform Commercial Code.[210] While the report did not directly address the issue of accord and satisfaction, it did address the legal consequences of section 1-207 on a buyer who knowingly accepts non-conforming goods.[211] The Commission noted that such an acceptance under these circumstances

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204. *E.g.*, *Horn Waterproofing Corp.*, 488 N.E.2d at 60-61; Scholl v. Tallman, 247 N.W.2d 490, 492 (S.D. 1976); Strauss, Factor, Hillman & Lopes v. Kohler General Corp., 3 UCC Rep. Serv. 2d (Callaghan) 466, 467 (R.I. Dis. Ct. 1987); *Robinson*, 804 S.W.2d at 247. Although the New York Reports persuasively argue that § 1-207 alters the common law, it is only evidence of New York's legislative history, and not law. *See, e.g.*, Flambeau Prod. Corp. v. Honeywell Info. Sys., 341 N.W.2d 655, 662 (Wis. 1984).

205. REPORT OF THE COMMISSION ON UNIFORM STATE LAWS TO LEGISLATURE OF STATE OF NEW YORK, 19-20 (1961) [hereinafter 1961 N.Y. REPORT].

206. *Id.*; *see also infra* note 227 and accompanying text.

207. 42 N.E. 715 (N.Y. 1896). "[T]he debtor paid no more than the exact amount he claimed due. The Court held that the conditional payment was payment of an unliquidated claim if any part of the payment disputed, and that the acceptance of the payment discharged the entire debt." 1961 N.Y. REPORT, *supra* note 205, at 19-20 (citing Nassoiy v. Tomlinson, 42 N.E. 715 (N.Y. 1896)).

208. 1961 N.Y. REPORT, *supra* note 205, at 19-20.

209. Hawkland, *supra* note 2, at 332.

210. 1 NEW YORK LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 330 (1955) [hereinafter 1955 N.Y. REPORT]; *see, e.g.*, Robinson v. Garcia, 504 S.W.2d 238, 247 (Tex. Ct. App. 1991).

211. Hawkland, *supra* note 2, at 332.

precluded the buyer from not only rejecting goods, but also from revoking his acceptance of them under section 1-207.[212] However, if section 1-207 applies to this situation, the buyer could reserve his or her rights.[213] The Commission stated:

> It may be argued that [section 2-607] as a specific provision will necessarily make an exception to [section 1-207] .... Furthermore, may there not be other situations . . . where the policy of making a party decide promptly where he stands will be a more just one than the policy of permitting a unilateral reservation of all rights? If there are, then [section 1-207] will work injustice in such cases unless they are specifically covered by a provision like that of [2-607(2)].[214]

Professor Hawkland argues that it is conceivable that the Commission, when contemplating other situations, was referring to the doctrine of accord and satisfaction.[215] This report permits an interpretation of the term "performance" as including payment.[216]

C. *Reliance on the Uniform Sales Act, section 49, in conjunction with a state's statutory annotations to justify the conclusion that section 1-207 alters the common law*

The States of Delaware, New Hampshire, and Massachusetts have only addressed the impact of section 1-207 in their statutory comments.[217] Legal scholars use section 49 of the Uniform Sales Act[218] in conjunction with the state comments to suggest that these state courts would rule that section 1-207 alters the common law.[219] Delaware's statutory comments to section 1-207 state that section 1-207 "makes possible [the] avoidance of the sometimes harsh effect of cases holding that a debt is discharged in its

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212. *Id.*

213. *Id.* at 329; *see generally* White, *supra* note 38, at 523.

214. 1955 N.Y. REPORT, *supra* note 210, at 332.

215. Hawkland, *supra* note 2, at 332.

216. *Id.*; *contra* Flambeau Prod. Corp. v. Honeywell Info. Sys., 341 N.W.2d 655, 662 (Wis. 1984). "Because the legislative history is subject to conflicting inferences, it does not aid us in interpreting sec. 1-207." *Id.*

217. *Robinson*, 244 S.W.2d at 245 n.2; WHITE & SUMMERS, *supra* note 2, § 13-24.

218. UNIFORM SALES ACT § 49, 1a U.L.A 99 (1950) (*repealed by* the adoption of the U.C.C.) [hereinafter U.S.A. § 49].

> In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefore.

Id.

219. *Dilemma Revisited*, *supra* note 2, at 425; WHITE & SUMMERS, *supra* note 2, § 13-24; New York's statutory annotation to § 1-207 is similar to the statutory annotations of Delaware and New Hampshire. N.Y. U.C.C. LAW § 1-207 (McKinney 1964 & Supp. 1990).

entirety by acceptance of part payment when the debtor tenders a full payment of an unliquidated claim."[220] The comment cited *Ashland Coal & Coke Co. v. Old Ben Coal Corp.*,[221] a pre-Code case. The comment also states that:

> [T]his provision is analogous to section 49 of the Uniform Sales Act (6 Del. C. section 749) which states that "unless otherwise agreed, buyer's acceptance of goods shall not bar any suit by him for damages or other legal remedy so long as the buyer gives notice of the claimed breach within a reasonable time."[222]

Legal scholars White and Summers and Professors Jack Grosse and Edward Goggin have concluded that it is probable that a Delaware state court would use this comment to justify adopting this interpretation.[223] New Hampshire's Statutory Comment also refers to Uniform Sales Act section 49 in similar manner.[224]

In Massachusetts the outcome is less clear. The two companies that publish the state's annotated laws, Lawyers Co-operative Publishing Company[225] and West Publishing Company,[226] take opposing positions. The Lawyers Co-operative statutory comment adopts the position that section 1-207 alters the common law rule and states:

> This section permits a party involved in a code-covered transaction to "accept" whatever he can get by way of payment, performance, etc., without losing his rights to demand the remainder of the goods—set off a failure of quality—sue for the balance of the payment, so long as he explicitly reserves his rights.
>
> The only present statute provision bearing any similarity is Sec. 49 of the Sales Act . . . which provides that in general the buyer's acceptance of goods shall not bar rescission or action for breach of contract so long as he gives notice to the seller of whatever it is that constitutes breach of the contract within a reasonable time. The analogous provisions are sections 2-607 and 2-608 . . . . As to the common law, this section would, in code covered situations, permit acceptance of a *part performance or payment in full settlement without the acceptor gambling with his legal right to demand performance or payment tendered* a course impossible now save where the part tendered is either liquidated or undisputed.[227]

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220. DEL. CODE ANN. tit. 6, § 1-207 (1975) (quoting U.S.A. § 49, *supra* note 218).

221. 187 A. 596 (Del. Super. Ct. 1934).

222. DEL. CODE ANN. tit. 6, § 1-207 (1975) (quoting U.S.A. § 49, *supra* note 218).

223. WHITE & SUMMERS, *supra* note 2, § 13-24; *Dilemma, supra* note 2, at 552 (1984); *see also Robinson*, 804 S.W.2d at 245 n.8.

224. N.H. REV. ST. ANN. 382:A:1-207 (1961); *see supra* note 184.

225. MASS. ANN. LAWS ch. 16, § 1-207 (Law. Co-op. 1984 & Supp. 1992); *see also* WHITE & SUMMERS, *supra* note 2, § 13-24 n.4.

226. MASS. GEN. LAWS ANN. ch. 16, § 1-207 (West 1992). .

227. MASS. ANN. LAWS ch. 16, § 1-207 (Law Co-op. 1984 & Supp. 1992).

To support this position, the annotation cites to New York state cases.[228] Courts, as well as legal scholars, cite this comment to suggest that a Massachusetts court, faced with the issue, would rule that section 1-207 alters the common law.[229]

Unfortunately, no legal scholar or court has recognized the existence of the West Statutory Annotation which adopts the opposite position.[230] West's version cites two Massachusetts Supreme Judicial Court decisions in its statutory comments section as supporting the common law rule: *Whitaker Chain Tread Co. v. Standard Auto Supply Co.*[231] and *Champlin v. Jackson.*[232] In addition, this position is supported by the Wisconsin Supreme Court which adopted the common law rule in *Flambeau Products Corp. v. Honeywell Information Systems.*[233] The Wisconsin Supreme Court stated that:

> [T]he contract provided that it was governed by the law of Massachusetts. The parties took the position that the law of Massachusetts and the law of Wisconsin are the same on the question of accord and satisfaction. Following the parties' lead we have examined Wisconsin cases, not Massachusetts cases, and we have deemed Massachusetts law to be the same as Wisconsin's since there was no showing that Massachusetts law is different.[234]

It is premature to claim that Massachusetts would adopt either position based solely on one of the two statutory annotations. Both annotations are only evidence of legislative history and thus, merely carry persuasive weight in cases of first impression. These three statutory comments suggest that Delaware and New Hampshire will take the position that section 1-207 alters the common law.[235] It is unclear which position Massachusetts will adopt.[236]

In contrast, one appellate court has rejected this interpretation of U.S.A. section 49. In *Chancellor, Inc. v. Hamilton Appliance Co., Inc.*,[237] a New Jersey appellate court stated that the statutory comment to section 1-207:

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228. *See, e.g.*, Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., 488 N.E.2d 56 (N.Y. 1985).

229. *See, e.g.*, Robinson v. Garcia, 504 S.W.2d 238, 246 (Tex. Ct. App. 1991); WHITE & SUMMERS, *supra* note 2, § 13-24; *see also Dilemma, supra* note 2, at 553; *Dilemma Revisited, supra* note 2, at 449.

230. MASS. ANN. LAWS ch. 16, § 1-207.

231. 103 N.E. 695 (Mass. 1913).

232. 48 N.E.2d 46 (Mass. 1943).

233. 341 N.W.2d 655 (Wis. 1984).

234. *Id.* at 664 n.13. It seems reasonable to assume that an attorney attempting to avoid an accord and satisfaction would not stipulate to this factual assumption unless the attorney believed that the laws governing both states were similar.

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

236. *See supra* notes 225-27 and accompanying text.

237. 418 A.2d 1326 (N.J. Super. Ct. 1980).

> only states that section 1-207 is in accord with its predecessor statute, [section 49 of the Uniform Sales Act] . . . . [This section] did not purport to alter the rule of common law accord and satisfaction. Its language spoke only to the acceptance of goods, not payments . . . . It would appear that the Legislature adopted section 1-207 presupposing that it reflected existing [common] law.[238]

The use of a statutory annotation in coordination with U.S.A. section 49 does not provide a strong argument to justify rejecting the common law doctrine of accord and satisfaction, because "legislative history is subject to conflicting inferences . . . ."[239]

D. *Case law supporting the view that section 1-207 alters the common law*

New York, a leading commercial state, adopted the view that section 1-207 alters the common law in *Horn Waterproofing Corp. v. Bushwick Iron & Steel.*[240] The New York Court of Appeals, the state's highest court, based its conclusion on three factors. First, it relied on the legislative intent expressed in the 1955 and 1961 reports.[241] Second, it supported its conclusion with White and Summer's treatise on the Uniform Commercial Code.[242] Finally, it stated that debatable public policy warranted concluding that "the common-law doctrine of accord and satisfaction creates a cruel dilemma for the good-faith creditor in possession of a full payment check."[243] Thus, the New York Court of Appeals subordinates the dilemma of the debtor who is not notified of the creditor's rejection.[244] Meanwhile, the other states adopting this position also cite White and Summers, the New York Reports, and public policy.[245] Because the New York Reports are only persuasive authority, these courts bolster their decisions in two manners. First, they hold that the text and the Official Comments to section 1-207 do not prohibit such an interpretation.[246] Second, they rely on other state supreme court decisions adopting the same rule, especially *Horn Water Proofing Corp.*[247]

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238. *Chancellor*, 418 A.2d at 1329.

239. Flambeau Prod. Corp. v. Honeywell Info. Sys., 341 N.W.2d 655, 662 (Wis. 1984).

240. 488 N.E.2d 56 (N.Y. 1985). The Court of Appeals also held that § 1-207 applied to service transactions involving full payment checks. *Id.* at 61. A lower New York court has refused to apply § 1-207 to a tort claim. *See* Clarke v. Yvans, 530 N.Y.S.2d 465, 468 (N.Y. Civ. Ct. 1988).

241. *Horn Waterproofing*, 488 N.E.2d at 60.

242. *Id.* at 59.

243. *Id.*

244. *Id.* at 58; *see supra* text accompanying notes 184, 194-96.

245. *See supra* note 53.

246. *See, e.g.*, Ditch Witch Trenching Co. v. C & S Carpentry, 812 S.W.2d 171, 172 (Ky. Ct. App. 1991).

247. 488 N.E.2d 56 (N.Y. 1985); *see, e.g.*, Robinson v. Garcia, 804 S.W.2d 238, 244 (Tex. Ct. App. 1991).

E. *Scholarly Support*

The principle scholarly support for the position that section 1-207 alters the common law is White and Summers.[248] White and Summers first adopted this position when they published the second edition of their hornbook in 1972.[249] The authors concluded at that time that the majority of the states which had considered the issue had agreed that section 1-207 altered the common law rule.[250] Since that time, the majority of the courts, as well as most legal scholars that have addressed this issue, have developed a series of convincing arguments to support the conclusion that section 1-207 does not alter the common law doctrine.[251] Nevertheless, White and Summers continue to argue in subsequent editions that "the language of 1-207 fits the partial payment [rule] perfectly."[252] Yet, these same scholars also admit that the Official Comments do not closely fit this interpretation.[253] Their main sources of support are derived from the 1955 and 1961 New York Reports.[254] Meanwhile, they fail to address the arguments rejecting their interpretation of section 1-207. Although White and Summers are universally accepted for their treatise on the U.C.C., their analysis of section 1-207 has been criticized for being brief, incomplete, and misleading.[255] Judges and attorneys should not merely rely on the reputation of a treatise, but instead, on the soundness of its legal arguments.[256]

VI. Which Rule Governs? The Question Adressed, The Answer Unclear

Seven state courts have avoided officially taking a position on this issue.[257] Only one of these states, Illinois, has adopted section 3-311.[258] Meanwhile, it is unclear which rule Texas and California, two important

248. White & Summers, *supra* note 2, § 13-24.

249. James White & Robert S. Summers, Handbook On The Law Under The Uniform Commercial Code § 13-21 (1972).

250. White & Summers, *supra* note 2, § 13-24.

251. *See supra* notes 62-196 and accompanying text; *see also Dilemma Revisited, supra* note 2, at 449-50.

252. White & Summers, *supra* note 2, § 13-24.

253. *Id.*

254. *Id.*; *see supra* notes 205-16 and accompanying text.

255. *See Dilemma, supra* note 2, at 546; *Dilemma Revisited, supra* note 2, at 449-50.

256. *See Dilemma, supra* note 2, at 546; *Dilemma Revisited, supra* note 2, at 449-50.

257. Appellate courts: Georgia (American Food Purveyors, Inc. v. Lindsay Meats Inc., 265 S.E.2d 325 (Ga. Ct. App. 1980)); Iowa (RMP Industries v. Linen Center, 386 N.W.2d 523 (Iowa Ct. App. 1986)); Maryland (Air Power v. Omega Equipment, 359 A.2d 1120 (Md. Ct. Spec. App. 1983)); Tennessee (R.J. Betterton Mgmt. Serv. v. Whittlemore, 733 S.W.2d 880 (Tenn. Ct. App. 1987)); Illinois (Nelson v. Fire Ins. Exch., 510 N.E.2d 137 (Ill. App. Ct. 1987)); superior courts: Michigan (Fritz v. Mararette, 273 N.W.2d 425 (Mich. 1979)); West Virginia (Charleston Urban Renewal Auth. v. Stanley, 346 S.E.2d 740 (W.Va. 1985))

258. Ill. Rev. Stat. ch. 810, § 513-311 (1992).

commercial states, will adopt as its official position. The Appellate Courts of Texas are divided, and California has passed two overlapping statutes.[259]

A. *Texas: conflict among the state appellate courts*

Texas appellate courts have addressed the impact of section 1-207 four times. The first and fifth districts have adopted the common law position in *Hixon v. Cox*,[260] *Pileco Inc. v. HCI Inc.*,[261] and *Trevino v. Brookhill Capital Resources, Inc.*[262] The fifth district relied on the fact that the text and the Official Comments of section 1-207 related to performance, not payment.[263] The first district followed the Supreme Court of Maine,[264] concluding that the common law doctrine of accord and satisfaction is well established.[265]

Conversely, in *Robinson v. Garcia*,[266] the Texas Appellate Court rejected the majority position and held that section 1-207 applies to the doctrine of accord and satisfaction.[267] The court relied on legal scholars White and Summers,[268] the 1961 Report of the Commission on Uniform State Laws to the New York State Legislature,[269] and the *Robinson* Court decision.[270] The *Robinson* Court also used the principles of equity to justify its interpretation, stating that the full settlement check "inflicts an exquisite form of commercial torture on the payee."[271]

The *Robinson* Court further stated that section 1-207 is not limited to only transactions dealing with goods, but in fact, applies to all commercial transactions.[272] Hopefully, the Supreme Court of Texas will resolve this issue in order to prevent an Erie-type problem.[273]

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259. *See infra* notes 260-79 and accompanying text.

260. 633 S.W.2d 330, 331-32 (Tex. Ct. App. 1982).

261. 735 S.W.2d 561, 562-63 (Tex. Ct. App. 1987).

262. 782 S.W.2d 279, 281 (Tex. Ct. App. 1987).

263. *Hixon*, 633 S.W.2d at 331.

264. Stultz Elec. Works v. Marine Hydraulic Eng'g Co., 484 A.2d. 1008 (Me. 1984).

265. *Pileco*, 735 S.W.2d at 561-62.

266. 504 S.W.2d 238 (Tex. Ct. App. 1991).

267. *Id.* at 246.

268. *See supra* text accompanying notes 245-53.

269. *See supra* text accompanying notes 203-06.

270. *Robinson*, 504 S.W.2d at 247.

271. *Id.* at 247 (citing WHITE & SUMMERS, *supra* note 2, § 13-24).

272. *Id.* at 243; *see also* Horn Waterproofing Corp. v. Bushwick Iron & Steel Co., 488 N.E.2d 56 (N.Y. 1985).

273. An Erie-type problem occurs when a judicial result is dependent on the location in which a party brings the suit because the courts may apply different rules of law in different jurisdictions. *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

B. *California: Competing Statutes (U.C.C. Section 3-311 and Cal. Civ. Code Section 1526)*

California common law[274] has been superceded by the California Civil Code section 1526[275] and by U.C.C. section 3-311.[276] Effective in 1988, section 1526(a) states that a "creditor may reject an offer to enter into an accord while accepting the conditional check as a payment on account by three different methods: by striking out or deleting the notation, by accepting the check inadvertently, or by accepting it without knowledge of the notation."[277] The statute is not clear in explaining all the procedures needed to be performed in order to fit within one of the statutory exceptions.[278] Notwithstanding this statute, the California Legislature also adopted section 3-311 when it adopted revised Articles 3 and 4 of the U.C.C. in December 1992.[279] Unfortunately, section 1526 has not been repealed, and both sections will be active starting on January 1, 1993. The two statutes are not identical and both should be exploited for their distinct advantages. Hopefully, the California Legislature will rectify this duplication in the near future to prevent confusion.

VII. Analysis of U.C.C. Section 3-311: The Solution?

In 1990 the drafters of U.C.C. revised section 1-207[280] along with Article 3 (section 3-311).[281] Presently, twenty states have adopted these revisions.[282] The revision makes it clear that section 1-207 no longer applies to the common law doctrine of accord and satisfaction. First, section 1-207(2) specifically states that "[s]ubsection (1) does not apply to an accord and satisfaction."[283] Second, Official Comment 3 to section 1-207 indicates that this section was modified to resolve the conflict among the states and to emphasize that section 3-311 now governs the law of accord

274. *See, e.g.*, Connecticut Printers v. Gus Krosen, Inc., 134 Cal. App. 3d 54 (Cal. Ct. App. 1982); Potter v. Pacific Lumber, 234 P.2d 16 (Cal. 1951).

275. Cal. Civ. Code § 1526 (West 1990) (January 1, 1988 was the effective date for the § 1526). *See infra* app.

276. Cal. Bus. Code § 3311 (West 1992) (January 1, 1993 was the effective date for § 3311).

277. Scott J. Burnham, *Accord And Satisfaction In California: A Trap For The Unwary*, 30 Santa Clara L. Rev. 473, 487 (1989) (citing Cal. Civ. Code § 1526(a) & Supp. 1982).

278. An in depth analysis of § 1526 is beyond the scope of this article. For a complete discussion of California Civil Code § 1526, see Burnham, *supra* note 277, at 473.

279. Cal. Civ. Code § 1526 (West 1990); Cal. Bus. Code § 3311 (West 1992).

280. U.C.C. § 1-207; *see* app.

281. *Id.* § 3-311; *see* app.

282. *See supra* note 16. These states include Arkansas, California, Connecticut, Florida, Hawaii, Illinois, Kansas, Lousiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, Virginia, and Wyoming. Utah adopted revised § 1-207, but did not adopt Revised Article 3. Thus, Utah follows the common law rule. Telephone Interview, *supra* note 16.

283. U.C.C. § 1-207(2) (1990).

and satisfaction.[284] In addition, section 3-802, which contributed to the legislative history of section 1-207, was replaced by section 3-110, a modified version of section 3-802. Thus, the U.C.C. attempted to "close all the doors" available to a court wanting to apply section 1-207 to an accord and satisfaction. Ironically, while the U.C.C. rejected the position that section 1-207 does not alter the common law rule, the U.C.C. has enacted section 3-311, which basically accomplishes the same result.

A. *Interpreting U.C.C. Section 3-311*

Sections 3-311(a) and 3-311(b)[285] codify the elements of the common law doctrine of accord and satisfaction: "a good faith tender in full satisfaction of an unliquidated or disputed amount[286] and acceptance of the tender by the claimant accepting payment on the check."[287] However, subsection 3-311(c) enables "organizations" to avoid an accord and satisfaction if the procedural requirements described within the subsection are not satisfied.[288] Subsection 3-311(c)(1) states that a claim is not discharged if the claimant proves that: (1) it is an "organization,"[289] (2) the "organization" has communicated to the other party that an offer of full payment is to be sent to a particular person, office, or place, and (3) the check was not received by the designated person, office, or place.[290] Under this scenario, the check is treated as a partial payment of the debt, and not as an offer to settle.

Nevertheless, this rule is not absolute because subsection 311(d) provides that an accord and satisfaction will be consummated, despite the fact that the conditions of section 3-311(c) were met, if the recipient of

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284. *Id.* § 1-207 cmt. 3.

285. *Id.* § 3-311.

286. Section 1-201(19), which defines good faith, does not apply to Article 3 of the U.C.C. *See* U.C.C. § 1-103(a)(4) cmt. 4 (1990). A good faith dispute is defined differently in Articles 3 and 4. Section 3-103(a)(4) defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." U.C.C. § 1-103(a)(4) (1990). Thus, a higher standard of good faith will be required when arguing a disputed debt exists. *Cf.* M.L.G. Trust v. Gov't of Rep. of Indon., No. 90 CIV. 50205, 1992 WL 373154, at *2 (N.D. Ill. Dec. 10, 1992) (defense of accord and satisfaction failed because defendant could not establish that a disputed or unliquidated debt existed). *See also* note 35 (for examples of unliquidated or disputed claims).

287. Gail K. Hillebrand, *Revised Articles 3 and 4 Of the Uniform Commercial Code: A Consumer Protection Perspective,* 42 ALA. L. REV. 679, 690 (1991); *see supra* note 39; Burke Co., v. Hilton Department Co., 802 F. Supp. 434, 437-38 (N.D. Fla. 1992).

288. U.C.C. § 3-311(c).

289. "Organization includes a corporation, government or government subdivision or agency, business trust, estate, trust, partnership, on association, two or more persons having a joint or common venture, or any other legal or commercial entity." U.C.C. § 1-201(28) (1990); *see infra* note 305 and accompanying text.

290. U.C.C. § 3-311(c)(1). This section solves the lock-box arrangement. FREDRICK MILLER, THE EMERGED AND EMERGING NEW UNIFORM COMMERCIAL CODE: ANALYSIS OF ARTICLE 3 AND 4, 664 A.L.I.-A.B.A. 259 (Sept 12, 1991).

the check has actual knowledge of the dispute and the tender.[291] Official Comment 7 supports this interpretation and states that:

> [i]f a person against whom a claim is asserted proves that the claimant obtained payment of a check known to have been tendered in full satisfaction of the claim by 'the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation,' the claim is discharged even if . . . the check was not sent to the person, office, or place required by a notice complying with subsection (c)(1).[292]

Supporters of section 3-311 assert "that a check should not be a vehicle to thrust a full settlement obligation on a large unsuspecting payee."[293] Section 3-311(c) is designed to prevent an accord and satisfaction from inadvertently taking place when a check is sent to an automated collection center of a large organization and is cashed without inspection.[294] In the commercial world, hundreds of thousands of checks are processed daily by merchants and corporations. These parties are neither physically equipped nor possess the time to inspect every check for the purpose of avoiding inadvertent accord and satisfactions.[295] Thus, this section prevents a clever or careless debtor, aware of these modern business practices, from "pulling a fast one" by slipping a full settlement check through the system to pay less than the full amount on an allegedly questionably disputed claim.[296] While section 3-311(c) achieves this goal, it also reduces the rights of consumers who desire to settle disputes with organizations.[297]

B. *Is U.C.C. section 3-311(c)(1) really necessary?*

Professor Hillebrand opposes the adoption of section 3-311, asserting that the rights of consumers to settle disputes should not be simply reduced without additional evidence of inadvertent accord and satisfactions.[298] In addition, Professor Patricia Fry, a member of the American

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291. Hillebrand, *supra* note 287, at 691.

292. U.C.C. § 3-311 cmt. 7.

293. Morris Shanker, *The Folly Of Full Settlement Checks- And A Declaration Of Their Independence*, 90 COM. L.J. 1, 7 (1985).

294. U.C.C. § 3-311 cmt. 3; Hillebrand, *supra* note 287, at 691 n.38.

295. Shanker, *supra* note 293, at 8.

296. *Id.* at 9. "Elaborate business and banking systems have been designed and set up to expedite the daily receipt and clearance of millions of checks representing currency equivalents of billions of dollars. Modern innovations and technology have made this highly desirable commercial objective even more attainable." *Id.*

297. *See infra* notes 298-316 and accompanying text.

298. Hillebrand, *supra* note 287, at 691.

> Rather than entirely change the rules of accord and satisfaction, state legislators could demand proof that full payment checks sent to centralized payment centers are a real and significant problem before they consider reducing consumer rights to use accord and satisfaction. They might also demand proof that creditors cannot solve any alleged problem simply by instituting better check handling procedures rather than reducing consumer rights to use accord and satisfaction.

Bar Association Ad Hoc Committee on Payments Systems, Subcommittee on Articles 3 and 4, argued "that the reported cases primarily involved instances in which the creditor or claimant actually knew of the 'full payment' language on the check, but nonetheless chose to retain its proceeds and deny creation of an accord and satisfaction."[299] Professor Fry pointed out that adopting section 3-311 is unnecessary because any unfair surprise to creditors could be avoided by simply instructing their clerks to remove checks bearing any type of legend.[300] Checks contain various markings, including writing identifying which account to deposit a check for debtors with more than one account.[301] Consequently, if creditors are not permitted by law to ignore other legends, they should not receive a special exemption to ignore a legend stating "paid in full."[302]

C. *Definitional flaws of U.C.C. section 3-311(1)(c)*

Professor Hillebrand asserts that the scope of section 311(c)(1) is too broad.[303] The section should only apply to large payment centers where the risk is high.[304] The definition of "organization" is so broad that small businesses and joint ventures of two or more persons are covered by the section.[305] Meanwhile, the requirement that the check be sent to a designated address is also drafted very narrowly.[306] Section 311(c)(1) is satisfied only if a full payment check is sent to the centralized payment department.[307] If a consumer sends a letter with a full settlement check to the president of a corporation, the corporation may still cash the check and sue for the balance under section 311(c)(1), if the corporation has communicated to the debtor in a previous billing statement that all disputes or settlement offers be directed to its Consumer Relations Department.[308] Official Comment 7 explains this apparently unjust result:

Id.

299. *Id.* (quoting PATRICIA FRY, DISCUSSION OF AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLES 3 AND 4; ACCORD AND SATISFACTION (July 9, 1987) [hereinafter DISCUSSION DRAFT ON ACCORD AND SATISFACTION] (on file at Consumers Union, 1535 Mission Street, San Francisco, CA 94104)). Professor Fry's final judgment on the entirety of the revised Articles is that they are appropriate and fair to consumers. Hillebrand, *supra* note 287, at 691 n.39 (citing Letter from Professor Patricia Fry to Gail Hillebrand (Sept. 18, 1990) (on file at Consumers Union)).

300. Hillebrand, *supra* note 287, at 691 (citing DISCUSSION DRAFT ON ACCORD AND SATISFACTION, *supra* note 299). Checks are presently inspected for other markings by creditors, besides the words, "full settlement." *Id.*

301. Hillebrand, *supra* note 287, at 691.

302. *Id.*

303. *Id.* at 692.

304. *Id.*

305. *Id.* at 692; *see supra* note 289.

306. Hillebrand, *supra* note 287, at 692.

307. U.C.C. § 3-311(1)(c); *see supra* text accompanying note 290.

308. Hillebrand, *supra* note 287, at 692-93.

> If the check is mailed to the chief executive officer of the chain store subsection (d) would probably not be satisfied. The chief executive officer of a large corporation may have general responsibility for operations of the company, but does not normally have direct responsibility for resolving a small disputed bill to a customer. A check for a relatively small amount mailed to a high executive officer of a large organization is not likely to receive the executive's personal attention. Rather, the check would normally be routinely sent to the appropriate office for deposit and credit to the customer's account. However, [if] the check does receive the personal attention of the high executive officer and the officer is aware of the full-satisfaction language, collection of the check will result in an accord and satisfaction because subsection (d) applies. In this case the officer has assumed direct responsibility with respect to the disputed transaction.[309]

Unfortunately, it may be very difficult for the debtor to prove that an executive has assumed direct responsibility for the disputed transaction. Thus, this section shifts the burden of risk for human error from the creditor to the debtor. It seems unfair that the statute fails to impose a duty on the corporation to forward the full payment check to the proper location, since the creditor is in a better position to correct the mistake. Expanding the scope of section 3-311(d) may alleviate this problem.[310] Section 3-311(d) presently states:

> A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.[311]

Professor Hillebrand insists that the word "direct" should be deleted from section 3-311(d).[312] The Montana Legislature has accomplished this goal by adding a phrase to section 3-311 that transforms the requirement of actual knowledge into constructive notice.[313] Courts should adopt this position or interpret the term "direct" broadly when applying section 3-311.[314] Official Comment 1 of section 1-102 asserts that the "[t]ext of each section should be read in light of the purpose and policy of the rule or principle in question, as also of the Act as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies in-

309. U.C.C. § 3-311 cmt. 7.

310. Hillebrand, *supra* note 287, at 693.

311. U.C.C. § 3-311(1)(d).

312. Hillebrand, *supra* note 287, at 694.

313. MONT. CODE ANN. § 30-3-311 (1992). The Montana Legislature added the phrase "or received the instrument and any accompanying written communication" to § 3-311(d). *Id.*

314. *Id.*

volved."[315] In this situation, a narrow interpretation fulfills the purpose and policy of the Code by protecting consumers. A court could also base its decision on the principles of equity or unconscionability under section 1-103.[316]

D. *Subsection U.C.C. 3-311(c)(2): An expansion of consumer rights*

Under subsection 3-311(c)(2)[317] one may revoke an accord and satisfaction within ninety days by fully repaying the amount received (i.e., make restitution).[318] The only restriction is that section 3-311(c)(2) does not apply if the claimant is an organization that sent a statement complying with section 3-311(c)(1)(i).[319] Thus, consumers and organizations which have not sent notice that payment be directed to a particular office fall within subsection (c)(2). This subsection "will benefit consumers with substantial claims who receive and cash full payment checks without a full understanding of their legal rights and later secure counsel."[320] This section in part codifies the doctrine of unconscionability to prevent consumers from entering into unjust settlements without establishing unconscionability under the Code.[321]

Despite the alleged benefits that section 3-311(c)(2) provides to consumers,[322] the subsection has not been universally endorsed. The Montana Legislature omitted subsection (c)(2) when it adopted section 3-311.[323] In *Eastern Steel Corporation v. Edward Gray Corporation*, an Illinois federal district court held that section 3-311(c)(2) does not apply to contracts for services.[324] The court based its narrow interpretation of section 3-311(c)(2) on Official Comment 1 to section 3-311.[325] The scope of subsection (c)(2) was limited to only two situations: (1) the sale of goods,

315. U.C.C. § 1-102 cmt. 1; *Dilemma*, *supra* note 2, at 548 (1984) (citing § 1-102 cmt. 1 (1990)).

316. U.C.C. § 1-103.

317. *Id.* § 3-311(c)(2) (1990).

318. *Id.* § 3-311 cmt. 7.

319. *Id.* § 3-311(d) (1990); *see supra* note 290 and accompanying text.

320. Hillebrand, *supra* note 287, at 694.

321. U.C.C. §§ 1-103, 2-302 (1990).

322. *See supra* text accompanying notes 317-21.

323. MONT. CODE ANN. § 30-3-311 (West 1992).

324. Eastern Steel Corp. v. Edward Gray Corp., No. 92 Civ. 1442, 1993 WL 57541, at *6 n.9 (N.D. Ill. Mar. 4, 1993).

325. *Id.* § 3-311 cmt. 1. Comment 7 to § 3-311 also seems to support this position. U.C.C. § 3-311 cmt. 7. The tone of the decision suggests that Judge Williams supports the common law doctrine. *Eastern Steel Corp.*, No. 92 Civ. 1442, 1993 WL 57541, at *6 n.9. Judge Williams gave little weight to the statute, stating that "no court has relied upon or cited it yet." *Id.* at *6 n.9. The Judge held that an Illinois state court would adhere to the common law doctrine of accord and satisfaction in a case involving a service contract, based on Nelson v. Fire Ins. Exch., 510 N.E.2d 137, 139 (Ill. App. Ct. 1987), and that words of protest were irrelevant. *Id.* at *3. Ironically, Judge Williams neglected to cite U.C.C. § 1-207(2), which states that an accord and satisfaction cannot be avoided by writing words of protest on the check. U.C.C. § 1-207(2).

and (2) a claim on an insurance policy.[326] However, Official Comment 1 to section 3-311 stated that these two situations are merely typical situations in which subsection (c)(2) is available.[327] In addition, section 3-311 is titled: "Accord and Satisfaction by Use of Instrument."[328] When examining section 3-311 and its Official Comments, it is apparent that the section is intended to apply to any claim in which a party attempts to settle a dispute by use of an instrument (i.e., check).[329] These two examples may be prognostication of the reluctance of the courts and state legislatures to abandon the common law doctrine. It is too early to determine if *Eastern Steel* will be the first of many cases in which courts limit the scope of section 3-311, especially subsection (c)(2), through creative judicial interpretation to preserve the common law doctrine of accord and satisfaction.

IX. Conclusion: The Best Rule for Your State

Eventually, all states will be confronted with the issue of whether to adopt section 3-311 or whether section 1-207 alters the common law rule. When approaching this problem, courts should consider the following questions: "Which is the better reasoning? Is the payee who receives a 'full settlement check' being inflicted with an impermissible form of 'commercial torture;' or is he or she the 'bad faith weaseler' envisioned by Corbin,[330] seeking to take unfair advantage of the fortuitous situation?"[331] The law should protect the debtor, especially the consumer debtor. The doctrine of accord and satisfaction is a useful settlement device which saves judicial as well as private resources.[332] Since the debt is disputed, the full payment check provides the creditor with fair compensation. If the creditor believes the full amount is rightfully due, restitution should be made and a lawsuit should be initiated. By cashing the check, the creditor has objectively manifested an act of ownership.[333] A reasonable debtor should be able to rely on this act, under an estoppel theory, and assume that the debt is satisfied.[334]

Section 1-207 should not be construed to alter the common law since such an interpretation contradicts the rules of contract formation. In addition, the U.C.C. prohibits unilateral modification of a contract without notice to the other party and without mutual assent in the form of words, conduct, or silence.[335] The drafters of the Code are in accord with this

326. *Eastern Steel Corp.*, 1993 WL 57541 at *6, n.9.
327. U.C.C. § 3-311 cmt. 7.
328. *Id.* § 3-311.
329. *Id.* § 3-311 cmts. 1-8.
330. *See supra* notes 183-84 accompanying text.
331. Shanker, *supra* note 293, at 8.
332. *See supra* notes 171-73 and accompanying text.
333. *See supra* text accompanying note 33-34.
334. *See supra* note 187 and accompanying text.
335. *See supra* notes 58-93 and accompanying text.

conclusion and have eliminated this interpretation of section 1-207 in its 1990 revision of section 1-207.[336]

It is inevitable that section 3-311 will be adopted by almost every state.[337] Of the twenty states adopting revised Article 3, only Utah has refused to adopt section 3-311 in place of the common law rule.[338] Nonetheless, section 3-311 is a flawed rule and should be rejected in its present form.[339] States considering adopting section 3-311 should adopt a modified version of section 3-311. Subsections 3-311(a) and 3-311(b) codify the common law rule of accord and satisfaction.[340] However, section 3-311(c)(1) should be rejected.[341] Little evidence supports the necessity of this subsection to protect "organizations" from inadvertently cashing full settlement checks.[342] Yet, section 3-311(c) drastically reduces the rights of consumers against organizations.[343] This section shifts the burden of risk from the creditor to the debtor, even though the creditor is in possession of the check.[344] Section 3-311(c)(1), if adopted, should be modeled after section 3-311(c)(2). An organization should be required to return a full payment check if it desires to avoid an accord and satisfaction. Similarly, this option should be limited to a period of ninety days for checks sent to the incorrect department of the organization. These two additional requirements will provide the consumer with the same protection as organizations and will promote the Code's policy of protecting consumers.[345] By analogy, unconscionability is sometimes used to void contracts between corporations and consumers. Nevertheless, it is a novel concept that businesses require additional protection from consumers.[346] Section 3-311(c)(2) should readily be adopted because it increases the rights of consumers unfamiliar with the doctrine of accord and satisfaction. This section should be useful in preventing aggressive insurance companies from forcing settlements on naive consumers because, in reality, it codifies an "equity-unconscionability" type of restriction to prevent unjust settlements.[347] If section 3-311 is adopted in its

336. U.C.C. § 1-207(2).

337. Eight states are in the process of enacting the statute. (Alaska, Arizona, Idaho, Indiana, Michigan, Utah, Washington, and West Virginia). In addition, the California Legislature is attempting to repeal § 1526 of the Cal. Civ. Code in favor of § 3-311. *See supra* note 16, Telephone Interview.

338. *See supra* notes 194-95.

339. *See supra* notes 303-316 and accompanying text.

340. *See supra* notes 285-86 and accompanying text.

341. If subsection 3-311(c) is adopted, the court should delete the word "directly" in subsection 3-311(d) dealing with "direct knowledge." *See supra* text accompanying notes 303-316.

342. *See supra* note 298 and accompanying text.

343. *See supra* notes 269-311 and accompanying text.

344. *See supra* text accompanying notes 310-16.

345. *Cf.* WHITE & SUMMERS, *supra* note 2, 4-9.

346. *Id.*

347. U.C.C. §§ 1-103, 2-302.

complete form, the term "direct" should be removed from section 3-311(d) in order to promote equity.[348] If the check reaches the organization, the organization should be under an affirmative duty to forward the settlement check to the correct department.

While the remaining state legislatures will probably adopt section 3-311 and revised section 1-207(2), section 3-311 should be rejected in favor of the common law doctrine. Although this rule is not perfect and might be manipulated by the clever debtor in certain circumstances, this result is unlikely to occur because it is standard operating procedure for businesses to inspect checks for other language besides the words "full settlement."[349] In addition, if the result is unconscionable, the accord and satisfaction can be voided under section 2-302.[350] Statutory interpretation, statutory history, public policy, and equity as well as the basic rules and concepts of contract law support this result.[351] It is contradictory for the drafters of the U.C.C. to pass one section that holds section 1-207 does not affect the common law, and then enact another section, section 3-311, which accomplishes basically the same result. By proceeding in this manner, the drafters of the Code have ignored the same problems that afflicted the section 1-207 position, such as lack of notice and mutual assent.[352]

State legislatures should follow the example of the Utah Legislature which adopted the 1990 version of 1-207, but rejected section 3-311.[353] The effect of this action is that the State of Utah codified the common law by prohibiting the courts from applying section 1-207 to the doctrine of accord and satisfaction. The law favors settlements, not more lawsuits.

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348. *See supra* notes 312-16 and accompanying text.
349. *See supra* text accompanying note 296-98.
350. U.C.C. § 2-302 (unconscionability).
351. *See supra* notes 58-193 and accompanying text.
352. *See supra* notes 67-83 and accompanying text.
353. *See* Telephone Interview, *supra* note 16; Utah adopted the revised § 1-207, but did not adopt Revised Article 3. Thus, Utah follows the common law rule. *Id.*

APPENDIX

U.C.C. SECTION 1-207 (1990): PERFORMANCE OR ACCEPTANCE UNDER RESERVATION OF RIGHTS

(1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient.

(2) Subsection (1) does not apply to an accord and satisfaction.

As amended in 1990

U.C.C. SECTION 3-311: ACCORD AND SATISFACTION BY USE OF INSTRUMENT

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

CAL. CIV. CODE SECTION 1526 (WEST SUPP. 1990)[354]

Check or draft tendered in full discharge of claim; acceptance; protest; composition or extension agreement between debtor and creditors; release of claim (a) Where a claim is disputed or unliquidated and a check or draft is tendered by the debtor in settlement thereof in full discharge of the claim, and the words "payment in full" or other words of similar meaning are notated on the check or draft, the acceptance of the check or draft does not constitute an accord and satisfaction if the creditor protests against accepting the tender in full payment by striking out or otherwise deleting that notation or if the acceptance of the check or draft was inadvertent or without knowledge of the notation. (b) Notwithstanding subdivision (a), the acceptance of a check or draft constitutes an accord and satisfaction if a check or draft is tendered pursuant to a composition or extension agreement between a debtor and its creditors, and pursuant to that composition or extension agreement, all creditors of the same class are accorded similar treatment, and the creditor receives the check or draft with knowledge of the restriction.

A creditor shall be conclusively presumed to have knowledge of the restriction if a creditor either: (1) Has, previous to the receipt of the check or draft, executed a written consent to the composition or extension agreement.

(2) Has been given, not less than 15 days nor more than 90 days prior to receipt of the check or draft, notice, in writing, that a check or draft will be tendered with a restrictive endorsement and that acceptance and cashing of the check or draft will constitute an accord and satisfaction.

(c) Notwithstanding subdivision (a), the acceptance of a check or draft by a creditor constitutes an accord and satisfaction when the check or draft is issued pursuant to or in conjunction with a release of a claim.

(d) For the purposes of paragraph (2) of subdivision (b), mailing the notice by first-class mail, postage prepaid, addressed to the address shown for the creditor on the debtor's books or such other address as the creditor may designate in writing constitutes notice.

PRE-1990 REVISION U.C.C. SECTION 3-802 EFFECT OF INSTRUMENT ON OBLIGATION FOR WHICH IT IS GIVEN

(1) Unless otherwise agreed where an instrument is taken for an underlying obligation

(a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

(b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either

354. *See also* CAL. CIV. CODE §§ 1521-25 (West 1982 & Supp. 1992).

the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.

(2) The taking in good faith of a check which is not post-dated does not of itself so extend the time on the original obligation as to discharge a surety.

[Section 3-802(3) was deleted by the U.C.C. drafters]

(3) Where a check or similar payment instrument provides that it is in full satisfaction of an obligation, the payee discharges the underlying obligation by obtaining payment of the instrument unless he established that the obligor has taken unconscionable advantage of the circumstances.

Official Comment 5 for 3-802(3) (also later deleted) reads:

5. Checks are frequently given with a term providing that they are "in full payment of all claims," or similar language. The holder who obtains payment of such a check takes its benefits subject to the drawer's stipulation that he releases the original obligation. Even where the obligation is for an undisputed and liquidated debt there is no unfairness in the tender and acceptance of an accord and satisfaction; and in this respect subsection (3) changes the law in a number of states. The exception stated as to unconscionable advantage taken by the obligor has been recognized in a considerable number of decisions. A genuine accord and satisfaction is to be found only where the parties are dealing at arm's length and on fair terms of bargaining equality, without unfair advantage taken by either party. The following cases illustrate the application of the exception:

a. The debtor sends the creditor a false statement of their account with a check which stipulates that it is in full payment. The creditor cashes the check in good faith reliance on the statement of account. The original obligation is not discharged.

b. The debtor, knowing that it is the practice of the creditor's clerks to put through checks without examining accounts, sends a check for half the amount due which states that it is in full payment. The check is cashed without examining the account. The obligation is not discharged.

c. The debtor sends a check for less than the amount due which states that it is in full payment. The creditor insists that the amount is not correct, and finally cashes the check as the only available means of obtaining any payment. The original obligation is not discharged.

d. An employer hands an employee a check for less than the full amount of wages due which states that it is in full payment, and threatens to fire the employee if he does not accept the amount. When the employee cashes the check the original obligation is not discharged.

e. An employer hands an employee a check for less than the full amount of wages due which states that it is in full payment. He refuses the employee's demands for the proper amount, and the employee cashes the check in order to obtain money for subsistence. The obligation is not discharged.

Natural Law v. Positive Law: Interpreting Morality

Géronte: Il me semble que vous les placez autrement qu'ils ne sont: que le coeur est du côté gauche, et le foie due côté droit.
Sganarelle: Oui, cela était autrefois ainsi, mais nous avons changé tout cela, et nous faisons maintenant la médicine d'une méthode toute nouvelle.[1]

I. INTRODUCTION

In 1896, the United States Supreme Court considered the constitutionality of *de jure* segregation and declared that separate is equal.[2] In 1954, the Court reconsidered the issue and held that separate is inherently unequal.[3] The question for many has become—why does the meaning of the Constitution ultimately turn on the identity of the interpreter?[4]

The concept of "family values" overshadowed the 1992 presidential campaign season as the candidates, the media, and the electorate battled over an ideal that may have had less significance as a paragon than for its rhetorical value.[5] The Republicans defined "family" in a traditional, con-

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1. Geronte: It seems to me you are locating them wrongly: the heart is on the left and the liver is on the right.

Sganarelle: Yes, in the old days that was so, but we have changed all that, and now we practice medicine by a completely new method. Moliere, La Medicin malgre lui II-iv (1966).

2. Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding a Louisiana statute that required all railway companies provide separate but equal accommodations for its passengers).

3. Brown v. Board of Education, 347 U.S. 483 (1954) (black students have a right under the Equal Protection Clause to attend public schools on a non-segregated basis).

4. George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1297-98 (1990); *see also* Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 13-16 (1959); GARY L. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY 10-11 (1988).

5. Invocations to things familiar (i.e. "the family") allow speakers to connect with their audiences more effectively by keying in to their human emotions. *See* THOMAS MONTALBO, THE POWER OF ELOQUENCE 35 (1984). The "appeals to passion" technique has been used to "fire up" crowds; *see* CRANE BRINTON, THE ANATOMY OF A REVOLUTION 148-160 (1965); it has also been used to garner sympathy, as with Richard Nixon's infamous "Checkers Speech." Machiavelli prescribed in great detail the way leaders should make use of tactics such as cruelty and compassion. NICCOLO MACHIAVELLI, THE PRINCE 95-97 (Founder ed., 1964).

servative way,[6] whereas the Democrats' definition appeared to be liberal and inclusive.[7]

As the political parties split in terms of what "values" are, so does the Supreme Court divide in terms of whose definition of "family" the Constitution ultimately protects.[8] This is truly significant given that one aspect of governance involves regulating the public morality.[9] When the state seeks to regulate an area that has been traditionally afforded constitutional protection because it includes the "private realm of family life that the State cannot enter,"[10] its success will ultimately depend on the definition of "family" adopted by the Court's majority. In determining whether to permit regulation, the Court must elect between the competing values and hence, the competing "moralities."

Some jurists claim themselves to be "value neutral." They purport to base their interpretive strategies upon objective criteria. Others see the Constitution as setting forth broad principles that need not be constrained by a strict adherence to interpretive canons. To describe this division as being merely a clash of "liberal" and "conservative" ideologies, however, is to focus inappropriately on the *purpose* for reaching a decision as opposed to the *methodology* undertaken.[11]

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6. The Republicans have defined family narrowly, in the traditional sense, as "marriage between a man and a woman" and in terms of "fatherhood and motherhood." Former Education Secretary William Bennett, Address at the Republican National Convention (Aug. 19, 1992).

7. The 1992 Democratic presidential candidate stated that "family values encompass those of the traditional family, two parent households, single parent households, and foster families." Governor William Clinton, Address at the Democratic National Convention (July 16, 1992). Although this definition *appears* to be all-inclusive, a closer look reveals that it excludes domestic units without children from the definition of "family."

8. *Cf.* Michael H. v. Gerald D., 491 U.S. 110 (1989). A man declared himself the biological father of Victoria D. and brought an action in the California District Court seeking parental visitation. *Id.* at 110. The child's mother was married to another man whom she listed on the birth certificate as the child's father. *Id.* at 113. A paternity test established that there was a 98% chance that the claimant was indeed the biological parent. *Id.* at 114. And in fact, a relationship between the mother and the claimant was conceded. *Id.* However, because California presumes that the husband is the father if (1) he and the mother were cohabitating at the time of conception, and (2) the husband is not impotent, both of which can only be rebutted by the husband or the wife, the District Court dismissed the suit. *Id.* at 117-18. The United States Supreme Court affirmed the decision to deny visitation rights maintaining that, "the relationship between persons in the situation of Michael H., [the claimant] and Victoria D., has not been protected as a family unit under the historical practices of our society." *Id.* at 124.

9. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 80 (1989); Cohen v. California, 403 U.S. 15 (1971).

10. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

11. STEPHEN MACEDO, THE NEW RIGHT V. THE CONSTITUTION xi (1987); HERBERT JACOB, JUSTICE IN AMERICA 55-59 (1984); HARVEY M. KARLEN, THE PATTERN OF AMERICAN GOVERNMENT 101-13, 259-60 (1968). Professor Chemerinsky points out, "[t]o view the Court entirely from a political perspective is to overlook the many forces that

For example, the Court's decision in the case of *Plessy v. Ferguson*,[12] to uphold a statute mandating the separation of the races in public railway accommodations, could be deemed "conservative" because it acted to preserve the status quo.[13] The outcome, however, reveals little of the institutional approach taken by the members of the Court.[14] The dichotomy of methodology centers on the interpretive or "noninterpretive"[15] role embraced by the decision maker and has been distinguished, more precisely, in terms of its activism or restraint.[16]

The power of the Supreme Court to determine the constitutional validity of the acts of the other branches of government was established in *Marbury v. Madison*.[17] As a result, in cases like *Plessy*, it is the Court that has the ultimate authority for deciding whether state-enforced segregation contravenes the constitutional directive that no "State shall deprive any person of . . . the equal protection of the laws."[18] And it is the Court that decides what constitutes "equal protection."

There are two basic types of interpretive situations confronting the judiciary. The first is simple. It involves a law-to-fact application where the text is unambiguous. This is because it is "universally accepted that our system recognizes no higher legal authority than our written constitu-

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[influence] judicial decision making." Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 44, 46 (1989).

12. 163 U.S. 537 (1896).

13. For a discussion of the significance of political labels, *see* HERBERT WINTER, PEOPLE AND POLITICS 97-102 (1989).

14. The Court, in fact, employed the Doctrine of Original Intent. "The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but . . . it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Plessy*, 163 U.S. at 543-44; *see also infra* notes 88-124 and accompanying text for an analysis of the Doctrine of Original Intent.

15. "Noninterpretive" is a term of art for the positivist approach. Clifford Wallace, *Interpreting the Constitution: The Supreme Court's Proper and Historic Function, the Case for Judicial Restraint*, 7 JUDICATURE 80, 82-83 (Aug.-Sept. 1987); Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?* 69 N.C. L. REV. 337, 423 (1990).

16. Judicial activism is often associated with liberalism because a number of progressive rulings have derived from activist methodologies. For example, in Griswold v. Connecticut, 381 U.S. 479 (1965), the Court held a Connecticut statute invalid because it restricted the right of married couples to use contraceptive devices. In order to validate the holding in the absence of a constitutional provision on point, Justice Douglas is said to have *created* a right to privacy from the several guarantees of the First Amendment. MACEDO, *supra* note 11, at 113. On the other hand, there is also a phenomenon known as "conservative activism" that first appeared as economic protectionism. Lochner v. New York, 198 U.S. 45 (1905). *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 8.4 (2d ed. 1988).

17. 5 U.S. (1 Cranch) 137 (1803). Justice Marshall wrote, "it is emphatically the province and duty of the judicial department to say what the law is." *Id.* at 177.

18. U.S. CONST. amend. XIV, § 1.

tion; [that] *explicit constitutional text* cannot be overridden by natural or fundamental law."[19] The Court is therefore obliged to follow the rule as set out in the text. A problem necessarily arises in the second interpretive situation when the Court is faced with an issue that is not squarely addressed by an explicit provision.[20] Judges and scholars alike disagree over the institutional approach to the judicial review of claims arising in this area.[21]

Discerning the "correct approach"[22] prompts inquiry into the very nature and legitimacy of governmental authority and sparks controversies that have plagued philosophers and statesmen since the beginning of written history.[23] For example, Professor Ides suggests that interpretive models of judicial review will necessarily be based upon one's understanding of American democracy.[24] For example, "liberal democracy" highlights individualism; whereas "participatory democracy" is more communitarian.[25] The following discussion will illustrate how this cleavage impacts the respective burdens on constitutional litigants. This Note will explore the origins of these enduring dilemmas in light of the issues raised by modern constitutional jurisprudence.

Part II contextualizes the interpretive framework for constitutional adjudication by setting forth the justifications for judicial review.[26] This will provide a backdrop for understanding the broad distinctions between the two major philosophies.

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19. THOMAS C. GREY, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, in* JUDICIAL REVIEW IN AMERICAN HISTORY 266 (Kermit L. Hall ed., 1987) (emphasis added).

20. Professor Macedo has observed, that "[i]f every phrase in the Constitution were as easy to interpret as 'neither shall any Person be eligible to that Office [the Presidency] who shall not have attained the Age of thirty-five Years,' enforcing its provisions would be an almost mechanical process." MACEDO, *supra* note 11, at 7-8.

21. Robert H. Bork, *Neutral Principles and Some First Amendment Problems, in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 197-98 (1990) (Judge Bork has observed that this approach is "the subject of lengthy and often acrimonious debate"); *see also* BENJAMIN F. WRIGHT, THE GROWTH OF CONSTITUTIONAL LAW 196-98 (1967).

22. It is probably more accurate to say the "better" approach because whatever methodology the Court chooses to employ necessarily becomes the "correct" approach.

23. *See supra* note 1 and accompanying text.

24. Allen Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1, 1-5 (1991). "[M]uch of the disagreement over the legitimacy and proper scope of judicial review may be really a disagreement over the meaning of American democracy." *Id.* at 3. Professor Davis notes that "College students . . . will usually incorporate their understandings of the *entire* Constitution into their notions of American democratic government." Lane Davis, *Mistakes about Democracy and Government*, 72 IOWA L. REV. 1315, 1316 (1987) (emphasis added).

25. Ides, *supra* note 24, at 8.

26. *See infra* notes 44-138 and accompanying text.

Part III introduces the concept of Legal Positivism, considered the "prevailing ideology of the Rehnquist Court,"[27] while exploring its origins and judicial applications.[28]

Positivists are divided into two theoretical schools of judicial interpretation. The first adheres to the Doctrine of Original Intent. This holds that in the face of ambiguity, the decision maker should refrain from subjective value imposition and inquire into the intentions of the original Framers.[29] "Originalists" have argued that to do otherwise would constitute nothing short of legislating judicially.[30] The second branch embraces Textual Constructionism.[31] Constructionists take a "four corners" approach,[32] arguing that if a definitive answer cannot be gleaned from the text itself, the Court must exercise a "principled restraint" and defer to the elected branches of government (euphemistically referred to as "deciding not to decide").[33]

Part IV examines the Natural Law approach.[34] Essentially, natural law theorists argue that the United States Constitution was never meant to address specifically every situation that could possibly arise,[35] nor was it meant to function as a statute or code.[36] Naturalists instead maintain that the Framers intended to set forth the general and fundamental principles by which the state should be organized and the people governed.[37]

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27. Jeffrey A. Segal & Harold J. Spaeth, *Rehnquist Court Disposition of Lower Court Decisions: Affirmation not Reversal*, 74 JUDICATURE 84, 96 (1990).

28. *See infra* notes 62-138 and accompanying text.

29. *See, e.g.*, GARY L. MCDOWELL, THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY 8-13 (1985); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS CONSTITUTION 1-29, 284-387 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, *in* INTERPRETING THE CONSTITUTION 53-116 (Rakove ed., 1990); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1084, 1086 (1989).

30. Rose v. Lundy, 455 U.S. 509, 522 (1982) (Blackmun, J., concurring).

31. *See infra* notes 127-38 and accompanying text.

32. *See, e.g.*, New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 351 (1989); Anderson v. Creighton, 483 U.S. 635, 654 (1987) (Stevens, J., dissenting); Ricketts v. Adamson, 483 U.S. 1, 15 (1987) (Brennan, J., dissenting).

33. Christopher A. Crain, *Judicial Restraint and the Non-decision in* Webster v. Reproductive Health Services, 13 HARV. J.L. & PUB. POL'Y 263, 265 n.12 (1990); Peter G. McAllen, *Deference to the Plaintiff in Forum Non Conveniens*, 13 S. ILL. U. L.J. 191, 232 (1989); Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1585 (1985).

34. *See infra* notes 146-265 and accompanying text.

35. MACEDO, *supra* note 11, at 22. Professor Macedo argues that the indeterminate language of the Constitution suggests that the Framers were looking to draft the document in such a way that it would be able to apply to both "unforeseen and unforeseeable circumstances." *Id.*

36. *Id.*

37. *Id.*

The judiciary's role was to determine whether the laws of the state comported with our inherent rights as set forth in the Constitution.[38]

These competing approaches to judicial review of constitutional claims have been labeled *inter alia*, "Interpretive" vs. "Noninterpretive,"[39] "Originalist" vs. "Naturalist,"[40] and "Positivist" vs. "Naturalist."[41] This Note will use the Positivist/Naturalist label because it clearly suggests the methodologies employed.

II. JUSTIFICATION FOR REVIEW

A. *Authority for Review*

"Why should five Justices[42] be able to set aside the actions of a Congress and Presidency who are responsible to the electorate?"[43]

Judicial review is not mandated by the Constitution. In fact, it is not even mentioned in the text.[44] In 1803, however, Justice Marshall, in what some consider to be the most important decision in the history of the United States Supreme Court,[45] determined that not only is judicial review justified, it is also required by the very existence of the judicial branch.[46] Drawing upon the writings of Alexander Hamilton, Marshall posited, "[t]hose who apply the rule to particular cases, *must of necessity* expound and interpret that rule."[47]

Syllogistically, Marshall's argument looks like this: (1) all laws are subordinate to the Constitution ("the Constitution is the supreme law of the land");[48] (2) the role of the federal judiciary is to interpret the Constitution (the Court is vested with the original grant of jurisdiction "to say what the law is");[49] (3) therefore, the Court has the authority to invali-

38. For example, the Fourteenth Amendment refers to the idea of "due process of law." The Amendment does not define the type of process due citizens under this entitlement, nor is there any explanation of the kind of state action that will contravene due process of law. It therefore becomes necessary, in the context of judicial review, to first determine what values and principles are invoked by the concept of "due process" and second, apply these principles to resolve the controversy at hand. *See generally* EDMOND CAHN, SUPREME COURT AND SUPREME LAW 177 (1954).

39. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, in* KERMIT L. HALL, JUDICIAL REVIEW IN AMERICAN HISTORY 266-68 (1988); Farber, supra note 29, at 1084.

40. Wallace, *supra* note 15, at 82.

41. MICHAEL J. PERRY, MORALITY, POLITICS AND LAW 24 (1988).

42. A binding decision requires a majority of a quorum or at least four votes. HARVEY M. KARLEN, THE PATTERN OF AMERICAN GOVERNMENT 250 (1968).

43. MALCOLM M. FEELEY & SAMUEL KRISLOV, CONSTITUTIONAL LAW 3 (2d ed. 1990).

44. *Id.* at 4.

45. *Id.* at 10.

46. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 139-41 (1803).

47. *Id.* at 139 (emphasis added).

48. *Id.*

49. *Id.* at 139-40.

date the laws of the elected branches that contravene constitutional requisites (there exists an inherent right of judicial review).[50]

In order to understand the conflicting methodological approaches to constitutional interpretation, it becomes necessary to explore the justifications for judicial review.

B. *Counter-Majoritarianism*

One justification for review has been termed the "Counter-Majoritarian" argument.[51] It holds that the Court stands as a constitutional check on "runaway temporary majorities."[52] In support of this position, it has been noted that "[t]he life tenure of judges allows them the luxury of standing against momentary fads."[53] In *United States v. Carolene Products,*[54] Justice Stone suggested that in the absence of "exacting judicial scrutiny . . . [majorities could act] to curtail the operation of [the] political processes ordinarily to be relied upon to protect minorities."[55]

C. *The Educative Function*

Another justification is that judicial review serves an educative purpose.[56] By setting forth reasoned decisions and accommodating dissenting and concurring views, not only will the litigants be appraised of the basis for the judgment and the alternatives, but the legal community and the citizenry will also have the opportunity to learn the state of the law as the Court understands it.

Professor Feeley points to the fact that dissenting opinions, in particular, serve a vital purpose.[57] "Not only is it significant that we permit public dissent by our officials but [the fact that we] print and disseminate such disagreements is itself a profound symbolic act."[58]

Additionally, in the course of resolving a particular dispute, the Court will often go to great lengths to survey the theoretical underpinnings of a particular area of the law,[59] thereby promoting continuity. This brings us to the final justification, the doctrine of *stare decisis.*

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50. *See* IRVING COPI, SYMBOLIC LOGIC 174 (5th ed. 1979) (for a discussion on the applications of categorical syllogisms).

51. FEELEY, *supra* note 43, at 6.

52. *Id.*

53. *Id.*

54. 304 U.S. 144 (1938).

55. *Id.* at 148.

56. FEELEY, *supra* note 43, at 8.

57. *Id.*

58. *Id.*

59. *See, e.g.,* Branzburg v. Hayes, 408 U.S. 665 (1972) (surveying the law of testimonial privileges); United States v. Willow River Power Co., 324 U.S. 499 (1945) (reviewing noncompensable takings); Yakus v. United States, 321 U.S. 414 (1944) (surveying the powers of Congress to enact comprehensive legislation controlling the economy during wartime).

D. *Consistency*

Stare decisis holds that once a court has laid down a principle of law, it is bound by that principle.[60] Judicial review of constitutional claims, therefore, assures decisional uniformity and in turn, a fidelity to precedent.[61]

The foregoing tells us *why* the Court has the authority to construe the meaning of the Constitution. The following discussion will focus on the competing approaches as to *how* interpretation is to be performed within that authoritative framework.

III. Legal Positivism

"It is not Wisdom, but Authority that makes a Law."—Hobbes[62]

Judge Robert Bork is one of the most prominent and controversial proponents of the positivist approach.[63] But when his confirmation to the Supreme Court failed in 1987, his "political conservativism" was faulted.[64] The failure to focus on the propriety of Judge Bork's *methodology* (as opposed to his political ideology) was a conspicuous oversight. Justice Scalia and Chief Justice Rehnquist are also self-proclaimed positivist jurists.[65] Their appointments, however, were secured during a period of Republican control of the Senate.[66]

In order to understand the positivist model of judicial review, it is important to understand the intellectual tradition of legal positivism from which it springs.

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60. Black's Law Dictionary 1406 (6th ed. 1990).

61. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication, in* Rakove, Interpreting the Constitution: The Debate Over Original Intent 276-77 (1990).

62. Thomas Hobbes, A Dialogue between a Philosopher and a Student of the Common Laws of England 55 (J. Cropsey ed., 1971).

63. Gary McDowell, The Constitution and Contemporary Constitutional Theory xi (1985); Bruce N. Morton, *John Locke, Robert Bork, Natural Rights and the Interpretation of the Constitution*, 22 Seton Hall L. Rev. 709, 710 (1992).

64. *See* John Stookey & George Watson, *Supreme Court Confirmation Hearings: A View from the Senate*, 71 Judicature 186, 194-96 (Dec.-Jan. 1988). Bork has also been called "The Man Who Wrote Too Much," suggesting that his scholarly prolificacy, particularly with regard to issues of constitutional interpretation, served to frustrate his confirmation efforts before the Senate Judiciary Committee. George Kannar, *Citizenship and Scholarship*, 90 Colum. L. Rev. 2017, 2023 (1990) (book review).

65. David A. Kaplan & Bob Cohn, *At Least He's Read Roe Now: Can Clarence Thomas Finally Shake His Past?* Newsweek, Oct. 5, 1992, at 58-59; Beau James Brock, *Mr. Justice Antonin Scalia: A Renaissance of Positivism and Predictability in Constitutional Adjudication*, 51 La. L. Rev. 623, 632 (1991).

66. David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution and the Confirmation Process*, 101 Yale L.J. 1491, 1523 (1992); *see also* Stookey Watson, *supra* note 64, at 190.

A. *Legal Positivism Defined*

Legal positivism holds that law is valid only if it results from positive political procedures.[67] The positivists maintain that *positive law*, even though it may have been promulgated on the basis of a belief in some higher law, is supreme and should be accordingly venerated.[68]

Positive law is defined, therefore, as law "actually and specifically enacted or adopted by proper authority for the government of an organized jural society."[69] Alternatively stated, "[p]ositive law is law that exists by virtue of its being posited."[70] This latter definition takes into account the assertive quality of the positive law.[71] Whereas natural law is thought to exist in the abstract, whether or not it has been formally promulgated,[72] positive law is law *because* it has been advanced, usually in the form of statutes, constitutions, or even administrative regulations.[73]

According to legal positivists, positive law is legitimate because it stems from an agreement between government and the citizenry presumed to be necessary for the orderly administration of society.[74] For example, Thomas Hobbes, the "father of modern positivism,"[75] set forth the notion that "the very purpose of the social contract [the agreement between government and the governed] was to *supplant* the state of nature."[76] To Hobbes, "man living in a state of nature would be constantly engaged in a war of all against all, a government [becomes] necessary if man's wolfish instincts were not to govern his behavior."[77] So while the purpose of law for Hobbes would be to articulate the basic rules by which society should adhere in order to proliferate, its relationship to any type of natural justice is merely coincidental and arguably based on utilitarian considerations.

Legal positivism rejects the idea that morality necessarily stands as a check on the law or the government.[78] For example, whereas the proponents of natural law would reject entirely the laws of Nazism, apartheid,[79]

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67. Philippe Nonet, *What is Positive Law?* 100 YALE L.J. 667, 668-69 (1990).

68. *Id.*

69. BLACK'S LAW DICTIONARY 1162 (6th ed. 1990).

70. Nonet, *supra* note 67, at 667.

71. *See id.* at 668-69.

72. "[N]atural law [presumably] exists independently of anyone's will or fiat or preference." Morton, *supra* note 63, at 718.

73. Nonet, *supra* note 67, at 670.

74. LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 67 (1987); *see also* Morton, *supra* note 63, at 722 (referring to the Lockean "tacit agreement" between government and the governed).

75. WEINREB, *supra* note 74, at 67.

76. *Id.*

77. Jacob Viner, *The Intellectual History of Laissez Faire*, 3 J.L. & ECON. 45, 57 (1960).

78. James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power and Essentialism*, 35 U. PA. L. REV. 383, 385 (1987).

79. South Africa's racial policy of black inferiority. RANDOM HOUSE DICTIONARY 100 (2d ed. 1987).

and American slavery (during the antebellum South) as immoral and hence, invalid, the legal positivist would contend that the "power of command rises to the rank of supreme source of Law . . . ."[80]

B. *Positivism and Judicial Review*

In a democracy, legal positivism is based on the principles of majoritarianism[81] which hold that every citizen, having equal opportunity for input into the system, is likewise bound by the decisions rendered by the majority. Accordingly, American positivists maintain that the positive law, as set forth by societal majorities, comprises the only binding law.

In terms of judicial review, this means that the role of the judiciary is to interpret or clarify the meaning of the written law while avoiding any subjective value assessments on policy grounds.[82] Determining what the law *should be,* according to this view, rests solely with the politically accountable lawmakers as representatives of their popular constituencies.[83]

This, as well as any other interpretive model, functions on the basis of "normative hermeneutic reasoning."[84] This means that there must be a text-based authority from which rules are derived for the resolution of conflict, such as a constitutional provision,[85] as well as a theory of interpretation.[86] For the legal positivists, there are two general theories of interpretation: Originalism and Constructionism.

C. *Originalism*

When a constitutional provision does not specifically address the issue before the Court,[87] one theory of interpretation for the positivist is

80. Nonet, *supra* note 67, at 669. For a modern example of the positivist rejection of morality as a check on governmental action, see Robert Bork, *Neutral Principals: First Amendment Problems,* 47 IND. L.J. 3, 12-15 (1971) (arguing that *Brown v. Board of Education* was wrongly decided not because segregation is morally just or unjust, but because the Court, in interpreting the Fourteenth Amendment, did not have an explicit textual basis nor an implied foundation for its decision).

81. Daniel A. Farber, *The Originalist Debate: A Guide for the Perplexed,* 49 OHIO ST. L.J. 1085, 1099-1100 (1989); *see also* Erwin Chemerinsky, *The Vanishing Constitution,* 103 HARV. L. REV. 43, 48-51 (1989) (discussing the interrelationship of majoritarianism and judicial neutrality).

82. Bork, *supra* note 80, at 8.

> The choice of "fundamental values" by the Court cannot be justified. Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and history, and their fair implications, and not construct new rights.

Id.

83. Chemerinsky, *supra* note 81, at 68.

84. Michael S. Moore, *Do We Have An Unwritten Constitution?,* 63 S. CAL. L. REV. 107, 110 (1989).

85. *Id.*

86. *Id.* at 124.

87. *See supra* note 20 and accompanying text.

Originalism. Originalism (or the Doctrine of Original Intent) holds that "the Constitution should be interpreted in accordance with the Intentions of the Framers who drafted and ratified it."[88] The intent of the drafters constitutes, theoretically, the will of the majority which the positivist has obligated him or herself to determine. Today, originalism is a widely recognized theory of constitutional interpretation.[89]

The Constitution is a written document. Originalism holds that the interpreting entity (here, the judiciary) must first ascertain "the beliefs the text was originally understood to signify . . . and then . . . answer the question of what significance, if any, those beliefs . . . require the court to do . . . with respect to the conflict at hand."[90]

For example, in the case of *Mistretta v. United States*,[91] the Court considered the constitutionality of a Sentencing Commission that was created by the Sentencing Reform Act of 1984[92] to promulgate Uniform Sentencing Guidelines. Mistretta, who was convicted of trafficking in cocaine and whose sentence was derived on the basis of those Guidelines, argued *inter alia* that the act was unconstitutional because the Sentencing Commission "effected an unconstitutional accumulation of power within the judicial branch . . . ."[93] Mistretta argued that because the act required the Commission to be comprised of a body of Article III judges, it "undermin[ed] the Judiciary's independence and integrity [by requiring the judges] to exercise not only their judicial authority, but legislative authority—the making of sentencing policy—as well."[94]

The *Mistretta* Court determined that, even though the Constitution mandates the separation of powers, "[t]he text of the Constitution contains no prohibition against the service of active federal judges on independent commissions such as that established by the Act."[95] In order to determine the meaning of an independent judiciary in this "twilight area,"[96] the Court considered the intent of the original Framers concerning "extrajudicial services."[97]

Justice Blackmun, writing for the majority, held that the presence of Article III judges on the Sentencing Commission did not subvert the separation of powers principle because "two prohibitions against plural of-

88. MACEDO, *supra* note 11, at xi. "Originalists are committed to the view that original intent is not only relevant but authoritative, that we are in some sense obligated to follow the intent of the framers." *Id.*; *see* Farber, *supra* note 81, at 1086.

89. Morton, *supra* note 63, at 709.

90. MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 132 (1988).

91. 488 U.S. 361 (1989).

92. 28 U.S.C. § 991 (1987).

93. *Mistreeta*, 488 U.S. at 383.

94. *Id.* The Court also considered and rejected Mistretta's claim that this constituted an unconstitutional delegation of power. *Id.* at 371-79.

95. *Id.* at 397 (emphasis added).

96. *Id.* at 386.

97. *Id.* at 397-404.

fice holding by members of the Judiciary were proposed [at the Constitutional Convention], but did not reach the floor of the convention for a vote."[98] Also, the Framers themselves participated in extrajudicial services,[99] and the judges on the Commission do not act in a "judicial capacity."[100] On the basis of the historical record, Mistretta's constitutional claim was found to be without merit and was dismissed.

Originalists maintain that the only way to be true to the meaning of the text is to respect the Framers' intentions.[101] Otherwise, they argue, the Court necessarily engages in an activism that threatens the very legitimacy of our judicial branch.[102]

D. *The Infirmities of Originalist Theory*

The first problem with Originalism is that it is not entirely clear that the Framers *expected* their intentions to be pursued as a method of interpretation.[103] Professor Macedo and others suggest that "the Framers of the Constitution *did* reject reliance on historical intentions."[104] The first inquiry into the Framers' intent, therefore, may very well reveal that inquiry itself is inappropriate. Another problem becomes one of precision. How can intent derived from primordial handwritten notes and documents be a better forecast of what the Framers intended than that derived from the Constitutional text that was scrupulously deliberated before it was set out on the parchment?[105] One scholar has emphasized that "[t]hose who framed the Constitution chose their words carefully,"[106] suggesting that the Framers would have balked at the notion that their intentions were to be derived from informal sources.

Also, historical documentary evidence has been shown to be unreliable.[107] For example, James Madison,[108] the sole recorder at the Constitu-

98. *Id.* at 398.

99. *Id.* at 396-99. Blackmun points out that "John Jay served simultaneously as Chief Justice and Ambassador to England" and that "Oliver Ellsworth served simultaneously as Chief Justice and as Minister to France" and "while he was Chief Justice, John Marshall served briefly as Secretary of State . . . ." *Id.* at 398-99.

100. *Id.*

101. Farber, *supra* note 81, at 1086.

102. *Id.*

103. *Id.* at 1089-90; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903-04 (1985) (Professor Powell argues that the Framers expected the objective meaning of the Constitution's language to be the controlling factor instead of their own subjective intentions). Professor Macedo points out that James Madison and Alexander Hamilton, key drafters who were also influential in the ratification process, "positively opposed reliance on the intentions of the Framers." MACEDO, *supra* note 11, at 18.

104. MACEDO, *supra* note 11, at 17 (emphasis added); *see also* Powell, *supra* note 103, at 886.

105. MACEDO, *supra* note 11, at 14.

106. *Id.*

107. Farber, *supra* note 81, at 1091; *see also* James Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 27-33 (1986).

tional Convention, was only able to note a small fraction of the proceedings.[109] This is problematic because it suggests that the notes that *were* taken may not be representative of the entirety of the proceedings. Even given the best possible case scenario, assuming that Madison "summarized" the main points of the discussion, there are still partisan concerns. For example, evidence has surfaced indicating that Madison edited his own speeches and deleted those of his political opponents.[110]

Along those same lines, Federalist Thomas Lloyd, recorder at the Pennsylvania and Maryland debates, admitted that "[h]e reported only selective Federalist speeches and even those seem to have been significantly revised."[111] Lloyd was also responsible for the House reports covering the Bill of Rights.[112] By that time, Mr. Lloyd's "technical skills had become dulled by excessive drinking."[113]

Another question is whether the textual interpreters should be looking to the intent of the Framers at the time of the Constitutional Convention (the time of the drafting, as in traditional contract theory), or whether an attempt should be made to place the Framers in a contemporary setting.[114] The problem with the former is that American society has changed to such a large degree that the intent of the Framers is not only speculative; in some cases, it may also be unworkable.

For example, in *Kirchberg v. Feenstra*,[115] the Court invalidated a Louisiana statute giving a husband the unilateral right to dispose of property, jointly owned, without the consent of his wife. The decision was based upon the Equal Protection Clause of the Fourteenth Amendment.[116] If the Court had decided this case under the Doctrine of Original Intent theory and extracted the meaning of the Equal Protection clause as it applied to the property rights of women at the time of ratification, there is little doubt that they would have upheld the statutory preference of husband as "head and master."[117]

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108. Madison, a Federalist, was the fourth President of the United States. He is credited with recording the proceedings at the 1787 Constitutional Convention at Philadelphia. Hutson, *supra* note 107, at 34. He is also known for his historical contribution (along with Alexander Hamilton and John Jay) in authoring THE FEDERALIST PAPERS which outline the conflicting political concerns of the era. *Id.*

109. Farber, *supra* note 81, at 1088.

110. *Id.*

111. *Id.*; *see also* Hutson, *supra* note 107, at 22-23.

112. Farber, *supra* note 29, at 1089.

113. Hutson, *supra* note 107, at 36.

114. *See* Farber, *supra* note 29, at 1087.

115. 450 U.S. 455 (1981).

116. U.S. CONST. amend. XIV, § 2.

117. *Kirchberg*, 450 U.S. at 456; *see also* Thomas M. Featherston, Jr. & Julie A. Springer, *Marital Property Law in Texas: The Past, Present and Future*, 39 BAYLOR L. REV. 861 (1987).

Another criticism of originalist theory is that it is *not* majoritarian, which is its very claim to legitimacy.[118] The ratifiers of the Constitution were educated white males, elected by a small number of landed, franchised white males.[119] They were not representing the views of the majority at the time[120] any more than their resurrected intentions could be said to represent the views of the current societal majority.

The most persuasive argument against the originalist paradigm is that majoritarianism, as an approach to constitutional interpretation, fails to appreciate to an acceptable degree that one of the underlying functions of the United States Constitution[121] is to protect individuals from tyranny, majoritarian coercion, and undue governmental intrusion.[122] One scholar has termed this quasi-conservative oversight "The Majoritarian Myth,"[123] stating that "the conservative invocation of Original Intent has less to do with reverence for the ideas of the Founders than with a political preference for majoritarian power over individual rights and liberty."[124]

Majoritarianism holds that judges must defer to the elected branches by enforcing only those rights that are explicitly set out within the text or "very clearly implied [by] it."[125] In opposition to this view, Alexander Hamilton wrote:

> [T]he courts were designed to be an intermediate body between the people and the legislature . . . . A constitution is, in fact, and must be regarded by judges as, a fundamental law . . . [t]he constitution ought to be preferred to the statute . . . . This independence of judges is equally requisite to guard the constitution and rights of individuals from [ill-humored *majorities*], or the influence of particular conjectures, [who] sometimes disseminate among the people themselves . . . to occasion dangerous innovations in the government, and [cause] serious oppressions of the minor party in the community. . . . [I]t would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.[126]

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118. *See* Farber, *supra* note 29, at 1099.

119. *Id.*

120. *Id.*

121. More specifically, the Bill of Rights, which was designed to safeguard individual rights and liberties from the caprice of temporary majorities, is comprised of the vague types of language that have triggered much of the debate as to interpretation strategy. *See* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1165-66 (1987).

122. *See* Stanley v. Georgia, 394 U.S. 557 (1969) (holding that individuals have a right to be free from governmental intrusion in the privacy of their homes); *cf.* Bowers v. Hardwick, 478 U.S. 186 (1986) (a similar expectation of privacy does not extend to the homes of consenting adult homosexuals).

123. MACEDO, *supra* note 11, at 25.

124. *Id.* at 23.

125. *Id.* at 27.

126. THE FEDERALIST No. 78 (Alexander Hamilton) (emphasis added).

Although this speaks clearly against the originalist cause, it also denounces the theoretical positivist counterpart to originalism: textual constructionism.

E. *Textual Constructionism*

The constructionist model combines a "respect for stare decisis with a restrained interpretation of precedent and the Constitution's text."[127] This minimizes the role of the Framer's intent and eliminates any "unconstrained evaluation of evolving social values."[128] In fact, Justice Antonin Scalia has written, even "if someone should discover that the secret intent of the Framers was quite different from what the words seem to connote, it would not make a difference."[129]

Justice Scalia is committed to a methodology of textual fidelity because, he argues, "sticking to the 'plain meaning of a text' . . . assure[s] predictability and uniformity, [and] also serves as a further constraint on judicial discretion."[130]

Justice Scalia's dissent in *Mistretta v. United States*[131] provides insight into his Constructionist approach. Justice Scalia writes:

> While the products of the Sentencing Commission's labors have been given the modest name 'Guidelines,' . . . they have the force and effect of laws . . . . I can find no place within our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws.[132]

Here Justice Scalia maintains that the Commission results in an unconstitutional delegation of power contravening the express limitations of Congress as set forth in Article I.[133] He also criticizes the Court for contributing to the:

> [emerging] separation of powers jurisprudence . . . [that] treat[s] the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much is to be determined, case-by-case, by this Court.[134]

He cautions that the Court has grounded the *Mistretta* decision on the concept of a "perceived utility," instead of the constitutional text itself, and he dismisses the relevance of the Framer's own extra-judicial conduct as an expression of intent.[135]

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127. Kannar, *supra* note 4, at 1302.
128. *Id.* at 1307.
129. *Hearings on the Nomination of Judge Antonin Scalia Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986).
130. Kannar, *supra* note 4, at 1307.
131. 488 U.S. 361 (1989).
132. *Id.* at 413 (Scalia, J., dissenting).
133. *Id.* (Scalia, J., dissenting).
134. *Id.* at 425 (Scalia, J., dissenting).
135. *Id.* (Scalia, J., dissenting).

Justice Scalia's constructionist methodology has been lauded as adhering to a jurisprudence of principled restraint.[136] Not only has this restored a certain credibility to the Court's decision making,[137] but it has bestowed the Justice with an esteemed notoriety.[138]

IV. NATURAL LAW THEORY

The Legal Positivists have been highly critical of the Natural Law theory. For example, during his confirmation hearings before the Senate Judiciary Committee, Supreme Court nominee Clarence Thomas rejected the idea that natural law has a legitimate role in constitutional interpretation and suggested that it is merely a "philosophical background to the Constitution."[139]

During another prior, yet recent confirmation hearing,[140] Judge Robert Bork similarly denounced the libertarian view[141] that judges may invoke the natural law by theorizing a morality component into the interpretation process.[142] Championing the cause of majoritarian jurisprudence,[143] Judge Bork has said, "the Constitution specifies certain liberties . . . that judges are authorized to protect . . . . It allocates the creation of new rights to the democratic processes. Courts invade the proper domain of democratic government when they legislate judicially under the guise of protecting unenumerated constitutional rights."[144]

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136. Kannar, *supra* note 4, at 1297-1300.

137. Kaplan & Cohn, *supra* note 65, at 59.

138. Kannar, *supra* note 4, at 1304. Professor Kannar claims that this is because Scalia does not render decisions thought to be consistently conservative or liberal. *Id.*; *see also* Brock, *supra* note 65, at 623-24.

139. Kenneth L. Woodword, *'Natural Law': An Elusive Tradition,* NEWSWEEK, Sept. 23, 1991, at 20.

140. SENATE COMM. ON THE JUDICIARY, NOMINATION OF ROBERT BORK TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT, S. EXEC. REP. NO. 7, 100th Cong., 1st Sess. (1987) [hereinafter Bork Debates].

141. Judicial libertarians advocate an autonomous approach to judicial decision making, unfettered by doctrinal constraints and emphasizing individual liberty. *See* K. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 5, 20 (1986); Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending,* 58 N.Y.U. L. REV. 1273 (1983). *See also* Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech,* 4 J.L. & POL. 451 (1988) (discussing the libertarian perspective in the context of judicial review).

142. Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?* 69 N.C. L. REV. 421, 423 (1991); Gene R. Nichol, Jr., *Bork's Dilemma,* 76 VA. L. REV. 337 (1990); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Mortimer Adler, *Robert Bork: The Lessons to be Learned,* 84 NW. U. L. REV. 1121 (1990); *see also* Richard S. Kay, *The Bork Nomination and the Definition of "The Constitution,"* 84 NW. U. L. REV. 1190 (1990).

143. *See supra* notes 81-83 and accompanying text.

144. Michael, *supra* note 15, at 422; *see also* Bork Debates, *supra* note 140, at 30.

Justice Black has rejected "the implicit adoption of natural law concepts which under our system leaves to judges alone the power to say what the natural law means. If judges, in deciding whether laws are constitutional, are left to the admonitions of their own consciences, why was it that the Founders gave us a written Constitution at all?"[145]

Justice Thomas believes that natural law is irrelevant because it is an obscurity. Justice Bork argues that it *is* relevant but it is for the majoritarian institutions to define if they so chose. Justice Black, the constructionist, argues that value imposition by the judiciary is unacceptable; the law is what the law says, period. In order to answer these criticisms, it is important to define the theory in the context of the natural law tradition.

A. *What Is Natural Law?*

Natural law has been termed "an aggregate of moral principles to guide human conduct."[146] In terms of American jurisprudence, natural law *theory* has come to embody a "fundamental rights" position[147] whereby humans are thought to possess certain rights and liberties beyond and superior to those conferred by the state[148] as eluded to by the Constitution itself.[149] Early natural law proponents, however, would go beyond that definition, maintaining instead that the state *does not confer* rights at all but instead has been vested with the authority/obligation to protect those rights that individuals naturally possess.[150]

A system of rights based on morality, as Justice Thomas has suggested, becomes problematic in that it forces an inquiry into the meaning of morality itself.[151] Judge Bork simply denies that humans are "endowed . . . with certain unalienable Rights"[152] that can be objectively discerned.[153] The positivists would all agree that even if there truly are fundamental

145. Snidach v. Family Fin. Corp., 395 U.S. 337, 350-51 (1969) (Blackmun, J., dissenting).

146. CHARLES GROVE HAINES, 2 THE REVIVAL OF NATURAL LAW CONCEPTS 3, 17 (1930).

147. *Id.* at 29 (discussing the English natural rights emergence because it provides the backdrop for our constitutional heritage); *see also* Phillip Hamburger, *Natural Rights, Natural Law and American Constitutions*, 102 YALE L.J. 907 (1993) (discussing the modern indeterminate nature of natural rights jurisprudence).

148. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1168 (1987).

149. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

150. Hamburger, *supra* note 147, at 931.

151. *See* Wechsler, *supra* note 4, at 14-16. Suggesting that morality is purely speculative, Professor Perry has queried, "can there be moral knowledge?" MICHAEL J. PERRY, MORALITY, POLITICS AND THE LAW 9 (1988).

152. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

153. *See* Bork, *supra* note 21, at 201.

principles of morality, it is inappropriate for the judiciary to attempt to articulate and enforce them.[154]

In order to understand the controversial application of natural law as an instrument of judicial review as it contrasts with the positive law model, it is important to understand its theoretical origins. To illustrate the evolutionary character of the Natural Law theory, the following section will present the ideas of three theorists whose contributions have sculpted our contemporary Natural Law jurisprudence.

1. Cicero[155]

Cicero is lauded as being one of the first philosophers to expound a theory of natural law.[156] "His writings contain the first clear statements of Natural Law as a distinct philosophical doctrine."[157]

As the Roman empire spread to the far corners of the Mediterranean and the Roman armies attempted to organize the subject territories, Roman jurists came to distinguish *ius civile* (civil law), peculiar to each *civitas* (State), from the *ius gentium* (the law of the world).[158] Cicero maintained that *ius gentium* was "derived from Nature or Reason."[159] It was significant because of its "universality of application."[160]

As a member of the Stoic school of philosophy,[161] Cicero understood God as the source of *ius gentium*.[162] Cicero's basic theory of natural law was that every human has an affirmative obligation to help other humans in order to promote "universal sociability and well-being."[163] In *De Re Publica*, Cicero propounds his theory; it is a famous selection well worth reproducing in its entirety because it is considered one of the first authoritative definitions of natural law,[164] and also, because it establishes the framework for the natural rights theories that begin to emerge with the advent of the English Natural Law theorists:[165]

> There is in fact a true law—namely, right reason—which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its

154. Stephen Macedo, *Originalism and the Inescapability of Politics*, 84 Nw. U. L. Rev. 1203, 1212 (1990). Judge Bork's position is that majoritarian institutions are to denominate between competing "gratifications." Bork, *supra* note 21, at 202-04.

155. Marcus Tullius Cicero (106-43 B.C.) was a Roman statesman and writer. Oxford Classical Dictionary 234 (2d ed. 1970).

156. Weinreb, *supra* note 74, at 39.

157. *Id.*

158. *Id.* at 44-45.

159. *Id.*

160. *Id.*

161. Stoic philosophy dates back to 300 B.C. The Stoics maintained that it was necessary to submit to unavoidable necessity without complaint. David Stewart & H. Gene Blocker, Fundamentals of Philosophy 112 (1982).

162. *See infra* text accompanying note 163.

163. Stewart & Blocker, *supra* note 161, at 19.

164. *Id.* at 99.

165. *See infra* notes 203-22 and accompanying text.

> commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but is without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the Senate nor the people can absolve us from our obligation to obey this law, and it requires no Sextus Aelius to expound or interpret it. It will not lay down one rule in Rome and another in Athens, nor will it be one rule today and another tomorrow. But there will be one rule, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common ruler of men, namely, God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of man, will thereby suffer the severest of penalties, though he has escaped all the other consequences that men call punishment.[166]

Cicero's ancient presupposition focuses on notions of fundamental fairness that resound in contemporary legal theory. For example, when Cicero says that the law should be the same in Rome as it is in Athens, he appears to be advocating a recognition of uniformity as a fundamental principle; that law must be equal in its application.[167] The concern for uniformity was raised in two recent capital punishment cases.

In *Furman v. Georgia*,[168] Justice Douglas, writing for a splintered plurality (there were nine separate opinions), rejected the death penalty as it was then being administered because of its disproportionate application with regard to race.[169] Justice Douglas's argument was predicated on the constitutional prohibition of cruel and unusual punishment,[170] suggesting that the Eighth Amendment will not tolerate the arbitrary infliction of such a serious penalty when it has been shown to disproportionately impact upon a particular racial minority.[171]

Seven years later, in *Gregg v. Georgia*,[172] the *Furman* holding was exhumed in another important capital punishment case. The Court said in *Gregg* that "the Eighth Amendment demands more than that a challenged

166. DE RE PUBLICA 3.22.33; *see also* WEINREB *supra* note 74, at 40-41.

167. In terms of the consistency of application, the Constitution explicitly prohibits ex post facto laws. U.S. CONST. art. I, § 10. An ex post facto law is "[a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed." BLACK'S LAW DICTIONARY 580 (6th ed. 1990).

168. 408 U.S. 238 (1972) (holding that the death penalty was unconstitutional as applied because it impacted upon blacks in an arbitrary fashion).

169. *Id.* at 241-42; *see also* MALCOLM M. FEELEY, CONSTITUTIONAL LAW 651 (1990).

170. *Furman*, 408 U.S. at 243.

171. *Id.* at 241 (the Court found that blacks were more likely to receive a death sentence in situations where whites would not). The idea of symmetry in crime and punishment can be traced back to the Code of Hammerabi, for example, the idea of "an eye for an eye." HANS JOCHEN BOECKER, LAW AND THE ADMINISTRATION OF JUSTICE IN THE OLD TESTAMENT AND ANCIENT EAST 122 (1980).

172. 428 U.S. 153 (1976).

punishment be acceptable to contemporary society. The Court must also ask whether it comports with the basic concept of human dignity at the core of the Amendment."[173] With this statement, the Court flatly rejected the majoritarian view that law is valid because society says it is valid.[174]

Accordingly, the Court has affirmed Cicero's statement to the extent that natural rights cannot be curtailed by legislatures.[175] For example, recall Justice Marshall's assertion in *Marbury v. Madison*[176] rejecting legislative supremacy, maintaining that it is "the province of the *judiciary* to say what the law is."[177] Justice Earl Warren was more precise to this point, "[o]ur system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch . . . . [However,] it is the responsibility of this Court to act as the ultimate interpreter of the Constitution."[178]

By maintaining that a popularly elected legislature cannot legitimize a law that is morally wrong, the Naturalists stand in direct opposition to the positivist view that morality is a product of social consensus.[179]

Cicero's statement of first principles also underscores the notion of temporal uniformity: that laws cannot be right today and wrong tomorrow.[180] This highlights one of the most important aspects of natural law theory: fundamental principles are immutable.[181]

For example, in *Dred Scott v. Sandford*,[182] the Court held that blacks were not entitled to constitutional protection because they were not "citizens," and that it was "morally lawful to treat them as articles of property."[183] The Court subsequently recognized the abomination of this

173. *Id.* at 182.

174. *See supra* note 67-73 and accompanying text.

175. *See supra* note 166 and accompanying text.

176. 5 U.S. (1 Cranch) 137, 139 (1803).

177. *Id.* at 177 (emphasis added).

178. Powell v. McCormick, 395 U.S. 486, 521 (1969).

179. Arguments raised by the defendants tend to highlight this distinction. During the Nuremberg trials, certain war criminals sought exculpation for their moral depravity during World War II because, they argued, they were merely following orders, i.e., obeying the law. The international tribunal rejected this reasoning. NUREMBERG TRIALS (Video Treasures 1986). *Cf.* United States v. Calley, 48 C.M.R. 24 (1969) (rejecting the argument that the army lieutenant charged with the murder of twenty-two women, children, and elderly men in the My Lai hamlet during the Vietnam war was merely discharging the duties set forth by his superiors, and, therefore, his conduct was not unlawful).

180. The majoritarian view rejects this notion. It holds that because there is no universal morality, law should reflect the changing moral conscience of the community. George Anastapo, *Bork on Bork*, 84 Nw. U. L. REV. 1142, 1142-55 (1990).

181. Morton, *supra* note 63, at 723.

182. 60 U.S. (19 How.) 393 (1856).

183. *Id.*

holding.[184] But instead of merely contending that the moral convictions of the majority had shifted rendering the decision *socially* unacceptable, the Court determined that there is an *inherent* iniquity in treating humans as property, enslaved to others.[185]

2. Aquinas[186]

Whereas Cicero was the first philosopher to survey natural law on a conceptual level, identifying the so-called natural law principles,[187] Aquinas was the first to attempt the assimilation of natural law with secular justice.[188] Before Aquinas, natural law was something of an obscurity, permitting arbitrary and ambiguous application in various analytical circumstances.[189] Aquinas sought to integrate these early principles with the realities of the human condition.[190] Professor Weinreb credits Aquinas with rescuing natural law from abstraction, claiming that Aquinas "made it applicable to the here and now [bringing] it into direct relation with human law[191]. . . . All of this he accomplished without compromising its metaphysical[192]. . . character . . . . His aim, and ultimately, his achievement, was the integration of those two apparently irreconcilable objectives. He made each support the other."[193]

Aquinas maintained that natural law began as a matter of intuition and inclination.[194] For example, Aquinas argued that it is proper for humans to act rationally because they have the ability to reason.[195] According to Aquinas, "everything in the natural order has a nature or essence and a tendency to fulfill it."[196] Hence, Aquinas identified, as the first principle of natural law, that "good is to be done and pursued, and

184. DON E. FEHRENBACHER, THE DRED SCOTT CASE 573 (1978). For the Court, *Dred Scott* was to become an "embarrassment—[a] highly visible skeleton in a transparent closet . . . damag[ing] its authority and reputation." *Id.*

185. United States v. Holt, 448 F.2d 1108 (D.C. Cir. 1971) (commenting that the *Dred Scott* decision and the idea of slavery is "lamentable and erroneous").

186. Thomas Aquinas was a thirteenth century philosopher and Roman Catholic theologian. His major work was *Summa Thelogica*, "a systematic exploration of the entire range of thirteenth century philosophy and theology." WEINREB, *supra* note 74, at 54.

187. ERNST CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT 203, 304, 309 (1951) (Cicero's writings are considered to have influenced an entire generation of Enlightenment thinkers).

188. WEINREB, *supra* note 74, at 55-56.

189. *Id.* at 44, 55.

190. *Id.* at 58, 60.

191. "Human law [being] the positive law of particular communities." *Id.* at 59.

192. Metaphysical in the sense that it continued a search for essential principles. *See* STEWART & BLOCKER, *supra* note 161, at 6.

193. WEINREB, *supra* note 74, at 55.

194. *Id.* at 58-59.

195. *Id.* at 57.

196. *Id.*

evil is to be avoided."[197] Because humans desire good things and avoid things that are bad, Aquinas deemed it reasonable to move in the direction of our natural inclinations.[198] Ironically, this parallels Hobbes's notion that human nature is begotten of our "appetites and aversions."[199]

Aquinas saw natural law as the means by which humans could translate our "natural inclinations into practical decisions and actions."[200] Thus, Aquinas not only believed that the principles of natural law were ascertainable, he also concluded that they should serve to guide governmental objectives.[201]

3. Locke[202]

To the English, who greatly influenced the Founders of our constitutional democracy,[203] natural law was an "assemblage of Laws, Institutions and Customs, derived from certain fix'd [sic] Principles of Reason."[204]

Like Aquinas and, to a certain degree, Cicero,[205] John Locke's natural law theory was grounded in reason.[206] For example, Professor Morton points out that Locke affirmed Aristotle's idea that "'the special function of man is the active exercise of the mind's facilities in accordance with rational principle.'"[207] Morton also stresses that it is important to view Locke's natural law theory in light of its historical antecedents.[208]

Locke's theory, that humans have certain inalienable rights that cannot be infringed upon by the State, influenced Jefferson's drafting of the Declaration of Independence.[209] For example, Locke suggests that the natural right to property becomes absolute when it is removed from the

197. *Id.* at 58 (emphasis omitted); *see also* Germaine G. Grisez, THE FIRST PRINCIPLE OF PRACTICAL REASON: A COMMENTARY ON THE SUMMA THEOLOGIAE 1-2, QUESTION 94, ARTICLE 2, NATURAL LAW FORUM 10, 168-201 (1965).

198. WEINREB, *supra* note 74, at 59.

199. *See* James Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991); *see also* Boyle, *supra* note 78, at 405.

200. WEINREB, *supra* note 74, at 59.

201. *Id.* at 61.

202. John Locke was an English political philosopher whose SECOND TREATISE ON GOVERNMENT is considered the "single most important document in the literature of constitutional democracy." ROBERT PAUL WOLFF, ABOUT PHILOSOPHY 151 (2d ed. 1981).

203. Sherry, *supra* note 148, at 1129.

204. *Id.* at 1130.

205. WEINREB, *supra* note 74, at 40.

206. Haines, *supra* note 146, at 23-24.

207. Bruce N. Morton, *John Locke, Robert Bork, Natural Rights and the Interpretation of the Constitution*, 22 SETON HALL L. REV. 709, 723 (1992) (quoting JOHN LOCKE, ESSAYS ON THE LAW OF NATURE, *reprinted in* GEORGE C. CHRISTIE, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 217, 220 (1973)).

208. Morton, *supra* note 207, at 718.

209. *Id.* at 720.

state of nature or created by one's own labor or efforts.[210] The natural right to property that Locke regarded as the most basic of all rights[211] was to become a cornerstone of our constitutional tradition.[212] In fact, Locke's entire natural rights theory is "widely regarded as [having] the single greatest philosophical influence on the framers of the Constitution."[213]

According to Locke, natural rights are a part of the "rational order[ing] of the universe . . . [derived from] the 'law of nature.'"[214] Of these rights, Locke considered an individual's right to "life, liberty, and property" to be fundamental.[215]

Instead of maintaining that natural rights are divinely ordained, as did Cicero, or intuitively, as with Aquinas, Locke maintained, in the empiricist tradition,[216] that "all knowledge must ultimately have its source in sense experience."[217] Therefore, to Locke, natural law was ascertainable through reason as apprehended by sensory perception.

Locke rejected the idea that tradition contributes to an understanding of natural law, contending instead that the ascertainment of fundamental truths becomes an intellectual struggle.[218] To Locke, only minor rights may be abridged by governmental authority by reason of our consent to be governed. Locke theorized that we agree to this arrangement "only because civil society allows [us] to enjoy more fully and comfortably the freedoms to which [we are] naturally entitled."[219] Professor Morton has concluded, therefore, that Locke's theory creates a presumption against governmental authority, in favor of the individual.[220]

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210. *Id.* at 721; *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 327-44 (Peter Laslett ed., 1960).

211. Morton, *supra* note 207, at 719.

212. *Id.* at 720-21.

213. *Id.* at 724.

214. *Id.* at 719.

215. *Id.* It is argued that Thomas Jefferson subsequently used "life, liberty, and the pursuit of happiness" in the American Declaration of Independence to more accurately reflect Locke's meaning of the word property: "to refer not to the crass ownership of physical objects, but to the general conditions necessary for the attainment of human well being and satisfaction." *Id.* at 720-21.

216. *Id.* at 724.

217. *Id.* at 724-25.

218. *Id.* at 725-27. Locke has written, "[c]areful reflection, thought, and attention by the mind is needed, in order that by argument and reasoning one may find a way from perceptible and obvious things into their hidden nature . . . ." *Id.* at 727 (quoting JOHN LOCKE, ESSAYS ON THE LAW OF NATURE, *reprinted in* GEORGE C. CHRISTIE, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 217, 225 (1973)).

219. Morton, *supra* note 207, at 730.

220. *Id.* at 731. "Because natural rights are presumed to be retained by the people unless a basis for a delegation to the government can be specifically demonstrated, this theory places substantial and general limitations on the power of government." *Id.*

It appears that Locke accepts the majoritarian concept of law as it pertains to the general authority of government by consent.[221] Locke recognized, however, that natural rights and natural law will always "stand[ ] as an eternal rule to all men, legislators as well as others. The rules they make for other mens' actions must . . . be conformable to the law of nature . . . ."[222] Modern natural law proponents hold that it is through the process of judicial review that judges must determine whether the laws of society conform to the laws of nature.

B. *Natural Law as an Instrument of Judicial Review*

From the foregoing historical dialectic emerges the American Natural Law model of interpretive jurisprudence. In the beginning, as the Court struggled to define itself from within the confines of a doctrine called justiciability,[223] every decision helped to shape the Court's role in a new and unproven tripartite system of government.[224] Individual justices became sensitized to the magnitude and conspicuousness of their rulings.[225] Those justices espousing the Naturalist model could not be as forthright in their approach as their Positivist counterparts because, "coercive force must attend any judicial decision to countermand the will of a contemporary majority, the Justices must [therefore] render constitutional interpretations that are *received* as legitimate."[226]

Accordingly, whereas the Positivist jurists have been confident in setting forth their reasons for utilizing the majoritarian model in their decisions,[227] the Naturalists have been cautious in defending a methodology that inevitably works to subvert the majoritarian cause.[228] On the other

221. *Id.*

222. *Id.* at 731-32 (quoting JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 135 (Bobbs-Merill ed., 1952)).

223. A justiciable controversy is one in which a claim of right is asserted against one who has an interest in contesting it. BLACK'S LAW DICTIONARY 777 (6th ed. 1990). Courts may only consider justiciable controversy, as distinguished from hypothetical differences or disputes, or controversy that is purely academic or moot. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1912).

224. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1921) (extending the power of the Court to review state court criminal judgments); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816) (establishing the Court's appellate jurisdiction over the states' highest courts on issues involving the federal constitution, laws, and treaties); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing the power of judicial review).

225. *See* William J. Brennan, *The Constitution of the United States, in* RAKOVE, INTERPRETING THE CONSTITUTION 25 (1988).

226. *Id.*

227. *See, e.g.*, Mistretta v. United States, 488 U.S. 361 (1989); Morrison v. Olsen, 487 U.S. 654 (1988) (Scalia, J., dissenting); C.T.S Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).

228. For example, in Roe v. Wade, 410 U.S. 113 (1973), Justice Blackmun took great pains to deemphasize the *State's interest* in the fetus during the first trimester to aid in legitimizing the privacy issue.

hand, proponents of this ideology have come forth in defense of Naturalism in some of the most eloquent exegesis of Constitutional interpretation. For example, Justice Brennan, speaking at the Text and Teaching Symposium at Georgetown University Law School in 1985, said, "the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law."[229] He defends his methodology by saying, "[t]he Constitution on its face is, in large measure, a structuring text, a blueprint for government. And when it is not prescribing the form of government it is limiting the powers of that government."[230] This directly affirms Locke's notion that there is a presumption against the government and in favor of individual rights.[231] It directly opposes the positivist view that government by the majority is to be preferred when there is no explicit constitutional guarantee to the contrary.[232] The Naturalist opinions, some of the most controversial in recent time,[233] have also been some of the most candid in their attempt to be true to the "spirit of the text."[234]

Justice Brennan once wrote that from within the Constitution's "majestic generalities [lies a commitment to] the invalidating of the expressed desires of representative bodies on the ground of inconsistency with higher law . . . though it may result in what the late Professor Alexander Bickel labeled 'the counter-majoritarian difficulty.'"[235]

There are a number of cases employing the Naturalist interpretive model striking down laws the Court has found to be contrary to fundamental principles not enumerated in the constitutional text.[236] By way of illustration, the following analysis will focus on two similar controversies

229. Brennan, *supra* note 225, at 225.

230. *Id.*

231. *See supra* notes 218-22 and accompanying text.

232. *See supra* notes 84-86 and accompanying text.

233. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Carey v. Population Servs., 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

234. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

235. WILLIAM J. BRENNAN, JR., THE CONSTITUTION OF THE UNITED STATES: CONTEMPORARY RATIFICATION 23 (1988). Professor Bickel determined that although there are rights that are beyond the reach of the government, enforcing them will always be a problem in a democratic political system. He has written that "judicial review is a deviant institution in American democracy." ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 10 (1977).

236. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the use of contraceptives is protected under a general constitutional right to privacy emanating from the enumerated guarantees); Brown v. Board of Educ., 347 U.S. 483 (1954) (holding that segregated educational facilities violated the constitutional requirement of Equal Protection); Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that mandatory sterilization of habitual felons was violative of due process); Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing a right to marry, raise children, and acquire useful knowledge as essential to the liberty interests protected by the due process guarantee).

that came before the Court for resolution. The first was resolved from a Naturalist perspective. The second utilized a Positivist approach and highlights the propensity for minority injustice on the basis of majoritarian deferment by the judicial branch.[237]

In *Stanley v. Georgia*,[238] federal and state agents searching for evidence of bookmaking under a valid warrant came across three reels of eight-millimeter film.[239] After viewing the film on a projector found in an upstairs living room, the officers concluded that they were obscene and seized them.[240] Stanley was arrested and charged with violating a Georgia statute.[241] He subsequently argued that "the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment."[242] Justice Marshall, writing for the Court, dismissed the State's contention that "'obscenity is not within the area of constitutionally protected speech'"[243] and characterized the issue in terms of Stanley's right to privacy.[244] He said that under the Constitution, Stanley has a "right to satisfy his intellectual and emotional needs in the privacy of his own home."[245] He maintained that "the categorization of these materials as 'obscene' is insufficient justification for such drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments."[246] After balancing Stanley's right to his private enjoyment of these materials against the state's right to curtail that enjoyment, Justice Marshall held for the former.

Conversely, in *Bowers v. Hardwick*,[247] police went to the Hardwick residence because Hardwick had failed to appear in court to answer a public drinking citation.[248] Admitted into the apartment by another occupant, the officers observed, through an open door, Hardwick engaged in the act of sodomy with another male.[249] Hardwick was arrested on a number of charges, including the illegal possession of marijuana[250] and the violation of a criminal statute prohibiting various types of sexual conduct.[251]

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237. This is because "[j]udicial deference is not [really] an avoidance of choice. Rather, it is a choice of majority power of individual liberty." MACEDO, *supra* note 11, at 27.

238. 394 U.S. 557 (1969).

239. *Id.* at 558.

240. *Id.*

241. *Id.*

242. *Id.* at 559.

243. *Id.* at 560 (quoting Roth v. United States, 354 U.S. 476, 485 (1957)).

244. *Id.* at 565.

245. *Id.*

246. *Id.*

247. 478 U.S. 186 (1986).

248. William D. Valente, Bowers v. Hardwick *and the Homosexual Teacher*, 35 ED. L. REP. 1 (1986).

249. *Id.* at 3.

250. *Id.*

251. *Id.*

Hardwick appealed, arguing that the statute violated his constitutional right to privacy.[252]

Justice White, writing for the Court, characterized this issue in terms of "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[253] He was clear to distance himself from the dissent saying that he refused to participate in "announcing rights not readily identifiable in the Constitution's text [because to do so would] involve[ ] . . . the imposition of the Justice's own choice of values . . . ."[254] Using an Originalist approach, Justice White concluded that because American society has a tradition of intolerance towards homosexuality ("[i]n 1868, when the Fourteenth Amendment was ratified, all but five of the thirty-seven states in the Union had criminal sodomy laws"),[255] sodomy could not possibly be one of the fundamental rights that the Constitution has an obligation to protect.[256] In essence, he determined that the State has the specific authority to regulate private, consensual, adult sexual conduct when it involves homosexuals even though the statute itself did not differentiate between actors.

Justice Blackmun's dissent noted this misplaced distinction. He juxtaposed the *Stanley* ruling,[257] saying, "[t]his case is no more about 'a fundamental right to engage in homosexual sodomy' . . . than *Stanley v. Georgia* . . . was about a fundamental right to watch obscene movies. . . . Rather, this case is about the most comprehensive of rights and the right most valued by civilized men, namely, the right to be let alone."[258] Justice Blackmun then balanced the values at stake (individual v. state) from a Naturalist perspective. First he concluded that "Hardwick has stated a cognizable claim that [the statute] interferes with constitutionally protected interests in privacy and freedom of intimate association."[259] He then explained why Hardwick's interests should be held to prevail over those of the State:

> [T]he concept of privacy embodies the moral fact that a person belongs to himself and not others nor . . . society as a whole. Only the most willful blindness could obscure the fact that sexual intimacy is a "sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." . . . The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there many be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the

252. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).
253. *Id.* at 190.
254. *Id.* at 191.
255. *Id.* at 192-93.
256. *Id.* at 194.
257. *See supra* note 122 and accompanying text.
258. 478 U.S. at 199 (citations omitted).
259. *Id.* at 202.

> freedom an individual has to *choose* the form and nature of these intensely personal bonds . . . .[260]

Justice Blackmun only refers to explicit provisions of the Constitution when he mentions that the conduct occurred in Hardwick's home,[261] and in a passing reference to associational freedoms, invoking the First Amendment.

Former United States Attorney General Edwin Meese has stated that, "[t]he judge who looks outside the Constitution always looks inside himself and nowhere else."[262] This speaks to the most critical weakness of the Naturalist approach: if the Constitution does indeed embody a set of fundamental values that preempt the laws of the majority, how is the Court better able to articulate these values without being purely subjective?

The Naturalists argue that the Court is the "least dangerous Branch" to engage in this inquiry.[263] They maintain that "[a]s government acts ever more deeply upon those areas of our lives once marked 'private,' there is an ever increasing need to see that individual rights are not curtailed or cheapened in the interest of what may temporarily appear to be the 'common good.'"[264] Justice Brennan has argued that the possibilities for oppression are so overwhelming in a pluralist culture, that the Court stands as the last hope for the emancipation of human liberty.[265]

V. Conclusion

There are jurists who have devoted a substantial part of their professional careers to unraveling the dilemma this discussion has introduced.[266] Ultimately, one's viewpoint turns on individual notions regarding the purpose of governmental authority. Does the state exist to define individual rights as the Positivists suggest? Or does the state exist for the sole purpose of assuring that individual rights are preserved?

Some would contend that rights begin with government, and because we have "consented" to live as members of this society, we are bound by a tacit agreement to obey all of its laws. The better view is that our consent extends only to those laws that conform to the terms of our agreement.

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260. *Id.* at 204-05 (citations omitted).

261. *Id.* at 206. "The behavior for which Hardwick faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance." *Id.*

262. Edwin Meese, Address at the Federalist Society Lawyers Division (November 15, 1985).

263. Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 390 (1969). Alexander Hamilton wrote, "the judiciary . . . has no influence over either the sword or the purse. . . . It may truly be said to have neither Force nor Will, but merely judgment." THE FEDERALIST No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

264. Brennan, *supra* note 225, at 29.

265. *Id.*

266. Judge Bork has produced thousands of pages in the defense of Originalism. *See generally* Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419 (1990).

When laws fail to conform, consent is effectively withdrawn. The question then becomes: what *are* those terms?

Realistically, the answer is of little consequence. The Constitution is what the Court says it is. Its meaning lies with its final arbiters.

Perhaps the Framers' design was to leave us a legacy of equivocation in order that the debate would continue for generations to come. Joseph Joubert said in 1789: "It is better to debate a question without settling it than to settle a question without debating it." The problem is that real cases provide the field for the debate over the *right* methodological approach. Given the stakes, should we not err on the side of liberty? Or should we simply defer to the positivist processes, foregoing our time-honored insight that tells us the heart is on the left?[267]

Rosina L. Hunt

267. *See supra* note 1 and accompanying text.

Overview of MASS. GEN. L. ch. 209A, the Abuse Prevention Statute, and the Prosecutorial Role of the District Attorney's Office

John P. Zanini*

I. DOMESTIC RELATIONS AND MASS. GEN. L. CH. 209A RESTRAINING, VACATE, AND NO-CONTACT ORDERS

Virtually all aspects of domestic relations in Massachusetts are governed by chapters 207 through 210 of the General Laws of Massachusetts. These chapters deal with marriage,[1] divorce,[2] real and personal property relations between husband and wife,[3] abuse prevention,[4] child custody jurisdiction,[5] children born out of wedlock,[6] and adoption of children.[7]

The Abuse Prevention statute, in general terms, provides for the issuance of protective orders to ensure the safety and security of adults and minor children.[8] This chapter of the General Laws also criminalizes the violation of such orders.[9] These protective orders may require a

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1. MASS. GEN. L. ch. 207, §§ 1-58 (1992).
2. MASS. GEN. L. ch. 208, §§ 1-46 (1992).
3. MASS. GEN. L. ch. 209, §§ 1-37 (1992).
4. MASS. GEN. L. ch. 209A, §§ 1-7 (1992).
5. MASS. GEN. L. ch. 209B, §§ 1-14 (1992).
6. MASS. GEN. L. ch. 209C, §§ 1-24 (1992).
7. MASS. GEN. L. ch. 210, §§ 1-14 (1992).
8. MASS. GEN. L. ch. 209A, §§ 1-7 (1992).
9. *Id.*

party to vacate the family household and to cease and desist from any contact with his or her current or former spouse, housemate, current or former fiance, substantive date, or minor child.[10] Such orders may also be issued during a divorce,[11] a continuing marriage in which the parties are living apart,[12] or a paternity proceeding.[13] In addition to these protective orders there are provisions of the divorce laws which criminalize fraudulent behavior related to the institution or conduct of a divorce proceeding, or to the issuance of a divorce decree.[14] There are separate statutory provisions directed solely toward preventing the abuse or neglect of children, handicapped persons, and elderly persons.[15]

II. VACATE, NO-CONTACT, NO-ABUSE, AND RESTRAINING ORDERS

A protective order designed to prevent abuse with respect to any family or household relationship may be issued by the superior, probate and family, district or Boston Municipal courts.[16] In a "dating" or "engagement" relationship, the protective order may be issued by the district, probate or Boston Municipal courts.[17] These orders are sought in civil proceedings by private parties.[18] After notice has been given and a hearing has been held the court may issue an order for a period

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10. *Id.* § 3.
11. MASS. GEN. L. ch. 208, §§ 18, 34B, 34C (1992).
12. MASS. GEN. L. ch. 209, § 32 (1992).
13. MASS. GEN. L. ch. 209C, §§ 15, 20 (1992).
14. MASS. GEN. L. ch. 208, §§ 40-45 (1992).
15. MASS. GEN. L. ch. 19A, §§ 16-20; MASS. GEN. L. ch. 119, §§ 24-27; MASS. GEN. L. ch. 119, §§ 51A-F.
16. MASS. GEN. L. ch. 209A, § 1 (1992). On January 29, 1986, the District Court Department of the Trial Court adopted Administrative Regulation No. 1-86, enunciating standards and policies for handling cases involving either relief sought by private parties, or criminal prosecution of violations, pursuant to MASS. GEN. L. ch. 209A.
17. *Id.* § 1. *See also* MASS. GEN. L. ch. 209A, §§ 6-7 (1992).
18. These proceedings are governed by the Massachusetts Rules of Domestic Relations Procedure. MASS. R. DOM. R. P. 1; Adoption of Jenna, 22 Mass. App. Ct. 739, 741-42 n.2, 604 N.E.2d 1325, 1327 n.2 (1992). In order to provide assistance to parties seeking restraining orders in the district court, the Suffolk County District Attorney's Office has implemented briefings for such parties. The briefings are conducted by victim-witness advocates to provide the following:
    a. an overview of the court process for obtaining MASS. GEN. L. ch. 209A protective orders, and civil and criminal relief;
    b. advice about actions to take if the defendant violates the protective order;
    c. referrals of services for victims and their children;
    d. discussion of safety issues and review of personalized safety plan; and
    e. answers to questions about such proceedings.

See generally MASS GEN. L. ch. 209A, § 3 (1992).

of time not to exceed one year, which may be extended at the discretion of the court.[19] The court may issue a temporary order without any prior notice or hearing, upon plaintiff's showing a "substantial likelihood of immediate danger of abuse."[20] These temporary orders may be issued by any justice of the superior, probate and family, or Boston Municipal courts when the court is closed, and may be issued by telephone to an officer or employee of an appropriate law enforcement agency.[21] The filing of a complaint is then required on the next business day, and subsequent notice and opportunity to be heard are mandated.[22]

The orders which the court has the power to issue may provide for the following:

(a) that the defendant refrain from directly contacting the complainant;
(b) that the defendant not approach the complainant at work, home, or in the community;
(c) that the defendant refrain from abusing complainant;
(d) that the defendant vacate the household;
(e) an award of temporary custody and support of minor children to the complainant;
(f) an award of compensation to the complainant for lost earnings, attorneys and medical fees, sharing expenses, lost earnings, personal property, etc; and
(g) the impoundment of the complainant's address.[23]

As noted earlier, similar vacate, restraining, and no-contact orders may be issued in divorce proceedings,[24] in proceedings concerning children born out of wedlock,[25] or to married persons living apart.[26] Violations of these orders are criminalized by the Abuse Prevention statute.[27]

19. *Id.*
20. *Id.* § 4.
21. *Id* § 5.
22. *Id.*
23. *Id.* § 3.
24. MASS. GEN. L. ch 208, §§ 18, 34B, 34C (1992).
25. MASS. GEN. L. ch. 209C, §§ 15, 20 (1992).
26. MASS. GEN. L. ch. 209, § 32 (1992).
27. MASS. GEN. L. ch. 209A, §§ 3A, 6, 7 (1992).

III. CRIMINAL CONDUCT AND DOMESTIC RELATIONS[28]

A. *Conduct Covered By The Abuse Prevention Statute*

There are four basic categories of criminal conduct which are included under the umbrella of the Abuse Prevention statute.[29] In general, this conduct is directed toward current or past family or household members, and includes: (1) any felony; (2) a misdemeanor involving "abuse" as defined in section 1 of the statute; (3) an assault and battery as defined in Massachusetts General Laws, chapter 265, section 13A; and (4) a violation of a court order issued pursuant to the domestic relations laws.[30]

The only conduct which is specifically criminalized by the Abuse Prevention statute, but not by other provisions of the General Laws, is the violation of a protective order.[31] The great import of this law is that it criminalizes violation of the vacate, no-contact, and no-abuse provisions of such restraining orders, and requires arrest for violation of such an order.[32]

The "abuse" which may be restrained, and which is in violation of such protective orders, is defined as follows:

"[T]he occurrence of one or more of the following acts between family or household members:

(a) attempting to cause or causing physical harm;

(b) placing another in fear of imminent serious physical harm;

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28. It must be noted that the legislature, in enacting the abuse prevention law, adopted a statutory scheme which addresses and remedies virtually each and every criticism of the legal system's treatment of domestic violence levelled by Lenore E. Walker in her oft-cited work in this field, THE BATTERED WOMAN (1979).

29. Violations of these restraining orders also subject the violator to civil contempt proceedings. MASS. GEN. L. ch. 209A, § 7 (1992). In Mahoney v. Commonwealth, the Supreme Judicial Court determined that the double jeopardy clause did not bar a criminal prosecution after a civil contempt proceeding. 415 Mass. 278, 278-86, 612 N.E.2d 1175, 1175-80 (1993). Although the defendant was committed for thirty days, he was provided with an opportunity to purge the contempt order by posting $5000.00 with the clerk of court. *Id.* at 278-86, 612 N.E.2d at 1175-80. The court may hold such a contempt hearing without the issuance of a formal complaint or the filing of an answer, provided that the violator has notice, is represented by counsel, and is afforded the opportunity to be heard. *Id.* at 287, 612 N.E.2d at 1180. The ninety-minute notice given to the violator in *Mahoney* was, therefore, sufficient and in keeping with the intent of the legislation to provide "speedy intervention by the courts . . . to protect the health and safety of the domestic partners." *Id.* at 287, 612 N.E.2d at 1180.

30. MASS. GEN. L. ch. 209A, § 6 (1992).

31. *See infra* Part IV; MASS. GEN. L. ch. 209A, § 7 (1992).

32. MASS. GEN. L. ch. 209A, §§ 6-7 (1992).

(c) causing another to engage involuntarily in sexual relations by force, threat or duress."[33]

B. *Persons Covered By The Abuse Prevention Statute*

The "family" or "household" members whose relationships are covered are defined as follows:

Persons who:

(a) are or were married to one another;
(b) are or were residing together in the same household;
(c) are or were related by blood or marriage;
(d) have a child in common regardless of whether they have ever married or lived together; or
(e) are or have been engaged in a substantive dating or engagement relationship. . . .[34]

C. *Role Of Law Enforcement Officers*

The legislature has mandated the arrest, by law enforcement officers, of any person whom they witness violating, or who they have probable cause to believe has violated any protective order issued pursuant to these various statutes.[35] In addition, in the absence of such protective orders, arrest is the "preferred response" for an officer who witnesses or has probable cause to believe that a person has (a) committed a felony; (b) committed a misdemeanor involving abuse; or (c) has committed an assault and battery in violation of section thirteen A of chapter two hundred and sixty-five.[36]

A police officer's paramount concern in an arrest determination must be the safety of the victim and any children involved.[37] The law officer who makes an arrest based upon probable cause and who acts reasonably

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33. *Id.* § 1. The term vacate has been interpreted to include a restriction against returning to the household during the term of the order. Commonwealth v. Gordon, 407 Mass. 340, 347, 553 N.E.2d 915, 918 (1990); *see also infra* Part IV.

34. MASS. GEN. L. ch. 209A, § 1 (1992). It should be noted that MASS. GEN. L. ch. 209A, §1 provides for review of the following factors to determine whether a substantive "dating" or "engagement" relationship exists or existed between the parties: "(1) the length of time of the relationship; (2) the type of relationship; (3) the frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship."

35. MASS. GEN. L. ch. 209A, §§ 6-7 (1992).

36. *Id.* In 1991, the Executive Office of Public Safety established a formal "Policy for Law Enforcement Response to Domestic Violence" which outlines and details the duties set forth by the statutory scheme, and sets forth procedures for the response to, and investigation of incidents of violence or abuse occurring in domestic relations. Each law enforcement agency in the Commonwealth was required to adopt guidelines consistent with this policy. 1990 Mass. Acts ch. 403, §§ 14-16.

37. MASS. GEN. L. ch. 209A, §§ 6-7 (1992).

and in good faith is immune from any civil liability "regarding personal injury or injury to property."[38] Prosecution of the criminal conduct may be instituted in the superior or district court departments, or Boston Municipal Court.[39]

D. *Role Of The District Attorney*

The primary role of the District Attorney is to prosecute all acts criminalized by the Abuse Prevention statute. The conduct defined as abuse in the statute is, depending on the seriousness of the conduct, either a misdemeanor or a felony under other chapters of the General Laws. In fact, the Abuse Prevention statute specifically provides that any action commenced under this chapter does not preclude other criminal remedies.[40]

The District Attorney's Office is required to prepare information packets for distribution to civil complainants seeking protective orders under the Abuse Prevention statute, informing complainants that violation of an order is criminal conduct, and advising them of their rights and the necessary procedures to pursue criminal remedies.[41] This information shall also include, but is not limited to, information regarding the crime of stalking under Massachusetts General Laws, chapter 265A, section 43.[42] In rough terms, stalking is the willful, malicious and repeated following of another, coupled with the making of a threat with the intent to place that person in imminent fear of death or serious injury.[43] Stalking in violation of an abuse prevention protective order is more severely punished, and prosecutors must be aware of the possibility of pursuing this charge.[44]

When prosecuting violations of protective orders, proof of the violation will require (1) a properly-admissible certified copy of the original order, with proof of service of the order upon the defendant,[45] (2) proof that the order was in effect on the date on which the alleged violation occurred; and (3) proof of the act(s) which constitute a violation of the terms of the order. Proof of the effective date and terms of the order itself should be made by a proper, certified, and authenticat-

38. *Id.*
39. *Id.* § 7.
40. *Id.* § 3.
41. *Id.* § 3A.
42. *Id.*
43. MASS. GEN. L. ch. 265A, § 43 (1992).
44. *Id.* § 43(b); MASS. GEN. L. ch. 209A, § 3A (1992).
45. Constructive notice may be sufficient to prosecute for violations of these restraining orders, although no reported decisions have directly addressed this issue. *Cf.* Commonwealth v. Olivo, 369 Mass. 62, 68-71, 73-74, 337 N.E.2d 904, 909-12 (1975); Commonwealth v. Porazzo, 25 Mass. App. Ct. 169, 175-77, 516 N.E.2d 1182, 1186-87 (1987).

ed copy of the original order. Proof of notice may best be made by the testimony of the police officer who effectuated service. Proof of the violation involves the testimony of the victim or witness(es), as well physical evidence such as photographs of the injury or the crime scene; emergency medical treatment, physician, and hospital records; telephone log tapes or answering machine tapes; letters or other correspondence; and torn clothing, broken furniture, or weapons. Consultation with the local police department and its Domestic Violence Unit must be undertaken upon receipt of a complaint of a violation of such order. Early contact with the victim, witness(es), and police department may lead to the filing of additional appropriate charges, such as stalking,[46] intimidation of a witness,[47] or revocation of bail proceedings.[48]

IV. PUBLISHED OPINIONS CONSIDERING THE SCOPE AND MEANING OF THE ABUSE PREVENTION STATUTE

The Supreme Judicial Court discussed the Abuse Prevention statute at some length in *Commonwealth v. Gordon*.[49] The Court interpreted the then-existing version of section seven as criminalizing only those portions of an order which require the subject to "refrain from abuse" or to "vacate the household."[50] An order to vacate the household requires that the subject not return at all, in order to create a safe haven for abused parties.[51] In *Gordon*, the defendant's presence at the household, his holding the door open, and his prior threats and verbal abuse were sufficient evidence to support the conclusion that he had violated the order and placed the victim in fear of imminent serious physical harm.[52] Evidence of a verbal outburst which occurred five days before the incident out of which the charge arose, and in which the defendant had called the victim a "bitch" and a "whore" in front of their five-year-old son, was admissible as probative of her fear of such imminent serious physical harm.[53]

The Supreme Judicial Court has held that an abuse prevention order may be issued to protect persons who live at Fort Devens, land previously ceded by the Commonwealth to the federal government.[54]

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46. MASS. GEN. L. ch. 265, § 43 (1992).
47. MASS. GEN. L. ch. 268, § 13B (1992).
48. MASS. GEN. L. ch. 276, § 58 (1992).
49. 407 Mass. 340, 553 N.E.2d 915 (1990).
50. *Id.* at 345, 553 N.E.2d at 918; MASS. GEN. L. ch. 209A, § 7 (1992), as enacted by 1983 Mass. Acts ch. 678, § 5. Section seven was subsequently amended to criminalize violation of a no-contact provision of such an order. MASS. GEN. L. ch. 209A, § 7 (1992), as amended by 1990 Mass. Acts ch. 403, § 8.
51. *Gordon*, 407 Mass. at 347, 553 N.E.2d at 918-19.
52. *Id.* at 348-350, 553 N.E.2d at 919-21.
53. *Id.* at 351, 553 N.E.2d at 921.
54. Cobb v. Cobb, 406 Mass. 21, 26, 545 N.E.2d 1161, 1164 (1989).

The court held that as long as the restraining order does not interfere with the functions of the federal government on that land, there is no impediment to a restraining order which is directed at a person's conduct on that land.[55]

Evidence of an abuse prevention order may be admitted in the prosecution of a person for armed assault, assault and battery, assault with intent to murder, or murder.[56] For example, where the defendant assaulted and battered an ex-boyfriend of the subject of the protective order, and where the subject of the order was murdered, the court recognized the admissibility of the order to show motive, intent, or state of mind.[57] Such orders are admissible, therefore, not only in prosecutions for violations of the orders themselves, but also as probative evidence of violence against the complainant or other targets of a batterer's wrath.[58]

In *Commonwealth v. Westmoreland*,[59] a defendant on trial for the murder of the subject of a protective order raised mental impairment and lack of criminal responsibility as defenses to his prosecution.[60] However, the defense counsel abandoned these theories in his closing argument in favor of seeking a voluntary manslaughter verdict.[61] Prosecutors may anticipate facing not only these defenses, but also arguments based upon theories of self-defense, heat of passion, or sudden provocation when trying violent criminals who have violated protective orders.

The Supreme Judicial Court has used the language of the Abuse Prevention statute to interpret the rape statute.[62] The court noted that the Abuse Prevention statute includes under its protective sweep involuntary sexual relations between spouses when forced to submit to sexual relations, and that criminal remedies were not excluded by the statute.[63] The amended rape statute, among other changes, omitted the word "unlawful," which at common law had created a spousal exception

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55. *Id.* at 26, 545 N.E.2d at 1164.

56. Commonwealth v. Leonardi, 413 Mass. 757, 763-64, 604 N.E.2d 23, 27-28 (1992); Commonwealth v. Gil, 393 Mass. 204, 215-17, 471 N.E.2d 30, 39-40 (1984).

57. *Leonardi*, 413 Mass. at 763-64, 604 N.E.2d at 27-28; *Gil*, 393 Mass. at 215-17, 471 N.E.2d at 39-40 (previously issued order probative of continuing hostility and motive).

58. *See also* Commonwealth v. Foster, 411 Mass. 762, 768, 585 N.E.2d 331, 334-35 (1992) (protective order admissible in prosecution for both violation of an order and assault with intent to commit the rape of a child under sixteen years of age).

59. 388 Mass. 269, 446 N.E.2d 663 (1983).

60. *Id.* at 273, 446 N.E.2d at 665.

61. *Id.* at 273-74, 446 N.E.2d at 665-66. The defense counsel's conduct was held to be ineffective assistance of counsel. *Id.* at 273-74, 446 N.E.2d at 665-66.

62. Commonwealth v. Chretien, 383 Mass. 123, 131-32, 417 N.E.2d 1203, 1209 (1981).

63. *Id.* at 131, 417 N.E.2d at 1209.

to rape.[64] In construing the rape statute to exclude any spousal exemption such as may have existed at common law or under the prior statutory scheme, the Supreme Judicial Court relied in part upon recognition of such involuntary sexual relations as "abuse" in MASS. GEN. L. ch. 209A, specifically stating: "[w]e think that G.L. c. 209A provides us with a clear legislative statement of public policy which we should try to advance in our construction of G.L. c. 277, § 39."[65] In view of both the omission of the term unlawful, and the public policy enunciated in the Abuse Prevention statute, the Court held that the rape statute included sexual relations between spouses when one spouse was forced to submit to sexual relations by force, threat of force, or duress.[66]

The Supreme Judicial Court also looked to the Abuse Prevention statute in construing the kidnapping statute to exclude from its reach a parent who takes his or her children from the Commonwealth without his or her spouse's consent.[67] The fact that the husband could and did obtain a custody order pursuant to the Abuse Prevention statute, coupled with the available statutory remedies for non-custodial taking of children, weighed against reading the kidnapping statute to criminalize such acts.[68]

A person's right to be free from an unreasonable search and seizure is also implicated by the scope of the Abuse Prevention statute.[69] When a police officer is confronted with a family abuse situation, she or he must "use all reasonable means to prevent further abuse."[70] With reference to this statutory language, the Appeals Court has recognized that when a police officer is confronted by a spouse threatening the health and safety of the other spouse, exigent circumstances may justify a limited search without a warrant.[71] The Appeals Court has also held that when a wife reports a domestic violence situation, she consents to the police officers' reasonable entry of the household.[72] Such consent may reasonably encompass accompanying the husband to a bedroom.[73]

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64. *Id.* at 131, 417 N.E.2d at 1209; MASS. GEN. L. ch. 265, § 22 (1992).

65. Commonwealth v. Chretien, 383 Mass. 123, 132, 417 N.E.2d 1203, 1209 (1981); MASS. GEN. L. ch. 277, § 39 (1990).

66. *Chretien*, 383 Mass. at 129-32, 417 N.E.2d at 1208-10.

67. Commonwealth v. Beals, 405 Mass. 550, 551, 555, 541 N.E.2d 1011, 1014-15 (1989).

68. *Id.* at 555, 541 N.E.2d at 1014-15.

69. U.S. CONST. amend. IV; MASS. CONST. art. XIV.

70. MASS. GEN. L. ch. 209A, § 6 (1992).

71. *See supra* note 66. Exceptions are made for a seizure made either pursuant to a consensual search or in exigent circumstances. *See, e.g.*, Commonwealth v. Rexach, 20 Mass. App. Ct. 919-21, 478 N.E.2d 744, 745-46 (1985) (rescript opinion); Commonwealth v. MacKenzie, 413 Mass 498, 597 N.E.2d 1037 (1992); Commonwealth v. Brown, 32 Mass. App. Ct. 649, 652, 593 N.E.2d 245 (1992).

72. *Rexach*, 20 Mass. App. Ct. at 919, 478 N.E.2d at 745-46.

73. *Id.* at 919, 478 N.E.2d at 745-46.

Controlled substances within the police officer's view from the bedroom door, therefore, were not subject to suppression.[74] In *dicta*, the court noted that the exigent circumstance exception to the warrant requirement may also apply to such evidence.[75] Thus, it is foreseeable that in domestic violence responses, limited protective searches may be permissible, and weapons or other illegal objects discovered in such pat-frisks may be admissible in subsequent prosecutions.[76]

As of this writing, there are no other reported cases at the appellate level which significantly review or construe the Abuse Prevention statute. The Supreme Judicial Court has also noted that a revocation of probation may be premised upon the violation of a protective order issued pursuant to the Abuse Prevention statute.[77]

V. PENALTIES FOR VIOLATIONS OF ORDERS

Violation of an abuse prevention order[78] to vacate the household or refrain from abusing the complainant or the complainant's minor child is "punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than two and one-half years in a house of correction, or both . . . ."[79] In addition, the court may order the defendant to participate in substance abuse and batterer's treatment programs.[80] The court may also order monetary compensation of a victim's out-of-pocket and economic costs, including, but not limited to, emergency shelter or housing, medical expenses, loss of earnings or support, and attorney's fees.[81]

Sentencing recommendations should be commensurate with other crimes of violence. The dangerousness of the defendant must be addressed based on the defendant's history, the severity of the offense, the impact of the crime on the victim and any minor children, concern for the victim's continued health and well-being, and the amenability of the defendant to treatment programs directed at abusive and physically violent domestic partners, or substance abusers, if appropriate. The prosecution must address the concerns of the victim in the sentence

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74. *Id.* at 919, 478 N.E.2d at 745-46.

75. *Id.* at 920, 478 N.E.2d at 746.

76. *Cf.* Terry v. Ohio, 392 U.S. 1, 27 (1968); Commonwealth v. Johnson, 413 Mass. 598, 600, 602 N.E.2d 555 (1992); Commonwealth v. Patti, 31 Mass. App. Ct. 440, 443, 579 N.E.2d 170 (1991), *further appellate review denied*, 411 Mass. 1105 (1992).

77. Delisle v. Commonwealth, 416 Mass. 359, 360-61 n.1, 622 N.E.2d 601, 602 n.1 (1993).

78. This includes orders issued by a court pursuant to MASS. GEN. L. ch. 208, §§ 18, 34B or 34C; MASS. GEN. L. ch. 209, § 32, MASS. GEN. L. ch. 209A, §§ 3, 4, 5 or MASS. GEN. L. ch. 209C, §§ 15, 20 (1992).

79. MASS. GEN. L. ch. 209A, § 7 (1992).

80. *Id.*

81. *Id.*

recommendation. If appropriate, the prosecution must not fail to seek incarceration, even on those occasions when the victim may oppose such measures, but should advise the court of the victim's position. If probation is appropriate, it should be granted only with conditions geared to protect the victim, such as treatment programs and electronic monitoring of the defendant.

VI. CONCLUSION

The recent criminalization of the violation of domestic protective orders serves to highlight an area of significant prosecutorial concern. Incidences of abuse and violence cannot be tolerated by society and will be vigorously prosecuted by the District Attorney for Suffolk County, who continues to seek the preservation of the health and safety of all persons within the county.

Abuse That Dare Not Speak Its Name: Assisting Victims of Lesbian and Gay Domestic Violence in Massachusetts

Sandra E. Lundy*

I. INTRODUCTION

On February 14, 1992 (Valentine's Day), seven women incarcerated in Massachusetts prisons and one woman who was free pending appeal submitted commutation petitions to the Massachusetts Advisory Board of Pardons and Massachusetts Governor William F. Weld.[1] The women, known collectively as the "Framingham Eight," argued that as a matter of clemency their murder/manslaughter sentences should be commuted because each was a battered woman who killed her batterer in self-defense. I use the gender-neutral term "batterer" because not all of the alleged batterers were male. Debra Denise Reid, one of the "Framingham Eight" petitioners, suffered the nightmare of domestic violence at the hands of another woman.

Ms. Reid is one of a very few individuals in same-sex relationships who have raised a battered person's self-defense, and the only woman in Massachusetts to have done so to date.[2] Media coverage of Ms. Reid's

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1. *See* Toni Locy, *Weld Urged to Free Eight Women*, BOSTON GLOBE, Feb. 15, 1992, at 15 and 17. The sentence of one member of the "Framingham Eight," Eugenia Moore, was commuted by the Massachusetts Governor's Council in April 1993. *See* Toni Locy, *Woman's Life Sentence is Commuted*, BOSTON GLOBE, Apr. 29, 1993, at 1. A second "Framingham Eight" petitioner, Meekah Scott, had her sentence reduced by a Massachusetts Superior Court judge to time served. *See* Doris Sue Wong, *Woman is Free in Killing of Boyfriend*, BOSTON GLOBE, July 2, 1993, at 18. In addition, Pat Allan's sentence was commuted in September 1993.

2. The author represents Ms. Reid in her petition for commutation before the Massachusetts Advisory Board of Pardons and Massachusetts Governor William F. Weld. On October 29, 1990, in what was quoted in the gay press as "the first victory of its kind," prosecutors in Los Angeles County, California successfully introduced

commutation petition has called attention to the rarely discussed phenomenon of lesbian and gay partner abuse in Massachusetts.[3] Yet, as shown below, many people in the Commonwealth, including those responsible for enforcing domestic violence laws and assisting victims of domestic abuse, still are completely unaware that abuse occurs in same-sex relationships, and they do not know how to assist the victims of such violence.

This Article attempts to provide an overview of the situation facing battered lesbians and gay men in the Commonwealth and to offer suggestions for improving legal and other assistance to such persons.[4] I shall argue that although same-sex domestic violence is as prevalent and serious as heterosexual domestic violence, cultural and institutional homophobia has isolated its victims from the psychological, social, and legal support they need to safely leave the abusive relationships. State agency personnel (including law enforcement officials), shelter workers, and the general community must be better educated about the seriousness of gay and lesbian domestic violence and of the need to commit more resources to address the problem. Finally, these resources must in fact be committed so that gay men and lesbians find the help they need to find safety from violent intimate relationships.

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the battered women's syndrome in a lesbian battering case. *See* Chris Nealon, *"Battered Woman Syndrome" Successfully Used in Lesbian Case*, GAY COMMUNITY NEWS, Dec. 23-Jan. 6, 1990, at 3. Evidence on the "battered person defense" was allowed but was unavailing in the case of Annette Green, a Florida woman who was convicted in the death of her lover. *See* Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567, 574-75 (1990). *See also* Dell Richards, *A Tragic Way to Win a Precedent*, BAY WINDOWS, Feb. 21-25, 1991, at 8 (lesbian in Idaho successfully raises battered women's defense); Jane Garcia, *The Cost of Escaping Domestic Violence*, LOS ANGELES TIMES, May 6, 1991, at E1 (discussing two California cases in which battered lesbians successfully raised the battered woman's syndrome defense).

3. *See, e.g.*, Christine Guilfoy, *Jailed Woman Seeks Governor's Pardon*, THE MONTACHUSETT TELEGRAM & GAZETTE, May 20, 1992, at 1; Eve Epstein, *Lesbian's Ordeal Brings Domestic Violence in Same-Sex Relationships into Focus*, BAY WINDOWS, Jan. 14, 1993, at 1, 5; Lynda Gorov, *Battered-By a Woman*, BOSTON SUNDAY GLOBE, Jan. 10, 1993, at 21, 23; Ann Russo, *A Battered Lesbian Fights for Recognition*, SOJOURNER, May 1992, at 14, 16, 17. A radio report by David Wright on Ms. Reid's case aired on National Public Radio's Boston affiliate, WBUR-FM, in January of 1993 and nationally thereafter (WBUR-FM broadcast, Jan. 11, 1993) (tape on file with the author).

4. Throughout this Article, I shall refer interchangeably to "battered lesbians and gay men" and "battered same-sex partners." Of course, bisexual women involved with women and bisexual men involved with men batter and are battered. However, the situation faced by bisexual individuals in same-sex battering couples does not appear to be appreciably different than the situation faced by lesbians and gay men in violent relationships, in that the same-sex nature of the relationships often triggers homophobic responses that further isolate the victim from sources of assistance. *See infra* Part III(D).

Part II of this article examines the dynamics of lesbian and gay partner abuse, within the context of an overview of domestic violence. Part III explores the resources available in Massachusetts to assist battered lesbians and gay men. Part IV offers proposals for improving assistance for this large but largely ignored population in jeopardy.

II. THE CONTEXT OF LESBIAN AND GAY DOMESTIC VIOLENCE

A. *Domestic Violence Defined*

Domestic violence is often perceived in sex-based terms (man v. woman) or incident-based terms (number of physical assaults). In reality, domestic violence is both broader and deeper than these definitions imply. Domestic violence, whether heterosexual or homosexual, is nothing less than the systematic exercise of illegitimate power and coercive control by one partner over another.[5] The batterer's purpose in creating and maintaining this systematic power imbalance is to perpetuate total domination over his or her partner. For the batterer, and through his or her actions, the subjectivity of the abused person is completely subsumed to the batterer's obsessive need for mastery and control.[6]

Domestic violence most often includes physical and sexual violence, ranging from slapping and shoving to the most degrading kinds of physical and sexual torture. However, battering often takes non-physical forms as well, and may be entirely non-physical. The batterer may control the victim with threats of harm—to the victim, the victim's relatives, friends, and even pets; or to the batterer him/herself. These threats can be as terrifying as physical assault.[7] The batterer also may

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5. *See generally* Martha R. Mahoney, *Legal Images of Battered Women: Redifining the Issue of Separation*, 90 MICH. L. REV. 1, 28-34 (1991). *See also* Barbara Hart, *Lesbian Battering: An Examination, in* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 173 (Kerry Lobel ed., 1986) (for the National Coalition Against Domestic Violence Lesbian Task Force) [hereinafter NAMING THE VIOLENCE] ("Lesbian battering is that pattern of violent and coercive behaviors whereby a lesbian seeks to control the thoughts, beliefs or conduct of her intimate partner or to punish the intimate for resisting the perpetrator's control over her."); DAVID ISLAND & PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM 27 (1991) (defining gay male's domestic violence as "any unwanted physical force, psychological abuse, material or property damage inflicted on one man by another").

6. *See generally* LENORE E. WALKER, THE BATTERED WOMAN 35-39 (1979); Hart, *supra* note 5, at 174-75. *See also* David Adams, *Identifying the Assaultive Husband In Court: You Be The Judge*, BOSTON B.J., July/Aug. 1989, at 23-24.

7. *See generally* Adams, *supra* note 6, at 24-25 (describing coercive behaviors of heterosexual male batterers, including humiliation, control over economic resources, and the manipulation of children); ISLAND & LETELLIER, *supra* note 5, at 26-27 (listing acts of physical, psychological, and material or property violence that may be present in gay male battering relationships); CLAIRE M. RENZETTI, VIOLENT BETRAYAL:

deprive the victim of the means of economic support (economic battering), or may verbally degrade and humiliate the victim in private and public (social battering), or stalk or imprison the victim.[8] Often the batterer employs a variety of behaviors to maintain control in the relationship. For instance if the victim is diabetic, the batterer may force her to eat sugar.[9] If the victim is disabled, the batterer may deprive the victim of the means of independence or mobility.[10] There is no "typical" form of domestic abuse, and no end to the warped creativity of batterers in tailoring abuse to fit the victim's particular vulnerabilities.[11]

Nor is there ever a time, in abusive relationships, where the victim feels safe. Even between assaultive incidents, the victim lives in a state of "constant anticipatory terror."[12]

B. *Prevalence*

Domestic violence occurs in couples of all religions, ethnic and racial groups, and among couples of every class and level of education.[13] Batterers and their victims are of all ages and physical types.[14] Estimates of the overall prevalence of heterosexual battering vary widely, and are heavily dependent on the researcher's definition of battering and his or her methodology.[15] On average, though, most researchers place

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PARTNER ABUSE IN LESBIAN RELATIONSHIPS 17-25 (1992) (discussing forms of physical and psychological abuse that may be present in lesbian battering relationships).

8. *See supra* note 7.

9. *See* RENZETTI, *supra* note 7, at 23. This incident was reported to Professor Renzetti by one of the battered lesbians in her study. *Id.*

10. *Id.*

11. *Id.* at 23-24.

12. *See* CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW 131 (1989) (asserting that battered women live in a state of "constant anticipatory terror") (citation omitted). *See also* WALKER, *supra* note 6, at 61 (anticipation of violent incidents causes severe psychological stress for the battered woman).

13. *See* WALKER, *supra* note 6, at 18-19; ISLAND & LETELLIER, *supra* note 5, at 24; Beth Leventhal, *Battered Lesbians, in* FOR SHELTER AND BEYOND: ENDING VIOLENCE AGAINST BATTERED WOMEN AND THEIR CHILDREN 75 (Charlene Allen et al. eds., 2d ed. 1992) [hereinafter FOR SHELTER AND BEYOND].

14. *See, e.g.*, Christine Butler, *Myths About Woman Abuse, in* FOR SHELTER AND BEYOND, *supra* note 13, at 21-23; ISLAND & LETELLIER, *supra* note 5, at 18; RENZETTI, *supra* note 7, at 103.

15. *See generally* Mahoney, *supra* note 5, at 10-11. Mahoney notes that "[a]ccurate estimates are difficult, in part because of the likelihood of underreporting." *Id.* at 11 (footnote omitted). One's definition of domestic violence and one's methodology also will affect prevalence of results. *Id.* Some researchers have pegged the level of heterosexual domestic violence as low as 12% of all couples, and others have obtained figures of more than 50%. *Id.*

the incidence of violence in heterosexual couples at around twenty-five to thirty-three percent of all such couples.[16]

Regardless of precise numbers, the level of domestic violence among heterosexual couples in Massachusetts has reached epidemic proportions. According to a recent report issued by the Massachusetts Office for Victim Assistance, in 1992, approximately 54,240 individuals filed for restraining orders against allegedly abusive domestic partners.[17] "In Massachusetts on average, a woman was killed by her [male] batterer every 22 days in 1990, every 16 days in 1991, and every 13 days in 1992."[18] Statistics like these led the office of Massachusetts Governor William Weld, in 1992, to declare a domestic violence "public emergency" in Massachusetts.[19]

Estimates of the prevalence of lesbian and gay domestic violence also vary widely but are equally alarming. Most researchers agree that the incidence of battering in lesbian and gay couples is about the same as it is for heterosexual couples–that is, approximately twenty-five to thirty-three percent of all such couples[20]–and that the figures may be higher for gay men than for lesbians.[21] In fact, domestic violence has been called "the third most severe health problem facing gay men today."[22] However, battered lesbians and gay men often do not report domestic

16. *See* RENZETTI, *supra* note 7, at 18 (citing M.P. KOSS (1990)).

17. VICTIM WITNESS ASSISTANCE BOARD, COMMONWEALTH OF MASSACHUSETTS, A GUIDE TO DOMESTIC VIOLENCE COURT ADVOCACY IN MASSACHUSETTS 16 (1993) [hereinafter A GUIDE TO DOMESTIC VIOLENCE COURT ADVOCACY]. These figures do not accurately represent the incidence of domestic violence in Massachusetts, since domestic violence is a seriously underreported crime. *See* WALKER, *supra* note 6, at 19. *See also* WALKER, *supra* note 6, at 26 (noting that only about 10% of battered women call police for help).

18. These statistics were compiled by the Massachusetts Coalition of Battered Women Service Groups, and are reprinted in SCOTT HARSHBARGER & JAY WINSTEN, REPORT ON DOMESTIC VIOLENCE: A COMMITMENT TO ACTION 7 n.1 (June, 1993) [hereinafter ATTORNEY GENERAL'S REPORT ON DOMESTIC VIOLENCE]. Disturbing as these figures are, they are even more chilling when placed with other statistics on domestic violence, which show that an estimated 3-4 million American women per year are battered by their husbands or boyfriends; "[b]attering accounts for more injuries to women than car accidents, muggings, and rapes combined;" police spend approximately one-third of their time responding to alleged incidents of domestic violence; and "[i]n one study, battering accounted for 25% of all suicide attempts by women, and 50% of all suicide attempts by black women." (quoting STARK, E. et al., 1981). JANE DOE SAFETY FUND, DOMESTIC VIOLENCE: BUILDING AN INTEGRATED COMMUNITY RESPONSE 4 (1993) [hereinafter JANE DOE SAFETY FUND].

19. *See* Toni Locy, *An Alarm Sounds over Battering, Cellucci Declares Emergency, Backs Program Funding*, BOSTON GLOBE, Apr. 8, 1992, at 21.

20. *See generally* RENZETTI, *supra* note 7, at 17-18.

21. *See* ISLAND & LETELLIER, *supra* note 5, at 14.

22. *Id.* at 283.

violence or seek outside help.[23] Thus, it is impossible to know whether a domestic violence "public emergency" exists in Massachusetts for lesbians and gay men as well as for heterosexual women, although there is little reason to suspect otherwise. Extrapolating from statistics on heterosexual domestic violence, it is likely that even by conservative estimate, tens of thousands of men and women in the Commonwealth are trapped in relationships where they are being beaten, raped, imprisoned or otherwise abused by their same-sex partners.[24]

C. *The Dynamics of Battering*

Victims of domestic violence are often blamed for staying in abusive relationships. To fully understand the dilemmas of people who find themselves in battering relationships, we must understand the dynamics of domestic violence. Since the 1970's a great deal of research has been conducted on the features of male-to-female battering.[25] Although the results of this research differ in details and implications, there seems to be broad agreement about some common characeristics of abusive heterosexual relationships.

Most researchers, for example, have discredited the notion that women who endure domestic abuse are masochistic or "crazy." Rather, studies show that battered heterosexual women are average, normal people responding in reasonable ways to the abnormally dangerous situations in which they live.[26] These women typically do not choose

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23. Although no hard-and-fast data exist on this point, experts in the field of same-sex domestic violence generally conclude that victims of same-sex violence are even less prone to report their assaults to police, hospitals, and courts than are women battered by men. *Id.* at 9-12; RENZETTI, *supra* note 7, at 90-91.

24. In estimating the number of gay men who may be victims of domestic violence, Island and Letellier used the following computation and assumptions: numbers of adults (18 yrs.+) in the United States x .10 (percentage of adults assumed to be gay) x .64 (percentage of heterosexual adults who marry or are in couples–this percentage is assumed to be the same in the gay and lesbian populations) x .5 (i.e., half of each couple) x 10.9% (proportion of individuals believed to be victims of domestic violence) = N (number of abused gay men). *See* ISLAND & LETELLIER, *supra* note 5, at 13-15. By their own admission, the 10.9% figure used by Island and Letellier is a very conservative estimate. *Id.*

The voting age population in Massachusetts as of 1990 has been estimated at approximately 28.7 million persons. *See* U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES 271 (11th ed. 1991). Using Island & Letellier's admittedly rough formula, if we assume that 2.87 million of these persons are gay or lesbian (i.e., 10%), that 1,836,800 of these individuals are in couples (i.e., 64%), and that 10.9% of 918,400 of these individuals have been battered, then approximately 100,105 gay men or lesbians in Massachusetts may currently be victims of domestic violence.

25. *See generally* Mahoney, *supra* note 5, at 26-34 (summarizing the history of the conceptualization of battering and main schools of thought on the issue).

26. *See, e.g.,* WALKER, *supra* note 6, at 20-21, 43-54.

violent partners, but they find themselves trapped in relationships with partners who become abusive. At the beginning of these relationships, the man often is charming, gentle, attentive and loving, showering the woman with the kind of attention to which she may not be accustomed and refraining from overt acts of abuse.[27] Usually, the battering becomes manifest only after the batterer has persuaded his mate to make a substantial commitment to the relationship–moving in together, relocating, getting married or pregnant, making a major financial investment to benefit the batterer, or dropping close acquaintances or family ties.[28] Over time the episodes of controlling behavior increase, the atmosphere of coercion deepens, and the violence often worsens.[29] The batterer systematically strips away all vestiges of his partner's independence–alienating her from her friends and family, isolating her economically, constantly accusing her of infidelity, and watching every move she makes.[30] The isolation of the battered woman increases her vulnerability and attachment to the batterer and leads to "extreme feelings of helplessness and powerlessness . . . . Whatever confidence she once had in her own capabilities deserts her and she suffers from a massive ebbing away of self-esteem."[31]

Often, the battered woman is shocked by the first assaultive incidents. She believes that if she changes her behavior to please the batterer, the violence will stop. Eventually, when the violence does not stop, the abused woman becomes hypervigilant, scrutinizing her batterer's demeanor for even the slightest portent of a coming assault.[32] She may minimize and deny the battering to herself and others, either from shame, desire to protect the batterer, or from terror of what the batterer will do to her if she reveals the abuse. She may not know that there are viable alternatives available to remaining in the relationship, or these alternatives simply may not exist. For example, family members, friends, clergy, or counselors may advise the victim to stay with or return to the abuser. Police and courts may be unresponsive to the woman's request for protection.[33] Space may not be available in the local shelter, if

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27. WALKER, *supra* note 6, at 73.

28. *See* GILLESPIE, *supra* note 12, at 146-47.

29. GILLESPIE, *supra* note 12, at 125-29.

30. *See* Adams, *supra* note 6, at 24; WALKER, *supra* note 6, at 172.

31. WALKER, *supra* note 6, at 174.

32. *See* Graham et al., *Survivors of Terror: Battered Women, Hostages, and the Stockholm Syndrome, in* FEMINIST PERSPECTIVES ON WIFE ABUSE 217 (Kirstie Yllo & Michelle Bograd eds., 1988).

33. *See, e.g.*, DEL MARTIN, BATTERED WIVES 73 (1981) (noting that battered women may not know of the existence of battered women's shelters); WALKER, *supra* note 6, at 127.

there is one.[34] If the abused woman is uneducated, is on welfare, is a substance abuser, does not speak English, or is otherwise identified with a stigmatized minority, she may find it even harder to locate and receive appropriate assistance.[35]

Yet in spite of all of these barriers, many battered women repeatedly try to escape their situations–only to return home as a result of economic or other necessity or to be tracked down by the batterer and severely punished for daring to flee. By now it is almost axiomatic that a battered woman's life is most in jeopardy when she threatens or attempts to leave the relationship. One scholar, Professor Martha Mahoney, argues that this type of violence is so common that we should create a separate category of crime called "separation abuse."[36]

Once she realizes that escape may be more dangerous than staying in the relationship, the battered woman often redirects her energies from hope to survival.[37] As with other victims of post-traumatic stress–such as hostages and survivors of natural disasters–the battered woman may use coping mechanisms such as withdrawal, acquiescence, and extreme passivity.[38] She may become suicidal or become a substance abuser.[39] In these circumstances, happy endings are rare.

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34. *See, e.g.*, Editorial Committee, *Rural Women*, *in* FOR SHELTER AND BEYOND, *supra* note 13, at 77-78 (noting that "[m]ost rural areas are not directly served by a battered women's program.").

35. *See generally* the "Expanding Accessibility" section *in* FOR SHELTER AND BEYOND, *supra* note 13, at 68-93 (articles on expanding accessibility of shelters and support services to battered women in prison, women in prostitution, older women, teenagers, rural women, women with disabilities, undocumented women, women with AIDS, and incest survivors).

36. *See* Mahoney, *supra* note 5, at 5-6. "At the moment of separation or attempted separation . . . the batterer's quest for control often becomes most acutely violent and potentially lethal." *Id.* *See also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 115-16 (1987) (battered woman's life is in greatest danger during separation or attempted separation from the batterer).

37. *See* WALKER, *supra* note 6, at 174. Dr. Walker explains that "[a]n overwhelming feeling of hopelessness envelops [the battered woman] . . . . The very energy that she now needs to propel her out of this violent situation is lost." *Id.* As a result, the battered woman "settles into a routine attempting to minimize her pain and suffering." *Id.*

38. *See* THE DIAGNOSTIC AND STATISTICAL MANUAL (DSM-III-R), which characterizes symptoms such as withdrawal, acquiescence and passivity as the result of the psychological trauma of battering, which is classified as a post-traumatic stress disorder. *See also* GILLESPIE, *supra* note 12, at 155.

39. *See* LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 45 (1990). Dr. Walker states that "many battered women who kill their abusers start out intending to commit suicide themselves. Suicide seems the only way to break the batter's control over them and avoid further abuse." *Id.* *See also* WALKER, *supra* note 6, at 174.

The abusive relationship too often ends when one partner, usually the abuser, maims or kills the other.[40]

D. *The Special Context of Lesbian and Gay Domestic Violence*

The above, very general outline of the battering dynamic in heterosexual relationships summarizes conclusions that have emerged from over two decades of extensive research. By comparison, studies of gay and lesbian domestic violence are relatively new and sparse, even more so for gay men than for lesbians.[41] The first full-length empirical study of lesbian battering, Professor Claire Renzetti's *Violent Betrayal*, was published in 1992, and the first full-length study of gay domestic violence, David Island's and Patrick Letellier's *Men Who Batter the Men Who Love Them*, was published in 1991.[42] Most of the research available is based on anecdotal evidence, in part because it is extremely difficult to obtain hard data on "hidden" populations such as lesbians and gay men.[43]

Researchers seem to agree, however, that the dynamics of lesbian and gay domestic violence are very similar to the dynamics of male-to-female battering described above. Yet, they also note a crucial difference that increases the vulnerability of gay men and lesbians to domestic abuse: homophobia and its attendant isolation.[44] In the sections below, I examine how homophobia, both internal and external, typically affects the behavior of same-sex batterers and survivors.

1. The Same-Sex Batterer

Lesbian and gay batterers and heterosexual male batters often use similar techniques of physical and psychological terror to control their mates, including rape, beatings, strangulation, public humiliation, economic and social battering, and forced isolation.[45] At a recent

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40. "According to the Uniform Crime Report of the Federal Bureau of Investigation (FBI), 30% of women killed in the United States die at the hands of a husband or boyfriend. In 1990, more than 800 women were killed by their husbands; 400 more were killed by their boyfriends." Surgeon General Antonia C. Novello, *From the Surgeon General, US Public Health Service*, 267 JAMA 3132 (1992). "One study found violence to be the second leading cause of injuries to women, and the leading cause of injuries to women age 15 through 44 years." *Id.* (citation omitted).

41. *See* Mahoney, *supra* note 5, at 9; ISLAND & LETELLIER, *supra* note 5, at 9-12.

42. *See generally* RENZETTI, *supra* note 7; ISLAND & LETELLIER, *supra* note 5.

43. RENZETTI, *supra* note 7, at 19 (finding that true prevalence studies of hidden populations are difficult to obtain).

44. *See infra* § III(D).

45. *See generally* RENZETTI, *supra* note 7, at 20-24. Some lesbians in Renzetti's study reported that they had been hit and punched, had figures carved into their skin, and guns or knives inserted into their vaginas. *Id.* at 21. These are common extreme forms of male violence toward female partners. In Renzetti's study of

forum on lesbian battering held in Boston, for instance, one woman told of being raped by her female partner, another told of being choked and held at knifepoint by her female partner, and a third recounted being constantly yelled at and criticized in public by her partner, who also hit her. At another forum on same-sex battering in Massachusetts, a gay man recounted being beaten by his partner and thrown onto the streets with just the clothes on his back. These are all forms of abuse that are common in violent heterosexual relationships.

The most significant difference between the behavior of same-sex and heterosexual (male) batterers is that same-sex batterers have an extra weapon in their arsenal of terror: homophobia, or society's fear and hatred of homosexuality.[46] The same-sex batterer frequently uses homophobia as a means to maintain the control and power imbalance in the relationship in a variety of ways. For example, lesbian battering activist Beth Leventhal notes that "[i]n a culture without many healthy role models for lesbian [and gay] relationships . . . the batterer can convince [his or] her partner that the abusive behavior is normal and that any problems the partner has with it are a reflection of [his or] her lack of experience and understanding of [gay or] lesbian relationships."[47] Lesbian and gay batterers also may use homophobia to control their mates by threatening to "out" the victim (i.e., disclose the victim's homosexuality) to friends, family, employers, or others unless the victim complies with the batterer's demands. As one activist who has

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battered lesbians, however, "psychological abuse was generally more frequent than physical abuse." *Id.* *See also* Hart, *supra* note 5, at 188-89 (detailing forms of lesbian domestic violence). *See also* ISLAND & LETELLIER, *supra* note 5, at 26-27 (detailing forms of gay male domestic violence). As one formerly battered lesbian has noted, "[w]hen the shades are drawn and the two of you are the only ones there, whether your batterer is a rich white man or a lesbian feminist, someone is trying to control your life . . . . And if your batterer is female, the fact that men kill more often than women does not assure that you will live through the night. And if you do, it does not lessen your experience." Debra Borkovitz, *Letter to the Editor*, SOJOURNER, Aug. 1991, at 2.

46. *See* Hart, *supra* note 5, at 173, 189; Terri L. Rutter, *Lesbian Battering: Dispelling the Myths*, BAY WINDOWS, June 2-8, 1988, at 1 ("[H]omophobic control . . . includes threats to tell family, friends, employers or others that the victim is a lesbian, or inferring that because she is a lesbian, she won't be able to seek help from a homophobic society, and that the lesbian community won't offer her help because it doesn't believe lesbians can be violent."). *See also* ISLAND & LETELLIER, *supra* note 5, at 49-52 (noting that many gay male batterers confuse their violence with masculinity). Of course, homophobia may also be used as a weapon by heterosexual men to prevent their female partners from going to shelters, calling hotlines, or getting counseling. *See* Charlene Allen & Liz Roberts, *Homophobia: A Weapon of Batterers?*, *in* FOR SHELTER AND BEYOND, *supra* note 13, at 187.

47. Letter from Beth Leventhal, Coordinator, Network for Battered Lesbians, to Robert Gittens, Chairman, Massachusetts Advisory Board of Pardons, in support of the commutation petition of Debra D. Reid (Feb. 4, 1992) (on file with author).

worked with battered lesbians has noted, "If a lesbian makes her sexuality known, she can lose her family, her friends, her job and her life."[48]

Yet even if the victim is open about his or her sexual preference and thus "outing" is not an issue, the same-sex batterer may still exercise homophobic control by exploiting sexist and heterosexist stereotypes to hide the abuse.[49] For example, gay and lesbian batterers frequently perpetuate their abuseive behavior by exploiting the "myth of mutual battering," the assumption that "most abusive intimate relationships are characterized by reciprocal violence in which each partner is both a perpetrator and a victim of abuse."[50] This myth–that "s/he likes it" or "it's a two-way street"–is also common in heterosexual battering relationships. But the myth of mutual battering is particularly invidious for same-sex couples, since a common misconception in both the heterosexual and homosexual communities is that any violence between two men or two women is by its very nature "just fighting" which is actively initiated by both parties.[51]

Moreover, since abused lesbians and gay men tend to use physical force to defend against their batterers more frequently than abused heterosexual women do, the victim him/herself might believe the assertion of the batterer, and even friends and counselors, that such self-defensive fighting constitutes abuse, and that the victim is the aggressor and does not deserve help or consideration.[52] "Often batterers use the survivor's self-doubt to their advantage. Batterers are notorious for labeling the survivor 'mutually abusive' in order to avoid taking responsibility for their actions."[53]

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48. Rebecca Redshaw, *quoted in* Garcia, *supra* note 2, at E1. *See also* Mindy Benowitz, *How Homophobia Affects Lesbians' Response to Violence in Lesbian Relationships*, *in* NAMING THE VIOLENCE, *supra* note 5, at 198, 200 (many battered lesbians remain silent for fear that speaking about the violence will force them "out of the closet" at work); Rebecca Redohaw, *Children from Violent Lesbian Homes*, NCADV CHILD ADVOCACY TASK FORCE BULLETIN, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, Summer 1989, at 1, 3 (lesbian batterers who are biological mothers may use threat of "outing" to threaten non-biological mothers with loss of children).

49. *See, e.g.*, ISLAND & LETELLIER, *supra* note 5, at 49-52 (discussing the role of cultural stereotypes of masculinity in perpetrating gay male domestic violence); RENZETTI, *supra* note 7, at 89.

50. RENZETTI, *supra* note 7, at 107.

51. Renzetti has found that in the lesbian community, the myth of mutual battering is "largely uncritical[ly] accept[ed] as fact." *Id.* at 108. *See also id.* at 107-12; Robson, *supra* note 2, at 578-79; ISLAND & LETELLIER, *supra* note 5, at 16-18.

52. *See* Hart, *supra* note 5, at 183-87. *See also* RENZETTI, *supra* note 7, at 109-10; ISLAND & LETELLIER, *supra* note 5, at 108 (gay male victim "may tend to believe that even violence perpetrated entirely by the partner is a shared responsibility of the two partners.").

53. K. L. Asherah, *The Myth of Mutual Abuse*, *quoted in* RENZETTI, *supra* note 7, at 109.

In a variation on the myth of mutual abuse, the lesbian or gay batterer often claims to be the actual victim of abuse, thus seeking to exploit the fact that in same-sex relationships identifying the batterer often is more difficult than in heterosexual situations, particularly if the couple is about the same age, size, etc.[54] Gay and lesbian batterers who claim themselves to be the victims often obtain restraining orders against the real victims, thereby enlisting the police and the courts in perpetuating the battering.[55]

In short, same-sex batterers often use the myth of mutual battering to disguise their abuse as mutual, consensual combat; alienate the victim from sources of assistance; reinforce the victim's guilt and self-doubt; and allow the abusive relationship to continue without challenge. The myth of mutual abuse, which at bottom is founded on sexist and heterosexist assumptions about how people behave, thus becomes a potent tool of control in many abusive same-sex relationships.

Finally, the lesbian or gay batterer may exercise homophobic control by convincing the victim that s/he is not legally entitled to protection from abuse, or that s/he will be treated with derision by hospitals, advocates, shelters, the police, and by the courts if s/he seeks help.[56] Sadly, as shown below, this warning all too often squares with the reality.

In sum, homophobia, a powerful tool for the oppression of gay men and lesbians in society at large, can also be a potent weapon of terror in the home.

2. The Abused

a. Family, Friends, Community

Victims of same-sex battering often react to their situation much as battered heterosexual women do. Denial, hypervigilence, and minimization, among other survivor behaviors, are well known to abused lesbians and gay men.[57] However, here again the presence of homo-

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54. *See* RENZETTI, *supra* note 7, at 95 (noting the difficulty of discerning the batterer in lesbian relationships).

55. *See* Robson, *supra* note 2, at 580 (discussing the problem of mutual restraining orders).

56. Hart, *supra* note 5, defines "homophobic control," *inter alia*, as "assuring [the victim] that no one would believe she has been violated because lesbians are not violent; reminding her that she has no options because the homophobic world will not help her." *Id.* at 189.

57. *See, e.g.*, Nancy Hammond, *Lesbian Victims and the Reluctance to Identify Abuse*, *in* NAMING THE VIOLENCE, *supra* note 5, at 190, 192 (battered lesbians and battered heterosexual women respond to abuse in similar ways, including self-blame, guilt, minimization, denial, and "a spiral of ever diminishing self-respect"); RENZETTI, *supra* note 7, at 84; ISLAND & LETELLIER, *supra* note 5, at 107-10 (listing 17 types of "victim behavior," including inappropriately feeling accountable for the violence, relinquishing control to the partner, denial and minimization, appeasement of the abuser,

phobia, and the isolation and alienation it fosters, plays an important role in defining the same-sex battered partner's attitudes and options.

Psychologist Nancy Hammond has noted that the battered lesbian and gay man "is faced with far greater loneliness" as a victim than the battered heterosexual woman.[58] For one thing, the fact alone of being lesbian or gay tends to increase one's distance from the larger society and from its resources. As one researcher puts it, "we are already isolated" before the battering even begins.[59] Moreover, in "same-sex relationships, the victim often feels like they don't have many options . . . . Often they don't have an intact support system that will help them out."[60] This isolation of gay people from the larger community may increase the victim's emotional dependence on the batterer, making separation more difficult.[61] For example, abused lesbians and gay men who are geographically or otherwise isolated from other gay people, may feel that their partners, however violent, are the only ones who can understand and accept their sexual preference. Family support may be unavailable for a number of complex reasons. Hammond notes that "lesbians are less likely than heterosexual women to turn to family members for emotional support in the aftermath of violence,"[62] and Island and Letellier have found that the same is true for gay men.[63] The abused gay man or lesbian may already be estranged from the family because of sexual preference issues, or may still be concealing their sexual preference from family members. Even if the victim has discussed the issue of sexual orientation with relatives, s/he "may fear reinforcing stereotypes of the 'sickness' of [same-sex] relationships and lifestyles"[64] by disclosing the abuse. Moreover, because of the still-rampant homophobia in our society, the abused lesbian or gay man may,

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behaving in an increasingly helpless manner). *Cf.* WALKER, *supra* note 6, at 36 (enumerating characteristics of battered heterosexual women).

58. Hammond, *supra* note 57, at 194.

59. Liz Hicks, *The Abused: Why Does She Stay?*, THE [SAN ANTONIO, TEX.] MARQUISE, Apr. 22, 1993, 7, 7 (quoting Emily French, graduate student at Warden School of Social Work) (on file with the author).

60. *Id.* (quoting Sandra Moore-Pope, clinical social worker).

61. "Research with lesbians involved in intimate relationships shows them to have a higher level of dyadic attachment or commitment to their partners than do gay men, and, in some studies, than do heterosexual partners." RENZETTI, *supra* note 7, at 30. Renzetti notes the explanation for this higher degree of attachment may be the "lack of social validation and support of lesbian relationships outside the lesbian and gay communities." *Id.* at 29. Island & Letellier note that societal homophobia may foster an "us against them" mentality that makes the gay male victim cling to and try to preserve the (abusive) relationship. ISLAND & LETELLIER, *supra* note 5, at 23-24, 246.

62. Hammond, *supra* note 57, at 196.

63. *See* ISLAND & LETELLIER, *supra* note 5, at 23 (noting that "many men are alienated from their families of origin due to homophobia and heterosexism").

64. Hammond, *supra* note 57, at 196.

ironically, be particularly protective of her or his mate and refrain from reporting the abuse to family or friends for fear of the consequences of bringing the abusive partner out of the closet.[65]

Abused same-sex partners also are less likely to turn to friends for support than are heterosexual women, even–and sometimes particularly–if these friends are lesbian or gay. The lesbian and gay communities historically have failed to support or shelter abused same-sex partners. Even so, the situations facing battered lesbians and battered gay men who seek help from their respective communities are somewhat different, and I shall discuss each in turn.

Activist Ann Russo notes that battered lesbians "continue to face the denial and passivity of the battered women's movement and the feminist and lesbian communities."[66] While denial and passivity also plague battered heterosexual women, they seem particularly entrenched in the lesbian community. Lesbian communities, for instance, may be reluctant for ideological reasons to acknowledge that women can batter other women, because to do so would mean shattering a utopic vision of a peaceful, women-centered world. Or lesbians may discourage the battered lesbian from seeking help because they may believe that the lesbian community should not "air its dirty laundry" in public or participate in patriarchal institutions such as the courts.[67] As a result, women who choose to report the abuse may be ostracized and isolated from her lesbian friends.

Moreover, the lesbian batterer may be a prominent person in the lesbian community or the battered women's community, thus providing what Leventhal calls the "perfect coverup" to cast doubt on the victim's

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65. *See* Hammond, *supra* note 57, at 196. *See also* ISLAND & LETELLIER, *supra* note 5, at 245-47.

66. Ann Russo, *If Not Now, When? Obstacles to Outrage, Part II*, SOJOURNER, Oct. 1992, at 13.

67. *See generally* Robson, *supra* note 2, at 587-90 (discussing controversy in lesbian community over accessing the legal system in incidents of domestic violence); RENZETTI, *supra* note 7, at 123-24. *See, e.g.*, LYDIA WALKER, *Battered Women's Shelters and Work With Battered Lesbians*, *in* NAMING THE VIOLENCE, *supra* note 5, at 73, 75 (denial of problem of lesbian battering based on "self-protective" stereotypes about differences between men and women); Linda Geraci, *Making Shelters Safe for Lesbians*, *in* NAMING THE VIOLENCE, *supra* note 5, at 77-78 ("[I]n the lesbian community at large, battering between women is a non-issue–it violates the idea of a safe, peaceful world of women."); TASK FORCE ON LESBIAN BATTERING OF THE MASSACHUSETTS COALITION OF BATTERED WOMEN'S SERVICES, *Confronting Lesbian Battering*, GAY COMMUNITY NEWS, May 22-28, 1988, at 5 (victims of lesbian battering risk re-victimization by lesbian community's denial or minimization of the issue.); Russo, *supra* note 66, at 15 (lesbian communities often excuse and minimize the behavior of batterers). Renzetti cites studies that conclude that "battered lesbians are somewhat less likely than battered heterosexual women to rate their friends' help highly." RENZETTI, *supra* note 7, at 102.

account and allow the battering to go unchallenged.[68] As a result, Russo notes, "[b]attered lesbians continue to face comments from other lesbians and feminists that their experiences don't constitute abuse, that their batterers have hard lives and so can't be expected to be perfect, and the abuse isn't that bad."[69] These comments and attitudes, which would be roundly condemned by many lesbians if directed towards battered heterosexual women, are routinely inflicted on battered lesbians by women who purport to be their allies.

For gay male victims of partner abuse, community awareness and response are far more muted. According to Steven Taylor, a victim advocate who has counseled many abused gay men, the topic of male domestic violence is almost completely ignored by the gay male community.[70] Sandra Moore-Pope, a Texas therapist who has counseled battered gay men, surmises that one reason for this avoidance may be that gay men wish to maintain the illusion that "they are somehow more evolved [than heterosexual men], . . . [that] they have left the paternalistic dominant society, and they would certainly never do something like that."[71] Or the victim's gay male community might cling to the masculinist idea that men are never victims and may consider the battered gay male as a threat to certain ideas about sexual freedom and masculinity.[72] In other words, in the gay male community, unlike in the lesbian community (where considerable controversy rages about how to define lesbian battering and what to do about it), there is little controversy about the issue of domestic violence because there is almost no discussion of it. As Letellier and Island put it, "[o]ne very important reason why it is so hard to find out how many gay men are battered by their mates is that the gay community would rather not know."[73]

b. Support Services

The battered women's service community also has been slow and late in offering support to battered lesbians and gay men. There are only a handful of organizations in the country that offer support services to battered gay men.[74] The situation for battered lesbians is only somewhat better. Many battered women's shelters even today will not house battered lesbians. The reasons given for this decision include fear

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68. Beth Leventhal, quoted by Russo, *supra* note 66, at 15.

69. Russo, *supra* note 66, at 15-16.

70. Telephone Interview with Steven Taylor, Advocate, Victim Recovery Program, Fenway Community Health Center, Boston, Mass. (June 3, 1993).

71. Sandra Moore-Pope, quoted in Liz Hicks, *"Family" (Domestic) Violence*, THE [SAN ANTONIO, TEX] MARQUISE, Mar. 25, 1993, at 3 (on file with author).

72. *See* ISLAND & LETELLIER, *supra* note 5, at 49-53.

73. *Id.* at 10. "In every article that has been written about gay men's domestic violence, one topic invariably comes up: Silence." *Id.* at 10, 36.

74. *Id.* at 35.

of losing funding or fear that lesbians will prove a divisive or disruptive presence in the shelter.[75] Another reason, according to Leventhal, is that the shelter may actually be run by a batterer.[76] And Dolores Aguirre, a heterosexual shelter worker who has led support groups for battered lesbians, notes that "there's a lot of homophobia in all of our shelters."[77]

In shelters which do admit battered lesbians, the staff and residents may make the battered lesbian feel unwelcome or unsupported.[78] One recent study of 100 battered lesbians found that only 13 went to shelters for help, and 9 of these 13 found the shelters not helpful or only a little helpful.[79]

Moreover, battered lesbians have special safety needs that the shelter may not address adequately or at all. As Leventhal notes, "Because they are both women, wherever a battered lesbian can go, her batterer can follow. The batterer may know the location of the shelter or she may try to get into the program to find her partner. She may work in the battered women's movement and have easy access to safety networks."[80] The shelter may not make adequate safety plans for the protection of battered lesbians and thus not constitute a real option from abuse. For instance, few shelters seem willing or able to provide the careful screening required to ensure that the lesbian batterer will not gain access to the victim.[81]

Lesbians and gay men who are identified with other stigmatized minorities may face additional hurdles in attempting to find help as battered persons. Psychologist Valli Kanuha notes of lesbians of color that "it is the combination of being women, battered, lesbians, and people of color that create significant barriers for lesbians of color in the . . . telling of their battering experiences."[82] People of color are not

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75. *See* Geraci, *supra* note 67, at 77-78 ("If we come out as a lesbian-sheltering shelter, with lesbian staff and volunteers, we run the risk of alienating our funders and losing vital contributions."). *See also* Allen & Roberts, *supra* note 46, at 189 (noting that straight women shelter workers may "blame" openly lesbian shelter workers "for endangering their reputation . . . . In light of tenuous funding for our [shelter] programs, many shelters try to cater to what they think funders want to see. This means programs that are nonthreatening to men [and exclude lesbians]").

76. *See* Russo, *supra* note 66, at 15.

77. Presentation at a forum on lesbian battering sponsored by the Network for Battered Lesbians, Transition House, and the Lesbian Battering Task Force of the Massachusetts Coalition of Battered Women's Service Groups, Boston, Mass. (June 16, 1993).

78. *See infra* § III(C).

79. RENZETTI, *supra* note 7, at 76, 93-94.

80. Leventhal, *supra* note 13, at 77; *see also* RENZETTI, *supra* note 7, at 95.

81. Leventhal, *supra* note 13, at 77; *see also* RENZETTI, *supra* note 7, at 95.

82. Valli Kanuha, *Compounding the Triple Jeopardy: Battering in Lesbian of Color Relationships*, in DIVERSITY AND COMPLEXITY IN FEMINIST THERAPY, 142, 143

only vulnerable to racism in the larger society, but also frequently are targets of homophobia in their own minority community.[83] This additional displacement "only further jeopardizes their ability to seek sanctuary from their violent relationships."[84] Class, ethnic, religious and linguistic prejudices on the part of the lesbian/gay and other communities also may impede the abused lesbian's or gay man's ability to receive help.[85] For example, people who live in communities where police brutality is real or assumed may find it impossible even to consider the police or the courts as possible allies.[86] People with AIDS or people who are HIV positive may feel that they have no viable alternatives to remaining in the battering relationship, given the widespread lack of social support services and the prejudice they face in society; or victims whose batterers have AIDS or are HIV positive may feel overwhelming guilt at even the thought of abandoning their partners.[87]

Finally, as Professor Renzetti points out, the abused lesbian or gay man who asks for help may not fit a certain ideal of the "worthy victim" in her or his community and so may fail to get needed assistance. For instance, if the battered lesbian or gay man is a drug addict or an alcoholic, if s/he is taller, stronger, richer, or older than the batterer, the battered lesbian or gay man simply may not be believed.[88] If the battered lesbian has taken steps to fight off her abuser, she may find her situation characterized as "just a cat fight" between two "girls," or "mutual abuse."[89] If a gay man has not fought back against his abuser, he might be criticized for "not being enough of a man."[90] All of these stereotypes create barriers of credibility which additionally burden the victim as s/he tries to speak out about the abuse and get help.

c. Official responses

Russo notes that a "major reason for the perpetuation of intimate violence is silence and secrecy."[91] We have seen above how this silence and secrecy is perpetrated by erstwhile allies such as families, friends,

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(L. Brown & M. Root eds., 1990).

83. *Id.* at 147.

84. *Id.*

85. *See generally* Kanuha, *supra* note 82. *See also* Allen and Roberts, *supra* note 46, at 190 (noting that homophobia "plays out differently in different communities").

86. *See, e.g.*, ISLAND & LETELLIER, *supra* note 5, at 246 ("For many gay men of color, trusting the police may simply be out of the question.").

87. Taylor, *supra* note 70.

88. RENZETTI, *supra* note 7, at 88-90. *See also* ISLAND & LETELLIER, *supra* note 6, at 18-19.

89. *See* RENZETTI, *supra* note 7, at 108.

90. Taylor, *supra* note 70. *See also* ISLAND & LETELLIER, *supra* note 5, at 102 (noting that the "culturally-based view of men as victimizers, but never victims" makes it difficult for third parties to recognize battering in a gay male relationship).

91. Russo, *supra* note 66, at 15.

and the battered women's community. Yet the problem that the battered lesbian or gay man faces in finding support from these sources often pales before the obstacles faced in police stations, attorneys' offices, and the courts. As noted earlier, lesbian and gay domestic violence is largely unreported, in part because of an expectation of hostile responses from those in authority. When the battered same-sex partner does take the extraordinary step of publicly disclosing her or his situation to persons in authority, s/he is likely to be subjected to a devastating, institutionalized re-victimization. S/he may find, for instance, that s/he is excluded from protection under the state's domestic violence laws. Not all states protect victims of same-sex domestic violence, and the abuse protection laws of several states specifically exclude such victims from their protection.[92] Same-sex victims who are nominally protected by the law may not fare much better. Taylor notes that "at every point in the system, [gay men are] more afraid to identify themselves as a victim," and that their pleas for help are often met by police, district attorneys' offices, and even their own attorneys with demeaning, abusive remarks such as, "Why aren't you defending yourself? You're a man. Stand up for yourself."[93] Negative reactions by the police also were overwhelmingly common in one study of lesbians who reported abuse.[94] Often, for example, police failed to take any action once they realized that a domestic dispute involved two women. As one interviewee told Professor Renzetti, "I called the police, but nothing was done about it. I kept thinking, 'No one cares because I'm a lesbian.' The police basically took the attitude, 'So two dykes are trying to kill each other; big deal.'"[95] One gay man reported to Island and Letellier that he was repeatedly referred to as "she" by police officers to whom he reported an incidence of domestic violence.[96]

Attorneys, assuming that a client's homosexuality is a "negative"—may counsel the victim either not to go forward with a claim of domestic abuse, or to minimize the abuse, or to attempt to disguise the nature of the relationship.[97] For example, Debra Reid's trial attorney made a motion in limine to preclude evidence of lesbian conduct, even though Ms. Reid's killing of her lesbian batterer made little sense outside the context of the batterer's years of abuse of Ms. Reid. He feared, apparently, that the very mention of Ms. Reid's lesbianism would prejudice the jury against her.[98]

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92. *See infra* note 105.
93. Taylor, *supra* note 70.
94. RENZETTI, *supra* note 7, at 91.
95. *Id.*
96. ISLAND & LETELLIER, *supra* note 5, at 22.
97. *See* RENZETTI, *supra* note 7, at 92.
98. *See* Supplemental Memorandum In Support of Commutation Petition of Debra Denise Reid, submitted to the Massachusetts Advisory Board of Pardons, at

Battered lesbians and gay men also are often subject to "outrageous treatment by many levels of the court system."[99] The behavior of court personnel, including judges, clerks, victim witness advocates, and district attorneys, may be abusive and deliberately unhelpful. Such officials may simply refuse to apply domestic violence laws to lesbians or gay men, even when the statutory scheme provides for such protection.[100] Judges, for instance, frequently dismiss cases of same-sex domestic violence on the grounds that such violence is de facto "mutual," or order inappropriate "relief" such as unwarranted mutual restraining orders, which frequently gives the batterer another tool of abuse.[101] District attorneys may not be interested in pursuing charges in a case of lesbian or gay battering, or may end up prosecuting the victim because they have not thoroughly investigated the case.[102] Homophobic remarks by court personnel, including judges, are also a pervasive problem for same-sex abused persons who go to court.[103] Indeed, the legal system, still largely unresponsive to the needs of battered heterosexual women, has been called a "nightmare" for lesbian and gay people.[104]

3. Conclusion

In short, while all forms of domestic violence are devastating, the special situation of battered lesbians and gay men renders their dilemma

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14 (Dec. 9, 1992) (on file with the author). A similar incident is reported in Robson, *supra* note 2, at 582-84.

Ms. Reid's trial attorney told the trial judge, at a pretrial bench conference, that "it would be unduly prejudicial . . . to develop [information about Ms. Reid's lesbianism at trial] . . . We know from I think our experience that the jury may want to punish somebody that is engaged in this conduct or it may inject something into the case that hurts my client's position." Commonwealth v. Reid, Crim. Nos. 90-0120-22, Suffolk Superior Court, Apr. 26, 1990. Transcript, Vol. I., at 13-14. The trial attorney also characterized Ms. Reid's lesbianism to the jury, in his opening statement, as a "problem." *Id.* at 82 ("even though we have this problem with love and what not, there was a self-defense situation . . . .") (transcript on file with the author).

99. Suffolk County (Mass.) Assistant District Attorney Sara Buel, Presentation at Forum on Lesbian and Gay Domestic Violence Sponsored by Fenway Community Health Service and Boston Police Department (June 29, 1993).

100. Taylor, *supra* note 70.

101. *See* Robson, *supra* note 2, at 579-80.

102. Taylor, *supra* note 70.

103. *Id.*

104. RENZETTI, *supra* note 7, at 92 (quoting PAMELA ELLIOTT, LESBIAN BATTERING INTERVENTION PROJECT REPORT 3 (1991) ("[P]ractically speaking, the legal system is at best risky, and at worst, a nightmare for battered lesbians who are not in a position to be victimized by an [alleged] support system."). For an account of a courtroom experience that *did* work in a lesbian battering context, see Angela West, *Prosecutorial Activism: Confronting Heterosexism In a Lesbian Battering Case*, 15 HARV. WOMENS L.J. 249 (1992).

particularly acute. The presence of homophobia in lesbian and gay abusive relationships–both internal and external, real and perceived–dramatically increases the isolation of the victim and heightens the victim's vulnerability. Such homophobia makes it easier for the lesbian or gay batterer to continue battering with impunity.

In what follows, I shall examine the specific situation of abused lesbians and gay men in Massachusetts and suggest ways to more effectively assist such individuals.

III. ABUSED LESBIANS AND GAY MEN IN MASSACHUSETTS: WHERE CAN THEY TURN FOR HELP

A. *The Law*

On paper, at least, Massachusetts affords some of the strongest protections in the United States to victims of lesbian and gay domestic violence. Although domestic violence laws in many states explicitly or indirectly exclude battered same-sex partners from protection,[105] the Massachusetts Abuse Prevention Act, MASS. GEN. L. ch. 209A ("Chapter 209A"), does and always has included same-sex couples within its scope.[106] A recent amendment to Chapter 209A even does away with the prerequisite that the couple must be living together in order for the victim to obtain a restraining order, and extends the reach of Chapter 209A to individuals who are or have been in a "significant dating relationship," regardless of whether they live or have lived together.[107]

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105. *See* Evan Witzer, Seeing the Invisible Victims: Domestic Violence In Lesbian Relationships: A Guide for Judges and Others in the Legal Community 13-14, A1-A3 (1993) (unpublished paper on file with the author.) Witzer notes that nine states–Alabama, Arizona, Delaware, Georgia, Michigan, New Jersey, North Carolina, and South Carolina–have domestic violence laws that apply only to heterosexual couples, and that Oregon's domestic violence law provides for warrantless searches in cases of heterosexual domestic violence only. "The states of Washington and Indiana both provide for the creation of shelters for battered women but limit the use of such shelters to either heterosexual couples (Washington) or spouses and former spouses (Indiana)." *Id.* at 14 (citations omitted).

106. "Family or household members" are defined as:

> persons who: (a) are or were married to one another; (b) are or were residing together in the same household; (c) are or were related by blood or marriage; (d) having a child in common regardless or [sic] whether they have ever married or lived together; or (e) are or have been in a substantive dating or engagement relationship.

MASS. GEN. L. ch. 209A, § 1 (1990).

107. *Id.* In a memorandum dated January 25, 1991 from Chief Justice Samuel I. Zoll of the Massachusetts District Court Department to all district court judges, clerk-magistrates, and chief probation officers concerning the 1990 amendments to Chapter 209A, Chief Judge Zoll enumerates the following non-comprehensive criteria for determining whether the parties had a "substantive dating . . . relationship . . . (1) the length of time of the relationship; (2) the type of relationship; (3) the

Only eight other states have eliminated the "living together" requirement.[108] Since many gay and lesbian couples do not share a residence, this amendment makes it easier for battered lesbians and gay men to seek protection under Chapter 209A.

Under Chapter 209A, an individual may obtain a temporary and a permanent (i.e., one year) protective order against the abuser, and the abuser may be subject to criminal penalties for violating the protective order.[109] In addition, judges have broad discretion to devise protective orders that are tailored to the particular needs of the abused person, and to order the abuser to attend a batterer's treatment program.[110] Chapter 209A also prohibits a judge from issuing mutual restraining orders without written findings of fact and from mandating mediation.[111] Moreover, the police are required under Chapter 209A to arrest abusers when they have reasonable cause to believe that domestic abuse has occurred and a restraining order is in effect.[112]

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frequency of interaction between the parties; and (4) if the relationship has been terminated by either person, the length of time elapsed since the termination of the relationship." Memorandum regarding new legislation from Chief Judge Samuel I. Zoll, to district court judges, clerk-magistrates, and chief probation officers 2 (Jan. 25, 1991). Chief Judge Zoll's Memorandum also specifically states that "personnel of the clerk-magistrate's office should not attempt to decide whether the relationship was 'substantive' or not" or use the definition to "screen out" potential plaintiffs. *Id.*

108. Witzer, *supra* note 105, at 14. These states and territories are Alaska, Colorado, New Hampshire, North Dakota, West Virginia, Puerto Rico, and the United States Virgin Islands. *Id.*

109. For example, violation of a Chapter 209A protective order is punishable by up to two and one-half years in a house of corrections and/or a fine of up to $5,000. *See* MASS. GEN. L. ch. 209A, § 7 (1990). *See also* Commonwealth v. Gordon, 407 Mass. 340, 553 N.E.2d 915 (1990) (finding husband criminally liable under Chapter 209A, § 7 for returning to marital residence in violation of restraining order).

110. The court is "not limited to" the protective measures enumerated in the statute. MASS. GEN. L. ch. 209A, § 3 (1990). "[T]he judge may recommend to the defendant that the defendant attend a recognized batterer's treatment program." *Id.* § 3(i). *See also* DISTRICT COURT DEPARTMENT OF THE TRIAL COURT, STANDARDS OF JUDICIAL PRACTICE ABUSE PREVENTION PROCEEDINGS § 6.00 cmts. (1986) [hereinafter STANDARDS OF JUDICIAL PRACTICE] ("[A]ny . . . terms of relief directed to addressing the impact that the abuse has had on the plaintiff's day-to-day activities are within the court's power [under chapter 209A].").

111. MASS. GEN. L. ch. 209A, § 3 (1990). Section 3 provides that: "No court shall compel the parties to mediate any aspect of their case . . . . A court may issue a mutual restraining order or a mutual no-contact order pursuant to any abuse prevention action only if the court has made specific written findings of fact." *Id.*

112. *Id.* § 6. Section 6 provides:

> Whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, such officer shall use all reasonable means to prevent further abuse, including . . . (4) arresting any person whom the officer has probable cause to believe has committed a felony . . . (6) arresting any person whom the officer has

In addition to the protections afforded by Chapter 209A, Massachusetts recently enacted a stalking law, which also is written in gender-neutral terms.[113] This law provides a mandatory one-year jail sentence for a person who commits the crime of stalking in violation of a protective order.[114] The Commonwealth also is one of only eight states in the nation to have passed a comprehensive lesbian and gay civil rights bill.[115] In theory, at least, these laws ensure strong legal recourse to abused lesbians and gay men who seek equal and effective protection under the law from domestic violence.

B. *Discrimination Under Law*

According to the Massachusetts Supreme Judicial Court's Gender Bias Study of the Massachusetts courts, despite the existence of laws that are designed to protect them, many abused lesbians and gay men in Massachusetts "are still confronted with bias . . . against homosexuals" when they seek legal protection from the violence.[116] Attorney Christine Butler, an author of Chapter 209A and an attorney who has represented victims of domestic violence for many years, has stated that the "legal system [in Massachusetts] at best was insensitive for lack of information and understanding, and at worst hostile and resistant to complaints filed by gay and lesbian people."[117] Another Boston attorney who has represented abused lesbians has described the court system as "a 'horror show' with a 'circus-like atmosphere' when lesbian abuse cases are brought to court."[118] The conclusion of the Massachusetts Attorney General's 1993 Report on Domestic Violence states boldly

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probable cause to believe has committed a misdemeanor pursuant to [ch. 208, § 34C or ch. 209A, § 7]; (7) arresting any person whom the officer has probable cause to believe has committed an assault and battery in violation of [ch. 265, § 13A] which involves abuse.

Id.

113. *See* MASS. GEN. L. ch. 265, § 43 (Supp. 1992). Section 43(a) states in pertinent part: "Whoever willfully, maliciously, and repeatedly follows or harasses another person and who makes a threat with the intent to place that person in imminent fear of death or serious bodily injury shall be guilty of the crime of stalking . . . ." *Id.* §43(a).

114. MASS. GEN. L. ch. 265, § 43(b) (Supp. 1992).

115. *See* MASS. GEN. L. ch. 151B, §§ 1-10 (Supp. 1992). The other states are Wisconsin, Vermont, New Jersey, Hawaii, Connecticut, California and Minnesota.

116. SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS 81 (1989) [hereinafter GENDER BIAS STUDY].

117. Letter from Christine Butler, Esq. to the Massachusetts Advisory Board of Pardons in support of the commutation petition of Debra D. Reid (Dec. 4, 1992) (on file with the author).

118. Rutter, *supra* note 46, at 11 (citations omitted).

that "Massachusetts is . . . failing victims of abuse . . . who are in same-sex relationships."[119]

Specific examples of such failures are legion. One woman, for instance, reported to me that when she told police officers, and later the assistant district attorney, about her partner's abusive behavior, they "drooled" and "snickered" when they heard that she was a lesbian. Another woman reported that her own attorney seemed more interested in the details of "what two women did in bed" than in knowing and presenting the facts of the abuse.[120] One judge, *sua sponte*, issued a mutual restraining order prohibiting two lesbians from speaking to each other for five years.[121] Gay men in Massachusetts find it difficult to obtain restraining orders in some courts because the judges assume that any fight between two men is consensual and "natural."[122] These instances are not merely anecdotal. They are consistent with the conclusions of the Gender Bias Study, the Attorney General's Report on Domestic Violence, and with research that shows widespread mistreatment of abused lesbians and gay men by the legal system.

Of course, homophobic treatment of abused lesbians and gay men may be unintended as well as actively hostile. At the Advisory Board hearing on Ms. Reid's petition for commutation held January 11-12, 1993, in Boston, Acting Chair Joyce Hooley frankly admitted that "courts are unfamiliar with lesbian battering" and that same-sex domestic violence "is a secret that has not been told in the past because there has not been a lot of public information, education on this whole situation."[123] Like the Massachusetts court clerk who greets women seeking protective orders with the question "husband or boyfriend," many in the justice system may have no idea that gay and lesbian people can be abused by their partners, or that victims of such abuse are protected under Chapter 209A.[124] The authority figure to whom the abused gay

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119. ATTORNEY GENERAL'S REPORT ON DOMESTIC VIOLENCE, *supra* note 18, at 21.

120. *See* Letter from Debra D. Reid to the Massachusetts Advisory Board of Pardons 2 (Feb. 3, 1992) (on file with the author).

121. Buel, *supra* note 99.

122. Taylor, *supra* note 70. Recently, for instance, a Massachusetts judge modified an abused gay man's restraining order by shortening it from a year to three months when the judge heard from the batterer that the victim had a black-belt in Karate. The judge reasoned that the black-belt would allow the victim to "take care of himself." *Id.*

123. Tape of Debra D. Reid's commutation hearing before the Massachusetts Advisory Board of Pardons (Jan. 11-12, 1993) (on file with Board of Pardons and with author) [hereinafter Commutation Hearing].

124. Witzer, *supra* note 105, at 22. At a recent lecture I gave on same-sex battering for police in Middlesex County, several police officers admitted that they did not know that domestic violence occurred in same-sex relationships. One officer told National Police Radio correspondent Tovia Smith, who attended the training, that he was laughing from discomfort because the notion of lesbian and gay domestic

or lesbian person turns may simply be ignorant of the special dilemmas of victims of gay and lesbian partner abuse and fail to respond appropriately.[125] Attorney Butler notes that in one case in which she represented a battered lesbian seeking relief under Chapter 209A, "[o]ne of the judge's questions related to why my client was intimidated by a person her same size and weight. He failed to grasp all of the issues of control and intimidation that were evident in this and every other case of domestic violence."[126] An abused lesbian recently told me that when she went to court to obtain a restraining order against her violent ex-lover, the judge required the victim to give testimony from the witness stand rather than at sidebar, as she had requested. This woman's job requires her to accompany clients to this same courtroom on a fairly regular basis. She has reported that since giving testimony in open court about the abuse at the hands of her lesbian partner, she is often treated disrespectfully by court officers.[127]

But perhaps the most serious injustice done to abused lesbians and gay men in the Massachusetts court system is the widespread abuse of mutual restraining orders in these cases. There are no hard data on this occurrence, but it is a central concern for every advocate across the state with whom I spoke, and a central concern in my own representation of battered lesbians. Robert Weinerman of the Victim Recovery Program at Fenway Community Health Center in Boston observes that:

> [b]ecause gay and lesbian victims of partner abuse are the same gender as their abusers, it is very easy for gay and lesbian abusers to seek and obtain 209A's from the courts against their victims. As many as 60-70 percent of gay and lesbian abusers obtain 209As against their victims.[128]

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violence was "new" to him. Tovia Smith, Report on Domestic Violence (WBUR-FM, Boston, Mass., radio broadcast, May 25, 1993) (on file with author). Smith noted that several officers at the training "could not keep a straight face" when learning of same-sex partner abuse. *Id.*

125. Commutation Hearing, *supra* note 123.

126. Butler, *supra* note 117.

127. *Cf.* STANDARDS OF JUDICIAL PRACTICE, *supra* note 110, § 2:02. "[E]fforts must be made [by clerks] to ensure privacy to the plaintiff seeking relief under MASS. GEN L. ch. 209A. Where a separate room or area is not available, the discussion itself should be conducted so as to protect the plaintiff's privacy." *Id.* § 2:02.

The standards do not mention same-sex domestic violence, and in fact often refer to domestic violence in terms of "husband and wife." *Id.*

The District Court Department expects to issue revised judicial standards for cases under Chapter 209A in the Fall of 1993. The new standards will discuss same-sex domestic violence and will take the position that such cases should not be treated differently than cases of heterosexual domestic violence. Telephone Interview with John Connors, Esq., Executive Assistant to District Court Chief Judge Samuel I. Zoll (June 30, 1993).

128. Witzer, *supra* note 105, at 19 (citations omitted).

Steven Taylor has found that in his experience as an advocate for battered lesbians and gay men in Massachusetts, police and the courts "don't take the time to determine who's doing the battering and who's the victim." Instead, judges routinely issue mutual restraining orders to both parties, often without the required written findings of fact.[129] Beth Leventhal of the Network for Battered Lesbians notes that mutual restraining orders have been issued in the vast majority of lesbian battering cases in Massachusetts of which the Network for Battered Lesbians is aware.[130] Suffolk County Assistant District Attorney Sarah Buel notes that in cases involving same-sex partners, judges routinely order mutual restraining orders without the required written findings of fact (and often require the parties to undergo mediation), in clear violation of Chapter 209A.[131] Such information is particularly alarming given the conclusion of the 1989 Gender Bias Study that mutual restraining orders under Chapter 209A are "rarely issued."[132] If this is so, then the pervasiveness of the practice of issuing mutual restraining orders in cases of same-sex domestic violence can be seen as symptomatic of the mistreatment of abused lesbians and gay men in the Massachusetts courts.

The unwarranted issuance of a mutual restraining order is of course more than an assault on the victim's pride. As Weinerman notes, the issuance of mutual orders without cause deprives the victim of "much of the protection 209A affords."[133] As is the case when mutual restraining orders are issued to heterosexual couples, the batterer often uses the order to further control and intimidate the victim, frequently by threatening to show the order to employers, neighbors, ex-spouses, child care workers, teachers of the partner's children, etc.[134] In other cases, the same-sex batterer may file criminal charges against the victim under Chapter 209A. In one case I am aware of, a lesbian batterer had succeeded in obtaining a mutual restraining order against three ex-partners who sought restraining orders against her, and promptly lodged criminal complaints against at least two of the victims. Moreover, district attorneys rarely take the time to investigate the lesbian or gay complainant's story because "they don't want to get involved" in gay and lesbian domestic violence cases or because they don't wish to take the time to investigate who is actually the batterer.[135] Often, this disinter-

129. Taylor, *supra* note 70.

130. Telephone Interview with Beth Leventhal, Coordinator, Network for Battered Lesbians, Somerville, Mass. (June 25, 1993).

131. Buel, *supra* note 99.

132. GENDER BIAS STUDY, *supra* note 116, at 93.

133. Witzer, *supra* note 105, at 19 (citations omitted).

134. Taylor, *supra* note 70. *See also* Robson, *supra* note 3, at 579-80 (discussing negative impact on victims of mutual restraining orders).

135. Taylor, *supra* note 70.

est leads to the dropping of charges (both those that have merit and those that do not), or to the prosecution of the victim.[136] According to Taylor, the Middlesex and Suffolk District Attorney's Offices are the only district attorneys offices in the state that are willing to challenge mutual restraining orders issued to same-sex couples and to attempt to discover who is really doing the battering.[137]

In sum, on the books Massachusetts offers abused lesbians and gay men some of the strongest protections in the country. In practice, however, there is a wide chasm between the letter and the practice of the law. Abused lesbians and gay men in Massachusetts often are re-victimized in the legal system by the ignorance, prejudice, or negligence of law enforcement and court personnel. Frequently the legal rights of abused lesbians and gay men in the Commonwealth to be protected from abuse seem worth little more than the paper on which they are written.

C. *Support Services*

Most victims of domestic violence do not initiate legal action without first getting other kinds of support. Counselors and other support services play an integral role in helping victims of domestic violence end their isolation and safely escape the abuse.[138] For the gay or lesbian victim of domestic violence in Massachusetts, these crucial support services are severely limited. Currently, for instance, there are 33 shelters for battered women in Massachusetts.[139] None of these shelters is designed to meet the specific security needs of abused lesbians, such as screening for the presence of abusers on the staff or among the clientele.[140] Many of these shelters still refuse to accept battered lesbians and/or provide no training to staff members about

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136. *Id.*

137. *Id.*

138. *See, e.g.*, RENZETTI, *supra* note 7, at 96 (noting that for the majority of battered lesbians in her survey, "it was counselors who helped them 'name the violence,' which, for the majority, was the first step in overcoming their denial of their victimization, their denial that one woman could abuse another"); ISLAND & LETELLIER, *supra* note 5, at 201 (noting that "[o]ne of the most helpful steps victims of gay men's domestic violence can take for himself is to get into therapy").

Recognizing the importance of confidential communications between domestic violence counselors and victims of domestic violence in empowering such individuals to take steps to end the abuse, the Massachusetts Legislature has accorded such communications absolute privilege. MASS. GEN. L. ch. 233, § 20K (Supp. 1992). *See also* Hon. Austin T. Philbin, *Domestic Abuse and Violence in Massachusetts: A Survey*, 24 NEW ENG. L. REV. 713, 724 (1990) (discussing scope of privilege).

139. Statistics provided by Massachusetts Coalition of Battered Women's Service Groups, Inc., Boston, Mass.

140. Leventhal, *supra* note 130.

lesbian battering.[141] Some may be staffed by batterers.[142] Battered lesbians in Massachusetts who do go to shelters still report being made to feel unwelcome by both staff and the other abused women.[143] Recently, for instance, one battered lesbian was turned away from a Massachusetts shelter because she was told that she would not be comfortable there.[144] One battered lesbian went through three levels of screenings at another shelter only to be told, when she revealed her sexual orientation, that no beds were available.[145] A Massachusetts shelter that had received a two-day training in lesbian battering refused to shelter a battered lesbian only days after the training was completed.[146] Only one Massachusetts shelter, Transition House, in Somerville, currently offers a support group for battered lesbians.

Specific support services outside of the shelter context also are scarce. The Network for Battered Lesbians (the "Network"), in Somerville, is the oldest and, in many ways, the most active organization in the state which seeks to assist victims of same-sex partner abuse. The Network was founded in 1986 by formerly battered lesbians.[147] In addition to holding bi-weekly support groups for battered lesbians and bisexual women, the Network also provides advocacy services (including accompanying the battered lesbian to court and referring her to attorneys knowledgeable in the field); education and training for judges, police officers, district attorneys, and the general community; and a part-time hotline.[148] The Network offers its support services in Spanish and English, and is currently developing a minority outreach program.[149] In 1992, the Network assisted approximately sixty victims or friends of victims of same-sex domestic violence.[150]

The Massachusetts Coalition of Battered Women Service Groups also has a Task Force on Lesbian Battering (the "Task Force"), which was formed to help improve support services in the state for battered lesbians by encouraging shelters to be sensitive to the issue of lesbian battering. The Task Force provides training to shelters, holds education-

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141. *See* Russo, *supra* note 66, at 14.

142. *Id.* at 15. *See also* Leventhal, *supra* note 13, at 77 (noting that the lesbian batterer "may work in the battered women's movement and have easy access to safety networks").

143. *See, e.g.*, Allen & Roberts, *supra* note 46, at 190-94 (discussing homophobia among staff and clients in shelter programs).

144. Leventhal, *supra* note 130.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id. See also Network Happenings*, THE NETWORK NEWS: THE NEWSLETTER OF THE NETWORK FOR BATTERED LESBIANS, Vol. I, no. 2, Spring 1993, at 6 (on file with author) (listing Network activities in 1993).

149. Leventhal, *supra* note 130.

150. *Id.*

al forums, and encourages inclusion of the issue of lesbian battering in domestic violence forums, commissions, and studies.[151] However, although the Network and the Task Force provide training to shelters on the features of lesbian battering, and provide homophobia training, they do not provide training in safety planning for shelters housing battered lesbians.[152] There are no specialized programs or services in Massachusetts for the counseling and rehabilitation of lesbian batterers.[153]

The Victim Recovery Program of Fenway Community Health Center (the "Program"), in Boston, Mass., was established in 1990 to deal with hate crimes against lesbians and gay men, but quickly found that fifty percent of its calls came from victims of same-sex partner abuse.[154] Currently, the Program offers (but does not advertise) some counseling, peer advocacy, and referral services to gay and lesbian victims of partner abuse on an individual basis, but its staff and resources are limited. In the first eight months of 1992, the Program assisted approximately 40 victims of same-sex partner abuse, 27 of whom were men and 13 of whom were women.[155] Currently, the Program receives about ten calls a month from victims of same-sex partner abuse, in equal proportion of men to women.[156]

The Program is the only organization in Massachusetts that provides services to battered gay men.[157] There are no battered men's shelters in Massachusetts, and no battered men's support groups.[158] Some batterers treatment programs in the state have taken or considered taking male batterers as clients.[159]

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151. *Id.*

152. *Id.*

153. Rutter, *supra* note 46, at 16; Leventhal, *supra* note 130. Other agencies in Masschusetts may offer individual counseling to battered lesbians at intervals. For example, in 1992, the Abuse and Rape Crisis Hotline (ARCH) in Springfield, Mass. established a lesbian support group in which, among other things, strict confidentiality was assured. However, the ARCH staff soon found that many battered lesbians were reluctant to reveal their sexual identity even in a group where confidentiality was assured. Consequently, the support group disbanded, and ARCH now counsels abused lesbians solely on an individual, case-by-case basis. Telephone Interview with Queen Smith-Gordon, ARCH (June 25, 1993). The Victim Recovery Program of Fenway Community Health Center has referred lesbian and gay batterers to individual counseling. Taylor, *supra* note 70.

154. Taylor, *supra* note 70.

155. FENWAY COMMUNITY HEALTH CENTER, *Some Facts About the Prevalence of Partner Abuse in Same-sex Relationships, in* JANE DOE SAFETY FUND, *supra* note 18, at 141.

156. Taylor, *supra* note 70.

157. *Id.*

158. *Id.*

159. Telephone Interview with Paul Zelizer, Intake Coordinator, MOVE, Amherst, Mass (June 1993). MOVE is a batterer's treatment program in Amherst, MA. Zelizer noted that in recent years MOVE has had a number of inquiries about whether the

Most of the services mentioned above are located in the more urban, eastern part of the state. Abused same-sex partners who live in other parts of Massachusetts generally must fend for themselves, often in communities with no visible gay or lesbian presence.[160]

D. *Community Support*

In part, the dearth of targeted shelters and formal support services for abused lesbians and gay men in Massachusetts can be attributed to the indifference or hostility of the general community toward gay men and lesbians. Despite the passage of a lesbian and gay civil rights bill, it can hardly be said that homophobia is dead in Massachusetts. Many politicians, funders, and women's groups in the state are still reluctant to be too closely associated with lesbian or gay issues for fear of losing more broad-based support.[161] In addition, the media in Massachusetts, for the most part, continues to focus on domestic violence as an exclusively male-female issue.[162]

In part, however, lack of available services in Massachusetts also must be tied to the historical minimization of, and even hostility toward, the problem of partner abuse within the Massachusetts gay and lesbian community itself. For instance, one prominent Boston attorney has been openly critical of lesbians who seek court protection from abuse, and has confessed "a personal hatred and bias against women using the legal system and the police system in their fights with each other."[163] A

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organization would be willing to accept gay male batterers. He told me that while MOVE would gladly provide treatment for such clients, no gay male batterers have actually applied to the program. *Id.*

160. *Id.* Zelizer noted that MOVE refers battered lesbians to area shelters and refers battered gay men to local psychotherapists specializing in training gay men, and that there are no support groups that he is aware of in western Massachusetts for battered lesbians or gay men. "Resources are very few and far between." *Id.*

161. *See, e.g.*, Rutter, *supra* note 46, at 11 ("Shelters may fear losing their funding if they allow lesbians to use their services."). *See also* Allen & Roberts, *supra* note 46, at 190 ("[L]esbian baiting attacks don't just come from batterers. They can come from many sources including funders, social service agencies, police departments, other community organizations, and individuals.").

162. I have been amazed, for instance, at how many accounts of the Framingham Eight describe the petitioners as women "battered by their husbands or boyfriends," despite the reporters' knowledge that Debra Reid, one of the Framingham Eight, was battered by a woman. In one example, a local news program in the Boston area which covered Ms. Reid's case identified her as both a battered lesbian and a member of the Framingham Eight. The very next news story in the program identified the Framingham Eight as women "abused by men." *Evening News* (WBZ-TV television broadcast, Jan. 11, 1993) (on file with the author).

163. Attorney Katherine Triantiffilou, *quoted in Lesbian Battering: The Search for Shelter*, GAY COMMUNITY NEWS, Jan. 14, 1984, at 25 (quoting). Triantiffillou also is reported as saying that she finds women who report to the police and the courts in lesbian battering situations "offensive as a feminist. Resolutions of disputes between

prominent gay political leader in Boston has declared that "[o]bviously there are going to be individual cases of abuse, but my experience of gay people is I think as a whole they're a very nonviolent group of people."[164] At a recent forum on lesbian battering sponsored by Transition House, the Network, and the Task Force, speaker after speaker recounted tales of indifference or hostility by the lesbian community to victims of lesbian partner abuse, including social ostracism, minimizing the abuse, and blaming the victim. Although such attitudes may be changing, they are pervasive enough to create an atmosphere that may make it difficult for victims of same-sex partner abuse to come forward.[165]

E. *Conclusion*

In Massachusetts, victims of same-sex violence often are poorly served by the justice system, the shelter movement, and the gay, lesbian and heterosexual communities. This lack of support ensures that lesbian and gay victims of abuse will continue to find it extraordinarily difficult to safely escape the domestic violence that plagues their lives. However, as more battered lesbians and gay men speak out and come forward, changes slowly are being made. In the next section, I shall examine some steps being taken by different organizations in Massachusetts to address the problem of same-sex domestic violence, and offer some additional suggestions.

IV. STRATEGIES AND SOLUTIONS

The invisibility, misunderstanding, bias and lack of resources that confront lesbian and gay victims of partner abuse in Massachusetts today are similar to the situation faced by battered heterosexual women in the state fifteen years ago when Massachusetts enacted Chapter 209A. Although the current plight in Massachusetts of women battered by men is in many ways still desperate, public awareness of, and official response to, heterosexual domestic violence have been steadily improving. These changes are largely due to the tireless efforts of advocates, legal professionals and battered women themselves, directed to four broad areas: (1) education and training; (2) creative legal advocacy; (3) increased support services; and (4) increased public support. I

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lesbians should not take place in a white male judicial court." *Id.*

164. *Id.* (quoting David LaFontaine, head of the Massachusetts-based Coalition for Lesbian and Gay Civil Rights and Chair of the Governor's Task force on Gay and Lesbian Youth). Epstein, *supra* note 3, at 1. LaFontaine conceded, however, that, "[P]art of it may be that we don't want to give homophobes any more ammunition to use against us by putting forward any negative examples of same-sex behavior." *Id.* at 5.

165. *See* Russo, *supra* note 66, at 15.

suggest that advocates for battered lesbians and gay men also focus on these areas—and indeed, as I shall show, we have already begun to do so.

A. *Government, Police and the Courts*

1. Education and Training

Public policy in Massachusetts has long recognized that state-sponsored or supported education and training are effective means to overcome the biases that confront victims of domestic violence when they seek help from the police or the courts. For example, the 1989 Gender Bias Study recommended sensitivity training for court personnel by advocates working with battered women in order to "make courts more accessible to victims."[166] Currently, all police recruits in the Commonwealth "are mandated to receive eight hours of domestic violence training."[167] In addition, "the Criminal Justice Training Council has developed a training curriculum, and has trained 100 law enforcement professionals to train police officers about domestic violence."[168] Many district attorneys' offices in the Commonwealth have held domestic violence seminars for police, assistant district attorneys, victim witness advocates, probation officers, and other professionals within their jurisdiction, although generally these courses are not mandatory.[169] Courses on domestic violence also are offered to all clerk-magistrate and to judges in the district, superior, and probate courts, again on a voluntary basis. Some of this education and training has been conducted by state agency personnel, and other courses have been offered by organizations such as battered women's shelters and batterers' treatment programs.

Historically these education and training seminars have not contained references to lesbian and gay domestic violence.[170] In recent years, this omission has been at least partially corrected. In 1991, for instance, the Network for Battered Lesbians held the first training session for district court judges and clerk magistrates specifically on the issue of same-sex domestic violence.[171] Since January 1993, the Middlesex District

166. GENDER BIAS STUDY, *supra* note 116, at 95.

167. ATTORNEY GENERAL'S REPORT ON DOMESTIC VIOLENCE, *supra* note 18, at 16.

168. *Id.*

169. *See, e.g., infra* note 173. In Fiscal Year 1993, each district attorney's office in Massachusetts received $150,000 to create "specialized prosecution units for domestic violence cases." ATTORNEY GENERAL'S REPORT ON DOMESTIC VIOLENCE, *supra* note 18, at 18. For a comprehensive, county-by-county overview of domestic violence court and advocacy services in Massachusetts, see *A Guide to Domestic Violence Court Advocacy, supra* note 17.

170. *See, e.g.,* STANDARDS OF JUDICIAL PRACTICE, *supra* note 110 (written in heterosexist terms).

171. Leventhal, *supra* note 130.

Attorney's office has included lectures on lesbian and gay domestic violence in its training sessions for assistant district attorneys, victim witness advocates, and police.[172] Fenway Community Health Center has offered training sessions on lesbian and gay domestic violence to police departments throughout eastern Massachusetts, although the Program offers such training only as a segment to a broader training program on combatting homophobia.[173] In addition, shelters such as Daybreak in Worcester have included information on lesbian and gay domestic violence in their police training.[174]

While these efforts are encouraging, they are not adequate. None of the above training sessions are mandatory; the training sessions tend to be concentrated in urban areas; and the availability of the training is very much dependent on groups who must struggle with limited funds and the time constraints of volunteers. Even in sessions where same-sex partner abuse is now mentioned, rarely is the topic covered in depth (e.g., information on specialized resources for victims of same-sex battering, issues of sexism and heterosexism in identifying the batterer, the special privacy needs of the victim). Rather, participants are merely urged to treat gay and lesbian victims "the same."

To be effective, training of law enforcement and court personnel in assisting victims of same-sex partner abuse must be state-wide, mandatory, and consistent. The Attorney General recently has recommended that all state personnel in Massachusetts who respond to victims of domestic violence be required to undergo "mandatory, uniform, multidisciplinary" training in domestic violence, which includes, inter alia, a focus on people in same-sex relationships.[175] The Attorney General's Report on Domestic Violence also recommends that personnel who receive such training be held strictly accountable for failing to comply with the uniform codes of behavior and protocols established in such training.[176] I would add here that any such training must go beyond merely admonishing officials to "treat gay and lesbian victims the same." As I have shown, same-sex partner abuse is both the same as and

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172. The author has given lectures on same-sex domestic violence at a training session held for Middlesex County assistant district attorneys, police, and victim witness advocates in January, 1993, and at a domestic violence training session for Middlesex County police in May, 1993. *See also* Smith, *supra* note 124.

173. Taylor, *supra* note 70. Recently the author and Taylor conducted a mandatory training session on same-sex domestic violence for domestic violence detectives of the Boston Police Department. Another mandatory training session on same-sex domestic violence will be conducted for Boston Police Academy recruits in the Winter/ Spring of 1994.

174. Letter from Dierdre Hunter, M.S.W., L.I.C.S.W. to the Massachusetts Advisory Board of Pardons (Jan. 21, 1993) (on file with Massachusetts Advisory Board of Pardons and with the author).

175. ATTORNEY GENERAL'S REPORT ON DOMESTIC VIOLENCE, *supra* note 18, at 13.

176. *Id.* at 14-15.

critically different from heterosexual domestic violence.[177] An understanding of these differences is central in providing effective assistance.

Mandatory, uniform, multidisciplinary training on the issues of lesbian and gay domestic violence, particularly when coupled with sanctions for noncompliance, could go a long way toward correcting the current, too-pervasive state of ignorance and hostility among Massachusetts law enforcement and court personnel. This ignorance and hostility has until now prevented abused same-sex partners from obtaining the full measure of legal protection to which they are entitled.

2. Creative advocacy

Since the passage of Chapter 209A, attorneys for heterosexual battered women have used resourceful, creative advocacy to invest the general principles of that law with real force. For example, thanks largely to the efforts of courtroom advocates for battered women, many restraining orders currently are more than the mere "stay away" orders of the past. They may include detailed orders regarding the batterer's access to guns or other weapons, detailed plans for child support, and other relief tailored to the specific safety needs of the battered women and the propensities of the batterer. Courtroom advocates for battered women also have made effective use of experts and have succeeded in overturning improperly-issued mutual restraining orders.[178]

Advocates for battered lesbians and gay men should build on this foundation. For instance, in appropriate cases expert testimony should be introduced to enhance the factfinders' understanding of the abused same-sex victim's experiences. Inappropriately (and illegally) issued mutual restraining orders and/or referrals to mediation, and the stereotypes on which they are based, should be vigorously challenged. Advocates for abused lesbians and gay men also must press for restraining orders tailored to the unique needs of the victim, whether it be the need to protect against involuntary "outing" by the batterer or the need for financial or other support from the batterer. For instance, where the victim has chosen to remain closeted, the advocate might argue that an involuntary "outing" of the victim by the batterer is a violation of the restraining order. The unlimited inventiveness of batterers, in short, must be met by equally unlimited creativity of

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177. I am reminded here of a famous lesbian saying: "If you want to be my friend, you must do two things. First, forget I am a lesbian. Second, never forget I am a lesbian."

178. *See, e.g.*, Jones v. Justices West Roxbury Dist. Ct., No. SJ-93-0009, Supreme Judicial Court, entered Mar. 24, 1993. Justice Herbert Wilkins' memorandum opinion vacated a mutual restraining order under Chapter 209A because the "judge made no specific findings of fact as the statute requires as to mutual restraining orders." *Id.* at 1. Justice Wilkins also observed that the trial judge's "general practice of issuing reciprocal orders in G.L. c. 209A cases is inappropriate." *Id.*

advocates as they seek protection for abused same-sex partners. On a broader scale, legal advocates for abused lesbians and gay men should consider such mechanisms as the class action device, section 1983,[179] the Massachusetts lesbian and gay civil rights bill and other constitutional or statutory provisions to challenge unequal or inadequate response to same-sex victims of domestic violence at the hands of law enforcement and courtroom personnel.[180] For instance, advocates might consider ways to hold the Commonwealth legally responsible for conditions that keep abused lesbians and gay men unsafe, such as the absence of treatment programs for lesbian batterers, inadequate or nonexistent training of police and court personnel, or the absence of references to same-sex partner abuse in written outreach materials issued by or under the auspices of the state. They might press charges against state personnel whose discriminatory treatment of abused lesbians and gay men puts (or keeps) such victims in jeopardy. In Massachusetts, there has been no litigation to date on these broad issues of accessibility.

The kind of advocacy of which I have been writing, of course, will require a network of individuals sensitive to the special needs of same-sex abused partners. Currently, advocates for women battered by men are trained in Massachusetts law schools, shelters, law firms, and public interest organizations around the state, but there is no program in the state that specifically trains attorneys to represent victims of lesbian and gay domestic violence. Nor is there any organization in Massachusetts for abused lesbians and gay men that is comparable to the Massachusetts Domestic Violence Council, which, among other things, promulgates minimum standards for attorney training, provides litigation assistance, coordinates legal assistance with other kinds of aid, and monitors actual courtroom practices.[181] Developing an effective network of advocates who can resourcefully apply the Massachusetts domestic violence laws, monitor courts and legislation, and provide training would be an important step in expanding the resources available to abused same-sex partners.[182]

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179. 42 U.S.C. § 1983 (1982).

180. *See, e.g.*, Note, *Section 1983 and Domestic Violence: A Solution to the Problem of Police Officers' Inaction*, 30 B.C. L. REV. 1357 (1989). The Note's author observes that although section 1983 is most often invoked in cases of domestic violence, "plaintiffs can also sue the town or municipality under section 1983 if they can show that the police carried out their actions pursuant to an unconstitutional policy or custom promulgated by official policymakers." *Id.* at 1375 n.131.

181. *See, e.g.*, Brief of Amicus Curiae for The Domestic Violence Council, Comm. v. Rape Crisis Center of Greater Lowell, No. 6193, at 1 n.2, Massachusetts Supreme Judicial Court (brief on file with the author) (describing work of the Domestic Violence Council).

182. Together with other members of the Massachusetts Lesbian and Gay Bar Association, the author currently is working with the Network for Battered Lesbians and the Victim Recovery Program to establish an attorney training and referral panel

3. Support Services

Only a handful of support services in Massachusetts are specifically directed to battered lesbians, and almost all of these are concentrated in eastern Massachusetts. The situation for battered gay men is even bleaker: the Victim Recovery Program at Fenway Community Health Center in Boston is the only formal support resource available for battered gay men in Massachusetts.

Several projects which would improve services to victims of same-sex domestic violence in the Commonwealth are in various stages of development. The Victim Recovery Program, for instance, is expanding its outreach to battered lesbians and gay men through community seminars, notices in gay and lesbian publications, and targeted outreach materials.[183] The Network for Battered Lesbians is seeking funding to establish a state-wide hotline in English and Spanish for battered lesbians and to expand its outreach to minority communities.[184] The Network is also seeking funding to establish a shelter exclusively for battered lesbians.[185]

Thanks largely to the efforts of the Network and the Task Force, the Massachusetts' battered women's community also is beginning to advocate for better support services for lesbian and gay men. Several battered women's shelters in the eastern and central parts of the state have begun to offer sensitivity training for their staff on issues of same-sex battering and homophobia, and to include information about lesbian battering in their outreach literature. One shelter, Transition House, has established battered lesbian support groups and offers hotline support to battered lesbians.[186]

Much more needs to be done, however, to integrate the concerns of abused lesbians and gay men into the support network of the Massachusetts battered women's community. The Attorney General's Report on Domestic Violence concludes that battered women's programs "should strive to expand services to provide appropriate interventions for battered lesbians; and programs must be developed to provide services to men who are victims of same-sex battering."[187] Leventhal recommends that staff in all shelters be trained to use gender-neutral terms in questioning clients about battering and that written materials be checked

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to assist victims of same-sex partner abuse. We hope to have the panel in place by Winter, 1994.

183. Taylor, *supra* note 70.

184. Leventhal, *supra* note 130. *Network Happenings*, *supra* note 148, at 6.

185. *See generally* Leventhal, *supra* note 130.

186. *Id.*

187. ATTORNEY GENERAL'S REPORT ON DOMESTIC VIOLENCE, *supra* note 18, at 20-21.

for heterosexist language and assumptions.[188] Battered women's shelters should develop safety plans to help screen out lesbian batterers among the staff and clientele, and to ensure that abused lesbians are safe within the shelters.[189] Hotline and shelter workers also should be trained to make appropriate referrals for battered lesbians and gay men.

Many of these initiatives will require money as well as time. In 1993, a group spearheaded by the Coalition of Battered Women Service Groups requested a $527,621 appropriation from the Legislature to be used for improving services for "special populations," including increasing services for battered lesbians and gay men.[190] The House, however, refused to grant the appropriation.[191] Thus, for the time being at least, the battered women's community in Massachusetts will be forced to fall back on its own already limited resources to fulfill any commitment to reach out to battered same-sex partners.

4. Generating Public Awareness and Support

a. The gay and lesbian community

It is unlikely that the heterosexual community will take the lead in advocating for battered lesbians and gay men, particularly if the gay and lesbian communities themselves are unwilling to focus realistically on the problem. Fortunately, there are indications that the historical reluctance of lesbians and gay men to address the issue of same-sex partner abuse is changing. In the past two years, a number of lesbian and gay organizations in Massachusetts have begun to openly address the issue of same-sex partner abuse and search for ways to assist its victims. For example, since 1992, the Network for Battered Lesbians, the Victim Recovery Program of Fenway Community Health Center, Gay and Lesbian Advocates and Defenders, the Massachusetts Lesbian and Gay Bar Association, and the Task Force all have sponsored forums in the gay and lesbian community to publicize the issue of same-sex domestic violence and consider solutions. There has been a groundswell of grass-roots support from the gay and lesbian community for Debra Reid, a battered lesbian who killed her abuser in self-defense.[192] Battered

188. Leventhal, *supra* note 13, at 76.

189. *See* RENZETTI, *supra* note 7, at 125-28 (discussing actions for making shelters more accessible to battered lesbians).

190. *See* Massachusetts Coalition of Battered Women Service Groups, *Additional Funding for Life-Saving Battered Women's Services Is Critically Needed, in* JANE DOE SAFETY FUND, *supra* note 18, at 137.

191. *See A Budget Plan That Batters Women,* BOSTON GLOBE, May 26, 1993, at 18.

192. Levanthal, *supra* note 130. The Network for Battered Lesbians has obtained hundreds of signatures across the state on a petition supporting commutation of Ms. Reid's sentence. *Id.* The public files of Ms. Reid's case at the Advisory Board of Pardons contains dozens of letters of support from openly

lesbians and gay men also seem increasingly willing to go public about their experiences, in community speak-outs and in the courtroom.[193]

Yet the fact remains that many abused same-sex partners in Massachusetts still are not aware of the availability of restraining orders and other protections and support services.[194] To correct this situation, information on same-sex domestic violence (whether published by the Commonwealth, a shelter, or a gay and lesbian organization) should be available at all lesbian and gay community events, and at bars, bookstores, community centers and other places frequented by gay men and lesbians.[195] Gay and lesbian newspapers must publish information about same-sex partner abuse, including where to get help. Island and Letellier suggest that telephone books and resource directories include a heading for "Same Sex Domestic Violence," which would list available community resources.[196] In addition, special efforts should be made to reach out to battered lesbians and gay men who are members of minority or disadvantaged communities. Gay and lesbian groups addressing the issue of same-sex domestic violence should join coalitions with other historically stigmatized groups in order to better assist abused same-sex partners who are members of these groups, and to increase political clout. But it is unfair, and unrealistic, to expect community groups and agencies to bear the entire burden of implementing such actions. Gay and lesbian domestic violence is a public policy concern, and its eradication will require a commitment of public funds and other resources.

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gay-and-lesbian-identified individuals and organizations throughout the state. *Id.*

193. *See* Russo, *supra* note 66, at 13 (noting that increasing numbers of battered lesbians are speaking out about their experiences). The growing awareness of the problem of same-sex domestic violence in the gay and lesbian community seems to have sparked an equally sympathetic response in academia and the social service community. Sessions on lesbian and gay battering routinely are becoming a segment of forums on domestic violence sponsored by academic, social service, and government organizations across Massachusetts. For example, panels of speakers on lesbian battering have been included at the following recent conferences: "Domestic Violence: Building An Integrated Community Response," sponsored by the Jane Doe Safety Fund and the McCormack Institute of the University of Massachusetts, Marlborough, Mass. (May 1993); "Health Families," sponsored by the Harvard School of Public Health, Boston, Mass. (June 1993); and "Increase the Peace: A Statewide Conference on Violence Prevention," sponsored by the Massachusetts Department of Public Health, the Governor's Advisory Council on Substance Abuse, the Massachusetts Adolescent Violence Prevention Project, and the Massachusetts Health Research Institute, Worcester, Mass. (June 1993) (programs on file with the author).

194. Taylor, *supra* note 70.

195. *See* ISLAND & LETELLIER, *supra* note 5, at 281-84.

196. *Id.* at 281.

b. Generating broad-based support

In his Report on Domestic Violence, Massachusetts Attorney General Scott Harshbarger notes that "[a] commitment by top-level leaders to the issue of domestic violence will permeate the public consciousness and will educate and inform the public response."[197] That commitment must include concern for victims of same-sex partner abuse. Lesbian, gay, and battered women's organizations do not have a great deal of influence over the general public. Governor Weld – who professes to champion both lesbian and gay rights and protection for victims of domestic violence, but has never put the two issues together – could use the "bully pulpit" of his office to educate Massachusetts citizens about the issue of same-sex partner abuse.

The Governor's office also should take the lead in conducting a comprehensive survey of lesbian and gay partner abuse. Although there is much anecdotal evidence supporting the hardships facing battered lesbians and gay men in Massachusetts, there has been no sustained, comprehensive study of same-sex battering in the state. Basic research needs to be done on the prevalence of same-sex domestic violence in Massachusetts, the adequacy of existing resources to deal with the problem, effective responses, and the need for additional resources. Because the state has a strong interest in protecting all of its citizens from domestic violence, this research should be funded by the Commonwealth.

The Governor also should consider establishing a special commission on same-sex partner abuse. This commission should be composed of a broad cross-section of knowledgeable individuals in law enforcement, district attorneys' offices, the battered women's community and the lesbian and gay communities. Like the Governor's Commission on Gay and Lesbian Youth, which was established in response to the high suicide rate of younger lesbians and gay men,[198] an executive commission on lesbian and gay domestic violence should be empowered to take testimony across the state, hire appropriate staff, make recommendations, and promulgate guidelines for state workers and other professionals who respond to victims of such abuse. Perhaps such a commission could also oversee the comprehensive study noted above.

The media, too, must be encouraged to play an important part in educating and informing public response by publicizing the problem of gay and lesbian partner abuse and avoiding heterosexist portrayals of the issue of domestic violence. Reporters should be called to account for

197. ATTORNEY GENERAL'S REPORT ON DOMESTIC VIOLENCE, *supra* note 18, at 28.

198. *See* Toni Locy, *Weld Creates Panel on Gay Youth Issues*, BOSTON GLOBE, Feb. 11, 1992, at 18.

presenting domestic violence in purely heterosexist terms, and encouraged to address the issue of same-sex partner abuse.

Creating widespread public awareness of lesbian and gay domestic violence, and understanding for its victims, is likely to be a slow and incremental process. Old prejudices die hard, and in the current era of fiscal stinginess, the public and politicians might be particularly reluctant to commit resources to assisting battered lesbians and gay men. But the alternative—maintaining the status quo—is intolerable. The Commonwealth surely has strong public safety and public policy interests in ensuring that same-sex abused partners are treated equally and fairly in the judicial system, and that they have adequate resources to find sanctuary from relationship violence.

V. CONCLUSION

Same-sex partner abuse forces us to see domestic violence for what it really is: not man vs. woman or strong vs. weak, but the exercise of illegitimate power and coercive control by one partner over the other. The homophobia that keeps the issue of same-sex domestic violence "in the closet" perpetuates horrendous violations of personhood for thousands of women and men in Massachusetts. Such attitudes also impede our fuller understanding of the dynamics of intra-family violence and our search for viable solutions.

Abused lesbians and gay men in Massachusetts are woefully underserved by the state and the community. This discrimination has no foundation in law, and no justification in fact. This Article has attempted to raise concern about the plight of abused lesbians and gay men in Massachusetts and to open a discourse to consider effective policy solutions. Hopefully, others will advance additional suggestions from other viewpoints. The important point is that the silence surrounding lesbian and gay partner abuse be broken, so that the work of finding viable remedies can move forward.

REPORT ON DOMESTIC VIOLENCE: A COMMITMENT TO ACTION

INTRODUCTORY NOTE: *NEW ENGLAND LAW REVIEW*

Domestic violence is one of the most pervasive and serious issues of our time. In recent years, battered women's advocates have worked tirelessly to bring the issue of domestic violence into the public eye, and the criminal justice system has attempted to fashion appropriate and effective responses. In spite of these efforts, the level of family violence continues to escalate. This persistence reflects the fact that domestic violence is a multi-faceted problem that cannot be resolved by "quick fixes." As such, it has become clear that a coordinated, multidisciplinary approach to family violence is needed.

In an effort to deepen public understanding of domestic violence and ways to prevent it, Massachusetts Attorney General Scott Harshbarger and Jay Winsten, Ph.D., of the Harvard School for Public Health Communication, launched the Working Luncheon Series on Domestic Violence in April, 1991. The series, conducted in cooperation with the Massachusetts coalition of Battered Women Service Groups, brings together legislators, advocates, members of the criminal justice system, academicians, and members of the news media to examine key aspects of the domestic violence problem, stimulating discussion about possible solutions.

The REPORT ON DOMESTIC VIOLENCE: A COMMITMENT TO ACTION is the culmination of the Working Luncheon Series on Domestic Violence, and includes key policy recommendations in three major areas: early intervention and prevention; the need for an integrated multidisciplinary approach; and long-term strategies to protect victims and prevent further violence in Massachusetts. It is hoped that this document, reprinted here in its entirety, will serve as the catalyst for the development of a state-wide policy for an integrated, multidisciplinary approach to the problem of domestic violence.

We commend *New England Law Review* for its Symposium on Domestic Violence and its demonstrated commitment to changing societal attitudes and ending family violence.

TABLE OF CONTENTS

Executive Summary 315
Introduction 319
Recommendations 321
I. Early Intervention and Prevention 321
A. Victim Services 321
B. Medical Community Response 321
C. Private/Public Sector as Employers 323
II. A Coordinated Response 324
A. Uniform Standards for Training and Practice 324
B. Additional Recommendations for Key Players 327
1. Criminal justice system 327
a. Police 327
b. Courts 328
c. District Attorneys' Offices 329
d. Probation 330
e. Mandatory Batterers' Treatment 331
2. Non-criminal justice system 332
a. Victim services 332
b. Domestic violence advocates 333
c. Child protection services 333
d. Probate Court 334
e. Voluntary batterers' treatment 336
C. Replication of the "Quincy Model" 336
III. Long-term Strategies 337
A. Empowering Victims 337
B. Collaboration Between Systems and Agencies 338
C. Related Societal Problems 339
D. Societal Attitudes 340
LUNCHEON SPEAKERS 341
SESSION SUMMARIES 343
SESSION 1 343
SESSION 2 347
SESSION 3 353
SESSION 4 357
SESSION 5 362
SESSION 6 366
SESSION 7 371
SESSION 8 377

EXECUTIVE SUMMARY

This report is the culmination of a two-year series of working luncheons co-sponsored by Attorney General Scott Harshbarger and the Harvard School of Public Health, Center for Health Communication, directed by Jay A. Winsten, Ph.D. The sessions were conducted in cooperation with the Massachusetts Coalition of Battered Women Service Groups.

To date, nine luncheons have been held which have brought together key policymakers, legislators, advocates, members of the criminal justice system and law enforcement, academicians, and representatives of the media. The goal of the luncheon series was to raise media and public awareness about the problem of domestic violence, with the hope of promoting meaningful change in public policy.

Eight sessions focused on a wide range of critical issues in domestic violence: the implications of the new amendments to the twelve-year-old Abuse Prevention Law; the granting of clemency for battered women imprisoned for killing their batterers; guidelines for the police response to domestic violence; training for all personnel in the judicial system; the need for an integrated, multidisciplinary approach to combatting domestic violence; the role of the medical community in identifying and assisting victims of abuse; the implications of the family preservation concept for battered women and their children; and the efficacy of batterers' treatment programs. The ninth session was devoted to a discussion of recommendations for domestic violence policy in Massachusetts.

The key recommendations contained in this report fall into three major areas:
(1) early intervention and prevention; (2) the need for an integrated, multidisciplinary approach to the problem of domestic violence; and (3) long-term strategies to protect victims and prevent further domestic violence in Massachusetts.

Please note that the recommendations section of this Executive Summary merely highlights the intervention efforts that need to be implemented if we are seriously committed to breaking the cycle of violence. The reader is urged to read the entire report for a more in-depth discussion of the suggested remedies.

KEY RECOMMENDATIONS:

1. Resources must be available to ensure that battered women can gain access to services by trained advocates on a 24-hour basis.

2. Multi-disciplinary training on domestic violence should be mandated for all health care workers, including but not limited to physicians,

nurses, social workers, and students in those disciplines, who come in contact with victims of abuse.

3. More social workers and victim advocates trained in domestic violence issues are needed in medical settings.

4. Health care institutions need to ensure that health care workers have adequate time to see patients in order to explore the possibility of violence and to discuss options, as part of their obligation to implement the requisite domestic violence protocols.

5. A unique program which offers battered women's advocacy within a pediatric health care setting (the AWAKE Project of Boston's Children's Hospital) should be replicated in other health care institutions which provide services to abused children.

6. Massachusetts law needs to be further amended to allow minors to seek treatment for injuries related to domestic violence without parental permission.

7. Employee assistance programs should include the provision of appropriate resources and referrals concerning domestic violence.

8. Employers should have protocols in place for dealing with employees who are victims or perpetrators of violence.

9. Special protocols must be developed regarding criminal justice or law enforcement officials who are the defendants in 209A petitions, orders, and/or charges.

10. There should be uniform, integrated standards of practice and multidisciplinary training developed for all individuals who are part of the domestic violence response network.

11. Such training should include a focus on cultural and linguistic minorities, and other populations which traditionally have been underserved, such as the differently-abled, people in same-sex relationships, and substance abusers.

12. Appropriations for expenditures associated with basic training in the area of domestic violence should be a budget priority for FY '94 and subsequent fiscal years.

13. A system should be established which can ensure that professionals or other certified individuals or organizations responding to domestic violence are in compliance with applicable laws and standards of practice, and are held accountable for their actions or inactions.

14. Police departments should designate a trained domestic violence officer or establish specialized domestic violence units to handle such cases.

15. Once the law enforcement and the criminal justice systems are involved in domestic violence matters, they should make all efforts to expedite the processing of domestic violence cases and to minimize the

possibility of harm. These efforts include the prompt issuance of restraining orders and warrants, the ordering of pre-trial probation for the batterer in serious cases of domestic violence, and developing sentencing guidelines for violations of restraining orders.

16. District Attorneys' Offices should utilize designated funds to create domestic violence units with specially-trained prosecutors and victim/witness advocates to handle criminal prosecution and post-conviction follow-up in domestic violence cases.

17. District Attorneys' Offices should explore possibilities of coordination with federal criminal justice officials to assist victims of abuse with relocation and identity changes when appropriate.

18. Probation officers must give high priority to serious domestic violence cases. They must follow batterers closely for compliance with court orders, participation in batterers' treatment programs, and adherence to other terms of probation.

19. The Massachusetts Department of Public Health must be given the resources necessary to certify and monitor batterers' treatment programs in accordance with the promulgated guidelines. Moreover, special batterers' treatment programs need to be developed for batterers with substance abuse problems.

20. An extensive range of battered women's programs must be supported, created and expanded to meet the increasing demands for services. These programs should include services for: victims of domestic violence from different cultural and linguistic minority communities; battered women with mental health concerns; battered lesbians; and differently-abled battered women. Finally, battered women's programs and shelters need to be developed to provide services to victims of abuse who have problems with alcohol and/or other drugs.

21. There should be specialized domestic violence advocates assigned to each district and probate and family court to assist victims with civil (pre-criminal) 209A petitions.

22. Services directed to identifying and treating the child victim/witness must be designed, funded, and implemented in shelters, the court, district attorneys' offices, and hospitals. In addition, law enforcement staff and personnel from the Massachusetts Department of Social Services should receive specific training to recognize and provide appropriate services to the children who witness and/or experience domestic violence.

23. Communication and coordination regarding the issuance and enforcement of restraining orders between the probate and the district courts should be improved.

24. Judges and family service officers should be trained in the dynamics of domestic violence as they relate to issues of custody and visitation,

and the inappropriateness of ordering mediation in domestic violence cases.

25. Additional visitation centers should be created where batterers may see their children under supervision without compromising the safety of the children or the mothers.

26. Certified batterers' treatment programs should be able to respond to the demand for treatment from non-court-referred, as well as court-referred, clients.

Finally, a variety of long-term strategies aimed at preventing domestic violence and improving interventions were suggested during the course of the luncheon series.

27. The importance of the implementation of an integrated response to combat domestic violence cannot be overstated. For this reason, the "Quincy model" or other similar integrated programs should be replicated state-wide.

28. Issues of both economic and personal empowerment for victims of domestic violence need to be addressed. These include support systems such as affordable housing, day care, and job training programs, along with efforts to increase individual self-esteem.

29. Increase and improve collaboration between systems and agencies involved in the domestic violence response network.

30. The problem of domestic violence should be addressed in terms of related societal problems.

31. Efforts aimed at changing social norms towards women and violence should be undertaken.

32. Lastly, it is crucial that government leaders and policymakers adopt and articulate a strong commitment to end domestic violence. Such high-level leadership will help to ensure long-term funding, public education about the problem, and will send the message to the public that domestic violence is a societal problem which may no longer be tolerated or marginalized.

INTRODUCTION

This report documents the proceedings of a series of working luncheons sponsored by Massachusetts Attorney General Scott Harshbarger and the Harvard School of Public Health, Center for Health Communication, directed by Jay A. Winsten, Ph.D. The sessions were conducted in cooperation with the Massachusetts Coalition of Battered Women Service Groups. The luncheons were held at the Harvard School of Public Health between April, 1991 and April, 1993, and brought together key policymakers, legislators, advocates, members of the criminal justice system and law enforcement, academicians, and representatives of the news media. The series was launched with three objectives in mind: to deepen public understanding of family violence and ways to prevent it; to raise family violence issues to higher visibility and higher priority on the public agenda; and to contribute to the development and implementation of effective public policies.

The first eight sessions focused on diverse and often controversial aspects of the problem of domestic violence, including the issue of clemency for battered women imprisoned for killing their batterers; the need for training in the criminal justice system; the implications of the Department of Social Services family preservation model on battered women and their children; and the effectiveness of batterers' treatment. Speakers were drawn from a variety of fields, and reflected the diverse backgrounds of the participants.

The ninth session was devoted to a discussion of recommendations for domestic violence policy in Massachusetts. In the preparation of this report, the authors drew on recommendations offered by participants in the working luncheons. These recommendations, generated by luncheon speakers and participants, are contained in this report and reflect the fact that, as the domestic violence crisis in Massachusetts escalated,[1] many of the sessions focused primarily on intervention strategies, rather than on prevention.

It is hoped that this report and the policy recommendations it contains will help further protect victims in the Commonwealth. Historically in Massachusetts, the response of individuals and groups such as the police, courts, health care professionals, child protective workers, and batterers' treatment providers, who might play an important role in intervening on behalf of victims and preventing violence, has been uneven. For example, despite the fact that the first Abuse Prevention

1. IN MASSACHUSETTS, ON AVERAGE, A WOMAN WAS KILLED BY HER BATTERER EVERY 22 DAYS IN 1990, EVERY 16 DAYS IN 1991, AND EVERY 13 DAYS IN 1992. [SOURCE: MASSACHUSETTS COALITION OF BATTERED WOMEN SERVICE GROUPS]

Law was enacted in 1978, in the 1980's many police officers were still unaware of what action was required of them. Similarly, until recently, few members of the medical community sought to identify victims of abuse, although several studies have shown that between 20 and 30 percent of adult women seeking care for trauma in hospital emergency departments are there for injuries resulting from domestic violence.[2]

Much of the frustration voiced during the sessions concerned the fact that for the most part, people working in the field of domestic violence know quite a bit about what works. Luncheon participants acknowledged that there are model programs in Massachusetts and elsewhere which effectively involve the criminal justice system, law enforcement, and the medical community in an integrated response to the problem, and therefore, that further costly, intensive research into how best to respond is not necessary before attempting to replicate such programs. What is needed is the political and institutional will and commitment to make domestic violence a priority, and to send a strong and consistent message to all citizens that domestic violence is a crime and that no one deserves to be abused. In the wake of such a commitment and with adequate financial support, model programs could be replicated throughout the Commonwealth. As Attorney General Harshbarger noted at the first luncheon, "without a dramatic change in societal attitudes, we will continue to have future generations who have grown up in families where violence is present, and society will continue to bear the burden of the human and fiscal costs resulting from that violence."

This report is divided into three major sections: an executive summary, recommendations, and a summary of the first eight sessions held to date.

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2. APPLETON, W, "THE BATTERED WOMAN SYNDROME," *ANNALS OF INTERNAL MEDICINE*, 1980; 9:84-91; GOLDBERG, W.G., AND TOMLANOVICH, M.C., "DOMESTIC VIOLENCE VICTIMS IN THE EMERGENCY DEPARTMENT: NEW FINDINGS," *JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION*, 1984;251:3259-3264; MCCLEER, S.V., AND ANWAR, R., "A STUDY OF BATTERED WOMEN PRESENTING IN AN EMERGENCY DEPARTMENT," *AMERICAN JOURNAL OF PUBLIC HEALTH*, 1989; 79: 65-66; STARK, E., FLITCRAFT, A., ZUCKERMAN, D., ET. AL., *WIFE ABUSE IN THE MEDICAL SETTING: AN INTRODUCTION FOR HEALTH PERSONNEL*, MONOGRAPH SERIES NO. 7, ROCKVILLE, MD, NATIONAL CLEARINGHOUSE ON DOMESTIC VIOLENCE, 1981.

RECOMMENDATIONS

I. EARLY INTERVENTION AND PREVENTION

A. *Victim Services*

1. 24-Hour Hotlines: Resources must be available to ensure that 24-hour hotlines can respond to both emergency and non-emergency situations in a standardized manner.

It is crucial that battered women be able to reach out confidentially to trained advocates who can help them to assess their level of danger, define their options, and craft their own safety plans. There is currently no domestic violence hotline operated centrally for the nation or for Massachusetts. Although every shelter in Massachusetts operates its own 24-hour emergency hotline to find shelter for victims in immediate danger, the range of other services they are able to provide on a 24-hour basis is variable. Some hotlines operate during "off hours" with an answering service, others are staffed with volunteers, while some shelters have professional staff on call throughout the night. Due to the cyclical nature of domestic violence, battered women may be ready and able to seek help at one point in time, and then not again for weeks or months. Therefore, battered women's programs must have adequate funding to provide access to trained domestic violence advocates at any time victims need assistance. Hotline services can best be provided by battered women's programs, which operate on a model of self-empowerment and which recognize a victim's unique knowledge of her own situation and the right to make her own decisions.

B. *Medical Community Response*

1. Training: Multi-disciplinary training on domestic violence should be mandated for all health care workers, including but not limited to physicians, nurses, social workers, and students in those disciplines, who come in contact with victims of abuse.

A 1992 study of emergency rooms in Massachusetts indicated that only 20 percent had a written protocol in use for the identification and care of battered women. This was in spite of the fact that such protocols have been required by the Joint Commission on the Accreditation of Health Care Organizations since January 1, 1992. Furthermore, the majority of emergency department chiefs surveyed greatly underestimated the number of abuse victims they believed were seen in their

emergency rooms, compared to what other research would suggest is true.[3]

Protocols alone, however, will not help victims of domestic violence. In order for the medical community to be able to correctly identify victims of domestic violence and assist them in living safely, training of health care personnel is critical. A 1988 study of 143 accredited U.S. and Canadian medical schools found that 53 percent of the schools that responded indicated that their students received no instruction in adult domestic violence.[4] Another study found that 61 percent of physicians responding said they'd received no training on the issue.[5]

This instruction needs to begin during professionals' academic training and needs to become a part of their field experience and continuing education requirements.

2. Staffing: More social workers and victim advocates trained in domestic violence issues are needed in medical settings.

3. Reform in health care practice: Ensure that health care workers have adequate time to see patients in order to explore the possibility of violence and to discuss options, as part of their obligation to implement the requisite domestic violence protocols.

4. Model program: Replication of the AWAKE Project (Advocacy for Women and Kids in Emergency) of Boston's Children's Hospital Medical Center in other health care institutions which provide services to abused children.

A Massachusetts study of emergency room reports showed that approximately 60 percent of abused children had mothers who were being battered.[6] However, the AWAKE Project is still the only program which offers battered women's advocacy within a pediatric health care setting. The AWAKE Project successfully uses battered women's advocates to assist mothers in families where there is domestic violence

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3. ISAAC, N., PRESENTATION, RESPONSE OF THE MEDICAL COMMUNITY TO DOMESTIC VIOLENCE, OCTOBER 23, 1992, WORKING LUNCHEON ON DOMESTIC VIOLENCE CO-SPONSORED BY ATTORNEY GENERAL SCOTT HARSHBARGER AND THE HARVARD CENTER FOR HEALTH COMMUNICATION.

4. CENTERS FOR DISEASE CONTROL, "EDUCATION ABOUT ADULT DOMESTIC VIOLENCE IN U.S. AND CANADIAN MEDICAL SCHOOLS, 1987-1988," *MORBIDITY AND MORTALITY WEEKLY REPORT*, JANUARY 20, 1989, VOL. 38, NO. 2, PP. 17-19.

5. SUGG, N., AND INUI, T., "PRIMARY CARE PHYSICIANS' RESPONSE TO DOMESTIC VIOLENCE, OPENING PANDORA'S BOX," *JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION*, 1993;267:3157-3160.

6. MCKIBBEN, L., DE VOS, E., AND NEWBERGER, E., "VICTIMIZATION OF MOTHERS OF ABUSED CHILDREN: A CONTROLLED STUDY," *PEDIATRICS*, 1989;84:531-535.

and child abuse, and to make the hospital a safe place to disclose abuse. Replication of this project would require a reallocation of resources and a reordering of priorities on the part of health care institutions.

5. Legislation: Further amend Massachusetts law to allow minors to seek treatment for injuries related to domestic violence without parental permission.

Currently in Massachusetts, it is legal for a minor to seek treatment for sexually-transmitted diseases, pregnancy-related problems, and alcohol- and other drug-related problems, without permission from parents. Without expansion of this permission to minors who are the victims of domestic violence, young victims will be deterred from seeking medical attention and from being supported to seek safety.

C. *Private/Public Sector as Employers*

1. Employee assistance programs should include the provision of appropriate resources and referrals concerning domestic violence.

2. Employers should have protocols in place for dealing with employees who are victims or perpetrators of violence.

There is no one profile of people involved in domestic violence incidents. Rather, batterers and their victims are represented by a wide range of social and demographic factors, including race, religion, occupation, socioeconomic status, level of education, and geographical location. Therefore, employers can play an important role in identifying victims of abuse, and supporting their efforts to live violence-free lives. A battered woman who is leaving her batterer faces tremendous obstacles. If she is employed, the added threat of losing her job because of harassment by her batterer may compel her to return to the offender–at great risk to her and her children's safety.

An employer who is sensitive to the stresses faced by a domestic violence victim can make a critical difference in the victim's ability to break out of the cycle of violence. Employers can do a number of things to standardize their response to domestic violence and reduce its potentially adverse impact on the workplace. For example, a protocol regarding service of domestic violence restraining orders when the abuser is an employee is very important. The protocol should make the process by which a restraining order is served at the workplace as confidential as possible, with an opportunity for the company's human resources division representative to speak with the abuser and make referrals for support services when appropriate. If the employee becomes distraught or makes threats against the victim, it should be clear to management when the police or medical professionals should be alerted.

Similarly, when the employee is the victim, the perpetrator may have been ordered to have no contact with the victim or to stay away from her workplace. Employers need to have protocols in place so that the opportunities for the batterer to have contact with the victim at the workplace will be minimized.

More difficult situations arise when the victim and the perpetrator are both employees, or when the perpetrator is a law enforcement officer or a security guard who has access to firearms in the course of their employment. Employers need to have protocols and policies in place for addressing these special circumstances.

3. Special protocols must be developed regarding criminal justice or law enforcement officials who are the defendants in 209A petitions, orders, and/or charges.

While there is no evidence to suggest that batterers are overrepresented by certain professions, particular attention must be paid to the problem of batterers in law enforcement and the criminal justice system. For many women, whether or not they seek protection under the law is in large part determined by their perception of the way in which police, clerks, prosecutors, and judges respond to them.

II. A COORDINATED RESPONSE

A. *Uniform Standards for Training and Practice*

1. There should be uniform, integrated standards of practice developed for all individuals who respond to victims of domestic violence.

Examples of the establishment of uniform standards of practice in domestic violence include the promulgation of standardized police guidelines by the Massachusetts Office of Public Safety in July, 1991, and the revision of the domestic violence standards for district courts which will be reissued in 1993. Advocates have reported a marked increase in the consistency and appropriateness of police response since the statewide guidelines were released. These efforts need to be encouraged and expanded to include all key players in the domestic violence response network.

2. There should be mandatory, uniform, multidisciplinary training for all individuals who respond to incidents of domestic violence, who intervene on behalf of victims, and/or who assist in the monitoring and treatment of offenders. These trainings should be developed from and based upon accepted standards of practice.

Among the groups to be included in mandatory training are the police, judges, clerks, prosecutors, private attorneys, advocates, batterers' treatment providers, probation officers, and child protection workers.

At a minimum, this training should provide an up-to-date review of current laws and regulations regarding domestic violence. It should also include an effort to increase awareness about the problem of domestic violence, heighten sensitivity towards victims–including children who witness the violence–and develop a better understanding of the ramifications of intervention for victims. Trainers should represent the various disciplines and include formerly or presently battered women. The newly-formed Governor's Domestic Violence Policy Commission should be charged with oversight for the coordination of such trainings.

3. Training should include a focus on cultural and linguistic minorities, and other populations which traditionally have been underserved, such as the differently-abled, people in same-sex relationships, and substance abusers.

At times, it is very difficult for victims of abuse to work with law enforcement agencies or to negotiate their way through the criminal justice system. The process is even more difficult for individuals who cannot speak or understand English, who have uncertain immigration status, or whose particular culture does not empower women. Similarly, individuals who are involved in violent same-sex relationships may face a number of obstacles in seeking protection which are specific to their situation, including fear of disclosing sexual orientation. Likewise, the differently-abled traditionally have been underserved by law enforcement and the criminal justice system, as well as by others responsible for responding to incidents of domestic violence. Sensitivity to the special needs of these populations must be matched by a strong commitment to provide those specialized services if the safety needs of all domestic violence victims are to be met.

4. Appropriations for expenditures associated with basic training in the area of domestic violence should be a budget priority for FY '94 and subsequent fiscal years. In addition, any future significant statutory changes should incorporate the funding necessary for training and/or the implementation of said changes.

5. A system should be established which can ensure that professionals or other certified individuals or organizations responding to domestic violence are in compliance with applicable laws and standards of practice, and are held accountable for their actions or inactions.

Victims must have some place to report those professionals who compromise their safety through non-compliance with statutes and/or standards. In spite of the 1978 passage of the Abuse Prevention Act and the 1990 passage of the Amendments to the Abuse Prevention Act, many individuals in law enforcement and the criminal justice system either 1) do not comply with current state law, or 2) interpret their obligations under the law in a manner which reflects misconceptions about the issue of domestic violence and its impact on victims. By enacting legislation to protect victims from abuse, Massachusetts has represented to its citizens that domestic violence is a crime for which abusers will be held accountable and from which victims will be protected. However, time and again, the system in place for responding to domestic violence has been unable to protect women from further violence when they try to leave abusive relationships–the point in time when women are most in danger of being physically hurt by their batterers.

Yet, it is apparent from all indications that law enforcement personnel as a group have undergone the most significant change in the way they respond to incidents of domestic violence and how they relate to victims of abuse. This has been attributed to the fact that police are the only group for whom training in domestic violence issues has been required, and police in their individual and collective capacities have been held legally and morally accountable for their actions–or inactions–in responding to domestic violence. The same level of accountability must be required of other individuals and professions who are part of the domestic violence response network.

B. *Additional Recommendations for Key Players*

1. Criminal justice system

a. Police

i. The Criminal Justice Training Council should assess the comprehensiveness of police training efforts in the area of domestic violence and make recommendations for further training as appropriate.

ii. Individual police departments should establish benchmarks to measure the success of mandatory domestic violence training for police officers.

iii. Police departments should designate a domestic violence officer or establish domestic violence units.

Several of the 1990 Amendments to the Abuse Prevention Act directly affect the police response to domestic violence. Specifically, as of January 1, 1991, arrest is the preferred response when police have probable cause to believe that an incident of domestic violence has occurred, and arrest is mandatory if probable cause exists *and* a domestic violence restraining order is in effect. In addition, police are directed by the guidelines to assist victims to safety, inquire about firearms, and speak with children who might have witnessed the violence. Finally, police can be held liable for failure to comply with the law.

For some police departments and officers, these amendments required significant changes in the way in which they had traditionally responded to domestic violence calls. For others, the new police guidelines reflect established policies and procedures. In order to ensure that the police response to domestic violence is uniform throughout the Commonwealth, all recruits are mandated to receive eight hours of domestic violence training. Through a federal grant, the Criminal Justice Training Council has developed a training curriculum, and has trained 100 law enforcement professionals to train police officers about domestic violence. Trainings have been conducted in individual police departments across the state, and other departments are expected to participate in future state-wide trainings as their budgets allow. Mayors, boards of selectpeople, and/or town managers should ensure that their police departments attend trainings available through the Criminal Justice Training Council, in order to better protect victims in their communities and to safeguard police departments from potential "failure to protect" liability.

Clearly, the new amendments affecting the police response to domestic violence will not benefit the victims of abuse if the police are not informed of the changes. The foregoing recommendations reflect

an effort to encourage continued domestic violence training in all police departments in Massachusetts and to ensure that the police response is uniform and consistent wherever an incident of domestic violence occurs.

b. Courts

i. Courts should make all efforts to develop a system to expedite the hearing of domestic violence cases and/or to conduct special domestic violence sessions.

ii. Courts should ensure the prompt processing and delivery of restraining orders and outstanding warrants to the appropriate police departments.

Battered women and their children are at greatest risk of harm from their batterers when they try to leave them. Once the law enforcement and the criminal justice systems are involved, cases should be expedited to minimize the possibility of harm.

iii. Courts should consider, after conferring with the victim, the issuance of complaints and arrest warrants when the information provided during the 209A process indicates the commission of a serious criminal act.

iv. Pre-trial probation should be ordered in serious cases of domestic violence to further protect victims.

Since a woman is often at greatest risk for physical danger when she tries to leave her batterer, inadequate surveillance during this period of time increases the possibility of imminent danger for the woman and her children. Probation officers must be made aware of the nature of domestic violence offenders and the potentially lethal consequences if batterers are not monitored closely. Probation officers must also be given the resources they need to do a thorough job.

v. The practice of issuing continuances without a finding in domestic violence cases should be discouraged.

When a court issues continuances without a finding or postpones hearing dates in domestic violence cases as a matter of course, then not only are the victims put at risk for further violence, but the batterers are also not held accountable for their abusive behavior. Therefore, it is not surprising that many offenders believe they can keep abusing their victims without fear of punishment, and continue to do so. While incarceration may not always be appropriate, courts must apply sanctions which will send a strong message to batterers that court orders will be enforced and that domestic violence is a crime and will not be tolerated.

vi. Sentencing guidelines for violations of restraining orders should be developed in an effort to raise the certainty of punishment as a deterrent to the offender.

Studies conducted in Massachusetts have determined that the most frequent disposition for a violation of a restraining order is dismissal.[7] While this outcome is worrisome, there is an equal amount of concern that the imposition of mandatory sentencing for 209A violations would act as a deterrent to the victims of abuse, who would lose further control over the outcome of the criminal prosecution of their batterers. In the case of a batterer whose only prior "criminal record" involves the same victim, the victim may be particularly reluctant to seek a criminal complaint for a violation of a restraining order if there is a mandatory sentence, especially if she is financially dependent on the batterer. Battered women's advocates report that most women going to court for the first time don't want to get their abusers into trouble; they simply want protection from further abuse. Sentencing guidelines would be effective in deterring the offender and informing the victim of the probable outcome of various courses of action.

c. District Attorneys' Offices

i. District Attorneys' Offices should utilize designated funds to create domestic violence units with specially-trained prosecutors and victim/witness advocates to handle criminal prosecution and post-conviction follow-up in domestic violence cases.

ii. District Attorneys' Offices should work with existing local resources, such as battered women's programs and legal service agencies, to ensure the availability of specially-trained advocates to assist 209A petitioners.

In FY '93, the eleven District Attorneys' Offices each received $150,000 from the legislature for the purpose of creating specialized prosecution units for domestic violence cases. How those funds would be allocated was left to the discretion of each District Attorney with periodic reports to be made to the Attorney General and to the Senate and House Committees on Ways and Means. District Attorneys can make maximal use of these funds by working cooperatively with existing community-based programs to provide pre-complaint advocacy services to victims, leaving them free to focus their attention on prosecution of

7. CURTIS, S., "CRIMINAL ENFORCEMENT OF RESTRAINING ORDERS: A STUDY OF FOUR DISTRICT COURTS," HARVARD LAW SCHOOL, MAY, 1991; UNPUBLISHED STUDY OF CASES OF VIOLATIONS OF RESTRAINING ORDERS IN THE QUINCY DISTRICT COURT BETWEEN JANUARY 1, 1990 AND MARCH, 1993, CONDUCTED BY ANDREW KLEIN, CHIEF PROBATION OFFICER, QUINCY DISTRICT COURT.

criminal complaints issued in domestic violence cases. Through the experience of these units, it is expected that the key components of a model domestic violence prosecution unit will be identified and adopted state-wide.

iii. District Attorneys' Offices should work with established battered women's programs to ensure that support groups are made available for victims of abuse as they go through probate court.

iv. Explore possibilities of coordination with federal criminal justice officials to assist victims of abuse with relocation and identity changes when appropriate.

Batterers are extraordinarily tenacious offenders. In spite of recent legislation which created the crime of stalking, batterers continue to kill their victims at unprecedented rates.[8] As a last resort, battered women at risk should be offered the same protection by government agencies as are victims and witnesses of other violent crimes. This is similar to a proposal recently put forth by Judge James Dolan of the Dorchester District Court.

d. Probation

i. A system should be developed whereby serious domestic violence offenders are classified on the risk-needs scale as highest risk, requiring intensive supervision by probation officers.

Because batterers are so tenacious in terms of their cyclical abusive behavior and obsession with their victims, probation officers must give high priority to domestic violence cases. They must supervise batterers closely to ensure compliance with court orders, participation in batterers' treatment programs, and adherence to other terms of probation.

Probation is one of the last systems a batterer may come in contact with after his case has been addressed by other law enforcement and criminal justice system personnel. Intense surveillance sends the message to batterers that domestic violence is a crime, and will be dealt with severely.

8. IN MASSACHUSETTS, ON AVERAGE, A WOMAN WAS KILLED BY HER BATTERER EVERY 22 DAYS N 1990, EVERY 16 DAYS IN 1991, AND EVERY 13 DAYS IN 1992. [SOURCE: MASSACHUSETTS COALITION OF BATTERED WOMEN SERVICE GROUPS]

ii. Probation and batterers' treatment programs must work more closely together. Batterers who do not attend treatment should be subject to an immediate revocation of probation hearing and appropriate sanctions imposed.

Probation and batterers' treatment programs can assist one another in their efforts to monitor batterers and prevent further violence. Batterers' treatment programs must inform probation of violations of orders, especially non-attendance at the treatment program. Similarly, probation officers must follow up on this information and seek probation revocations for batterers if violations of their terms of probation have occurred.

e. Mandatory Batterers' Treatment

i. The Massachusetts Department of Public Health must be given the resources necessary to certify and monitor batterers' treatment programs in accordance with the promulgated guidelines.

The 1990 Amendments to the Abuse Prevention Act required the Massachusetts Department of Public Health to certify batterers' treatment programs. However, no funds have been allocated to the Department to date with which to support this effort or to maintain an ongoing monitoring system for such programs.

The effectiveness of batterers' treatment programs in preventing further violence remains to be determined. However, such programs can serve an important role in warning victims about the batterers' threatened violent behavior and in assisting probation in monitoring batterers' compliance with court orders, since batterers' treatment programs must maintain ongoing contact with victims and probation officers as a requirement for certification.

ii. Special batterers' treatment programs need to be developed for batterers with substance abuse problems.

A study conducted in the Quincy District Court showed that 71 percent of batterers who went through the court system had problems with alcohol.[9] While many people attribute violent behavior to substance abuse, the two problems are distinct and require separate treatment approaches.

9. KRAMER, R., "ALCOHOL AND VICTIMIZATION FACTORS IN THE HISTORIES OF ABUSED WOMEN WHO COME TO COURT: A RETROSPECTIVE CASE-CONTROLLED STUDY," 1989, UMI DISSERTATION INFORMATION SERVICE, ANN ARBOR, MICHIGAN.

2. Non-criminal justice system

   a. Victim services:

      i. The network of existing battered women's programs must be supported and expanded to meet the increasing demands for services. These services should include 24-hour hotline and crisis intervention, emergency shelter, transitional living programs, individual and group peer support counseling, court and other social service advocacy, economic empowerment programs, children's services, and community outreach and training.

      ii. Programs must be developed which can respond to the special needs of diverse populations of victims of domestic violence. Cultural and linguistic minority communities must be assisted in the development of, and funds be provided for, culturally-appropriate and multi-lingual services.

      iii. Special services must also be developed to meet the needs of differently-abled battered women and battered women with mental health concerns.

      iv. Battered women's programs, including shelters, need to be developed to provide services to victims of abuse who have problems with alcohol and/or other drugs.

      v. Existing battered women's programs should strive to expand services to provide appropriate interventions for battered lesbians; and programs must be developed to provide services to men who are victims of same-sex battering.

In promising women assistance when they try to leave a violent relationship, the Commonwealth is failing women who abuse alcohol and/or other drugs. In order to keep custody of their children, battered women may be told to get off substances, but there are long waiting lists to get into treatment facilities, and women are often not safe from their batterers in such settings. Conversely, shelters in Massachusetts are unable to accommodate substance-abusing women and their children. So it is difficult–if not impossible–for such women to get the support they need to leave their batterers.

Massachusetts is also failing victims of abuse who are of cultural or linguistic minorities, who are differently-abled, or who are in same-sex relationships. A needs assessment should be conducted to determine the extent of these special needs, and plans for the development of programs should be coordinated with the appropriate agencies under the Executive Office of Health and Human Services.

b. Domestic violence advocates

i. There should be specialized domestic violence advocates assigned to each district and probate and family court to assist victims with civil (pre-criminal) 209A petitions. The number of advocates necessary in each court would depend on the number of domestic violence cases handled.[10]

Going through the criminal justice system may be a confusing and overwhelming experience for any citizen, but can be particularly frightening for victims of abuse, who often must confront their abusers in court. Without the assistance of qualified, trained, and supervised domestic violence advocates, many victims will not go through the process of filing petitions in court, and they and their children will remain in dangerous situations.

Advocates may be based at a variety of public and private agencies. Similar to recommendations contained in Section IIIA regarding training and accountability of key players in the system, these advocates need to be trained and supervised.

ii. Domestic violence advocates should conduct briefing sessions for all victims of domestic violence who come to court so that they may learn about their rights under the law.

iii. Domestic violence advocates should be familiar and coordinate their efforts with other support services in the community.

c. Child protection services

i. The number and type of emergency and transitional services available to families experiencing domestic violence should be increased.

ii. Police should be trained on how best to respond to children with whom they come in contact when answering domestic violence calls, and should be required to include a summary of that contact in their incident reports.

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10. THIS RECOMMENDATION IS ADOPTED FROM *A GUIDE TO DOMESTIC VIOLENCE COURT ADVOCACY IN MASSACHUSETTS*, COMMONWEALTH OF MASSACHUSETTS, VICTIM AND WITNESS ASSISTANCE BOARD, MASSACHUSETTS OFFICE FOR VICTIM ASSISTANCE, APRIL, 1993.

iii. Domestic violence programs should incorporate specific training for program staff in order to meet the needs of children who witness and/or experience domestic violence.

iv. The Massachusetts Department of Social Services, and the private child protective agencies with whom they contract for services, should provide specific training for program staff to recognize and provide appropriate services to a battered parent or guardian of an abused or neglected child.

v. The availability of therapeutic services should be increased for victims of child abuse and for children who witness domestic violence.

The effects of domestic violence are not only felt by its immediate victims, but by future generations through the children who witness it. Research suggests that approximately 30 percent of abused children grow up to be abusive parents.[11] Another study indicated that abused women were eight times more likely to abuse their children while living with their batterers than when they were safe from violence.[12]

Strong efforts must be directed towards ending the intergenerational cycle of abuse. Programs focused on identifying and treating the child victim/witness must be designed, funded, and implemented in shelters, the court, district attorneys' offices, and hospitals.

d. Probate Court

i. It is critical that communication and coordination regarding the issuance and enforcement of restraining orders between the probate and the district courts be improved.

ii. The practice of issuing mutual restraining orders in the absence of the requisite supportive statutory findings compromises the safety of domestic violence victims and should be strongly discouraged.

Section 3(j) of Chapter 209A, the Abuse Prevention Act, was amended in 1990 to limit the power of the court to issue mutual restraining orders. In the event that the facts of a particular case support the issuance of mutual restraining orders, the judge is required to make "specific written findings of fact." The intent behind the legislation was to discourage mutual restraining orders in cases where it was clear that one of the persons involved in the case was the perpetrator of the abuse

11. KAUFMAN, J., AND ZIGLER, E., "DO ABUSED CHILDREN BECOME ABUSIVE PARENTS?" *AMERICAN JOURNAL OF ORTHOPSYCHIATRY*, 1987;57:186-192.

12. WALKER, L., *THE BATTERED WOMAN SYNDROME*, NEW YORK: SPRINGER, 1984.

and the other person the victim. This recognition of the "primary aggressor" helps to validate the victim and assigns appropriate responsibility for his actions to the abuser.

iii. Judges and family service officers should be trained in the dynamics of domestic violence as they relate to issues of custody and visitation.

According to the 1989 Gender Bias study of the Supreme Judicial Court, in over 70 percent of the cases where fathers seek custody of their children, they obtain either primary or joint physical custody.[13] The study also found that when fathers contest custody, mothers are held to a different and higher standard than fathers.[14] If a father who is awarded child custody or visitation is also a batterer, there may be serious ramifications for the battered wife/mother and the children which need to be considered. In October, 1990, the United States Congress passed a resolution that "for purposes of determining child custody, evidence of spousal abuse should create a statutory presumption that it is detrimental to the child to be placed in the custody of an abusive parent."[15] To date, 37 states (Massachusetts not included) by law allow judges to consider battering when deciding physical custody cases.

Decisions regarding child custody and visitation must not be made in a vacuum without consideration of the presence of spousal or partner abuse. Batterers may use issues regarding custody and visitation as a means by which to inflict further abuse upon the children's mother. Similarly, shared custody arrangements require shared decision-making power between the parents or guardians which is unlikely to exist in battering relationships.

iv. Judges and family service officers should receive special training regarding the inappropriateness of ordering mediation in probate court cases involving domestic violence.

In recognition of the fact that mediation requires the participation of two parties operating from relatively similar positions of power or parity, the legislature further amended Section 3 of Chapter 209A in 1990 to prohibit a court from compelling mediation between the parties to a domestic violence case. The amendment also provides that while a

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13. SUPREME JUDICIAL COURT, *THE GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS*, 1989:62.

14. IBID.:63.

15. U.S. CONGRESS, HOUSE, COMMITTEE ON THE JUDICIARY, H. CON. RES. 172., 101ST CONG. 2D SESS., 1990.

judge may refer a case to the probation department or to a victim/witness advocate for purposes of gathering information, the court cannot compel the parties to meet together at these sessions.

v. Additional visitation centers should be created where batterers may see their children under supervision without compromising the safety of the children or the mothers. These centers should be certified in accordance with guidelines promulgated by the Massachusetts Department of Social Services, in cooperation with the Massachusetts Coalition of Battered Women Service Groups and the Probate Court Committee of the Committee for Gender Equality of the Supreme Judicial Court.

Currently, there is only one publicly-funded visitation center in Massachusetts. For many battered women, the batterers' right to see their children poses a major safety concern for them and their children. Even when courts order supervised visitation, battered women often do not have the resources to pay for a professional supervisor, and family members assigned to the task are often vulnerable to the batterers' demands and threats, and thereby are rendered ineffective. Visitation centers which provide on-site supervision and which have separate locations for children to be dropped off and picked up offer a convenient and safe solution for these families.

vi. Judges and family service officers should be familiar with certified batterers' treatment programs and refer batterers to those programs when appropriate.

e. Voluntary batterers' treatment

i. Certified batterers' treatment programs should strive to expand their programs in order to be able to respond to the demand for treatment from non-court-referred clients. Batterers who are motivated to change their violent behavior should have access to treatment programs.

C. *Replication of the "Quincy Model"*

1. The "Quincy model" or other similar integrated programs should be replicated to as great an extent as possible throughout the state.

The foregoing recommendations represent some of the components of a successful integrated response to the problem of domestic violence. Implementation of these recommendations involve a community-wide

commitment to give priority to domestic violence cases, yet require relatively minimal changes in current practices and procedures in order to better protect the victims of abuse. It is important to acknowledge that Norfolk County has had a model of multidisciplinary coordination involving the court, the district attorney's office, police, battered women's advocates, and other community agencies since 1978. The "Quincy model" sends the message to the batterers and to society that domestic violence is a crime and will not be tolerated, while at the same time empowering the battered women to seek safety for themselves and their children. A study conducted by Mr. Jim Hardeman of the Polaroid Corporation compared Norfolk County, where Quincy is located, with its neighbor, Plymouth County, where there was no similar program for domestic violence. Mr. Hardeman's study demonstrated that with the coordinated efforts of the Quincy team, there was a higher per capita rate of filings for emergency or temporary 209A orders in Norfolk than in Plymouth, and a greater percentage of domestic violence victims in Norfolk who sought emergency or temporary restraining orders returned to court to obtain permanent restraining orders.[16]

The success of the "Quincy model" is a strong argument for its replication across Massachusetts.

III. LONG-TERM STRATEGIES

A. *Issues of Empowerment for Victims of Domestic Violence Need to Be Addressed.*

There are two levels at which empowerment issues need to be addressed as part of any long-term strategy to effectively prevent domestic violence.

The first is the issue of economic empowerment, because even if a victim of domestic violence receives a prompt and effective response from the police, and is able to access and utilize the shelter network and the court system, she may still not be in a position financially to leave her batterer. Many obstacles may still stand in her way. There may be no affordable housing available for her and her children after the maximum shelter stay is over. Similarly, day care subsidies and job training programs have been the victims of annual budget cuts. Without these critical support systems, battered women are often left to choose between impoverishment–and even homelessness–and returning to an abusive relationship. Economic empowerment is a primary requirement

16. HARDEMAN, J., PRESENTATION, THE DOMESTIC VIOLENCE CRISIS IN MASSACHUSETTS AND THE NEED FOR AN INTEGRATED RESPONSE, MAY 5, 1992, WORKING LUNCHEON ON DOMESTIC VIOLENCE CO-SPONSORED BY ATTORNEY GENERAL SCOTT HARSHBARGER AND THE HARVARD CENTER FOR HEALTH COMMUNICATION.

if the victims of abuse and their children are to begin to rebuild their lives outside of the cycle of abuse.

The second level of the issue of empowerment that needs to be addressed is that of personal empowerment. There is a critical need to begin to refocus our efforts and resources away from the issue of victimization (i.e., why it occurred and who is to "blame")—although they remain important issues in terms of trauma and recovery—and towards the issue of how to decrease the risk of revictimization. It is important to acknowledge that while *economic* empowerment can make a critical difference in the lives of many battered women trying to escape the cycle of violence, the violence will continue if we fail to address the underlying *personal* empowerment issues. Battered women who have been able to break out of the cycle of violence speak repeatedly about how they felt or were made to feel about themselves while they were in the abusive relationship. They talk about feelings of low self-esteem and about not feeling worthy of better treatment. They express concern that they didn't know how to respond to the threats of violence, or how to try to defuse a tense and potentially violent situation. As a society, we need to offer educational, counseling, and training programs which boost self-esteem, and which acknowledge that everyone has the right not to subjugate their feelings and needs to others, and has the right to say "no," to say "no more," and to leave. We need to develop an intolerance for violence and to provide people with the skills they need to resolve conflicts nonviolently.

B. *There is a Need to Increase and Improve Collaboration Between Systems and Agencies Involved in the Domestic Violence Response Network.*

The system's response to the problem of domestic violence is generally piecemeal. In the most egregious cases, the system is nonresponsive or engages in courses of action which place the blame for domestic violence on the victim. At best, the system provides only temporary or band-aid solutions. First and foremost, as has been repeatedly pointed out in this report, there is a critical need for an integrated response. Victims need to be assured that there will always be an appropriate response when they need help; that that response will be consistent regardless of where or when the abuse occurs, and that the responding agencies will act in a coordinated way.

The system must also delicately balance the need to respond to domestic violence in the same manner as any other crime, while at the same time acknowledging that the victim is or was involved in an intimate relationship with the batterer, who may also be her husband or the father of her children. In order to validate the victim and hold the offender accountable for his actions, the system's response to domestic violence cases must be no different than its response to cases involving stranger-on-stranger assaults. But at the same time and because of the

nature of the relationship between the victim and the perpetrator, it is important that the system not disregard the victim's wishes. Whereas it may be presumed for a stranger-on-stranger crime that both the victim and the system want to punish the perpetrator, a victim of domestic violence may, in fact, just want the abuse to stop.

A long-term strategy for balancing these conflicting demands must involve a range of alternative sanctions which enables the system to hold the batterer accountable for his actions, but which also reflects the relationship between the parties involved. A system of graded sanctions, where the sanctions increase as the frequency or degree of violence increases, is needed and appropriate.

1. Domestic violence roundtables should be instituted in each geographic region or county.

One way in which the system can become more coordinated is to implement domestic violence "roundtables," a number of which have already been implemented across the country and in Massachusetts. They have proven to be extremely effective in opening up a dialogue between key players in the system in given communities. Because they are regional in nature, local problems, issues, and controversies can be discussed among the people involved who have the power to resolve them. Roundtables can be organized by any interested party, but should include representatives from area shelters; district attorney's offices; district, probate, and juvenile courts; police; health care institutions; batterers' treatment programs; child protective service workers; and other relevant agencies and organizations.

C. *The Problem of Domestic Violence Cannot Be Addressed in Isolation, but Must Be Approached in Terms of Related Societal Problems.*

Economic empowerment and poverty, alcohol and other drug abuse, child and elder abuse, teen pregnancy, adolescent violence, and domestic violence are frequently interrelated and the system's response to these problems are often intertwined. But a piecemeal approach to solving any one of these problems is inefficient and wastes scarce resources. In order to address the problem of domestic violence effectively in the long-term, a broad approach to the problem must be developed. This approach would recognize how various factors intersect and result in multiple problems for the individuals involved, such as the interrelationship between unemployment and substance abuse, and substance abuse and domestic violence. This broad approach would incorporate response systems and techniques which would facilitate addressing each interrelated problem at the same time or in appropriate sequence. By way of example, if there is evidence of a substance abuse problem in a domestic violence case, then treatment of the substance abuse problem needs to be incorporated in the batterers' treatment order for the

perpetrator, or in the safety plan for the victim. If a child in a domestic violence case is beginning to miss school or display delinquent behavior, then intervention efforts need to explore the interrelationship between the violence in the home and the child's problems.

D. *Societal Attitudes Around Violence Must Be Changed.*

In the United States we accept an extraordinarily high level of violence as a legitimate way of resolving conflict; we have laws which endorse violence as a means of protecting property; and we glorify violence through every vehicle of popular culture, including books, films, music, and television. Much of the time, the victims of such violence are women, which reflects the fact that sexism continues to pervade our collective psyche.

1. A strong commitment to end domestic violence needs to be made by government leaders and policymakers.

Sweeping changes in the way in which domestic violence is viewed in terms of public policy priorities are necessary. Professionals who do not respond to the problem of domestic violence in accordance with their legal obligations should be held accountable for their failures. A commitment by top-level leaders to the issue of domestic violence will permeate the public consciousness and will educate and inform the public response. It will help to ensure long-term funding and public support for efforts to stop domestic violence—a societal problem which can no longer be tolerated or marginalized.

2. Grade-school curricula on sexism, sex-role stereotyping, issues of power and control, conflict resolution, and peer and dating violence, need to be standardized, developed, and implemented state-wide by certified trainers.

Grade-school curricula which includes information on the warning signs of domestic violence, the rights of victims, and resources available for perpetrators and victims, is but a first step in raising public awareness about domestic violence and the wrongfulness of violence within the family and in society at large.

In the long-term, grade-school curricula must address the underlying myths and misperceptions which result in individual acceptance or tolerance of violence as a means of resolving conflict.

WORKING LUNCHEONS ON DOMESTIC VIOLENCE

1991 - 1993 SPEAKERS*

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*TITLES REFLECT THE SPEAKERS' AFFILIATION AT THE TIME OF THEIR PRESENTATIONS.

SESSION SUMMARIES

A. SESSION 1—APRIL 9, 1991: THE ABUSE PREVENTION ACT

In December, 1991, important amendments to General Law 209A, the 12-year-old Abuse Prevention Law, were passed. The passage of these amendments marked an important milestone for battered women's advocates and others involved in the area of domestic violence.

The changes in the law, as well as the roots of violence against women, were explored in the very first working luncheon held in April, 1991. The speakers were: Massachusetts Attorney General Scott Harshbarger; The Honorable Albert Kramer, Presiding Justice of Quincy District Court; and David P. Forsberg, Secretary of the Executive Office of Health and Human Services for the Commonwealth of Massachusetts.[17]

Attorney General Harshbarger pointed out the discrepancy between public perception of violence and the reality: "However serious the problem of violence in the streets is, the reality is that if you are a child or a woman, you are more likely to be the victim of violence in your own home or at least in your own neighborhood, at the hands of someone you know. Less than 20 percent of the serious crimes of violence, in spite of the attention they receive and the horror they invoke, involve strangers acting out in violence against other strangers. The overwhelming majority of victims know their offenders. In domestic violence cases, the majority of offenders are men acting out violently against women and children with whom they have a familial or custodial relationship."

He drew a parallel between laws mandating reporting of child abuse and the new law regarding domestic violence. He stated, "Because of drugs and other factors, some acts of violence are perhaps increasing, but the Child Abuse Reporting Law . . . was, in fact, the cause for the rise in the number of reported cases of child abuse. . . . I think the same thing applies to the rise in domestic violence cases we are beginning to see. Just as the Child Abuse Reporting Law brought cases of child abuse to the courts' attention, one of the ways to look at the new Abuse Prevention Law is as a vehicle that brings the system in to support the victim of a violent relationship. To some extent, Chapter 209A allows battering to be reported . . ."

The Attorney General stated that the new law, alone, would not solve the problem of domestic violence: ". . . [I]f we do not address the underlying causes of domestic violence, and develop and utilize the

17. AS OF THE DATE OF THIS REPORT, MR. FORSBERG IS CHIEF DEVELOPMENT OFFICER, WORCESTER, MASSACHUSETTS.

multidisciplinary approaches that call for early intervention, education and family support, we will never solve this problem."

Furthermore, he pointed out, "If we think we can repeatedly pass new laws and at the same time eliminate every shelter for battered women, every support program for families, every treatment program for children who have been abused, what does a new law matter?"

That caveat notwithstanding, however, the Attorney General pointed out that any efforts to stem and prevent domestic violence must involve prosecutors, law enforcement, and the courts, and that changes in the Abuse Prevention Act were designed to address some of the ambiguities that existed in the law, particularly as they relate to police, prosecutor and court responses. For example, the Act mandated new guidelines for police response; certification of batterers' treatment programs; and clarified no-contact orders and *ex parte* hearings. A major change in the law was that coverage was now extended to individuals involved in dating relationships. Attorney General Harshbarger expressed his hope that the new law would further protect victims of abuse.

In his presentation, the Honorable Albert Kramer discussed what he felt were barriers to successfully implementing the Abuse Prevention Law. Judge Kramer remarked that although the original Domestic Abuse Legislation was enacted in 1978, there have been numerous gaps in preventing violations of restraining orders, prosecuting violators, and getting judges, district attorneys, and probation officers to provide the enforcement required to adequately protect and respond to women who are victims of domestic violence.

Judge Kramer explained how the Quincy District Court has been in the forefront of responding to domestic violence cases, and has been involved in activities for a number of years which the new law now mandates, such as requiring a batterers' treatment program for offenders as a condition of probation. The statute also calls for, but doesn't require, that convicted batterers undergo alcohol treatment when necessary, and Quincy has mandated intensive alcohol treatment as another condition of probation. In addition, the Quincy Police Department, in conformity with the policy of the Norfolk County District Attorney's office, has had a pro-arrest policy for some time.

Judge Kramer believes that one of the biggest barriers to implementing the new law, and an explanation of why women are so often the targets of violence, is sexism, which has always permeated secular law. "For those of us who study law and understand the legacy of our social legal systems, we can see that man has always had the right to be the head of the family, and thereby, has had the corresponding legal right to hit 'his' woman," Judge Kramer said. "As Murray Straus, a leading researcher in the field has said, in a sense it has always been understood that a marriage license is a hitting license."

Furthermore, Judge Kramer claimed, "Until this century, women were denied divorce and the right to sue. They were denied wealth, inheritance and title. . . . There has been no right of a wife to sue her husband for assault and battery; husbands were always immune."

In England, Judge Kramer related, you could only use a whip no wider than a thumb, hence the 'rule of thumb.' Some states in this country incorporated the English system's right of chastisement into its law. As Judge Kramer pointed out, "In 1864 a woman couldn't prosecute her husband for assault and battery in North Carolina because the parties were involved in a 'domestic dispute' and should 'work it out'. . . . Wives could not sue husbands for assault and battery after being hit because it would 'disturb domestic tranquility.'"

Judge Kramer described how these old laws continue to impact on society today. "Even though these laws have all finally been repealed, in a *de facto* sense, the right of chastisement has worked itself into the norms of the court, the police, the clerks, and our society, denying women their status as legitimate victims and their rights to recourse. And until the feminist movement began to have its effect over 15 years ago, there existed a gentlemen's agreement within the chauvinistic criminal justice system that recognized the right of men to punish their women. It was an unwritten law, but nevertheless it was practiced."

Judge Kramer cited an Ohio study which found that only two percent of 3,600 women who sought criminal complaints for domestic violence succeeded in getting their complaints before the court. He read a description by the researchers of a woman trying to get a remedy: "If she seeks criminal remedy, the police may or may not respond. Even if her call is answered, she will probably receive no protection. If she requests a warrant, she would have to survive the scrutiny of the prosecuting attorney and prove she is a worthy victim, primarily through her decision to go through with the case or go through with the divorce. Having completed that stage, she may then enter a reconciliation court. In a criminal court she'd be told wife assault is a civil matter, and to settle it in a divorce court. In the civil court she would be told to go through the criminal court. Furthermore, society tells her it is her fault: she provokes it, she tolerates it, she may even like it." [18]

In addition to sexism and gender bias, Judge Kramer felt another barrier to the implementation of the Abuse Prevention Law stems from a "misconception of who the abuser is, how dangerous he can be, and what it takes to stop the abusive behavior. . . . Batterers, in general, are the most tenacious of all offenders in resisting court orders to stop or curb their violence and the relentless pursuit of their victims. We must learn to recognize these characteristics . . . if we are going to be able to

18. EISENBERG, S. AND MICKLOW, P., "THE ASSAULTIVE WIFE: "CATCH 22" REVISITED," WOMEN'S RIGHTS LAW REPORTER, Vol. 3, 1977.

effectively control their violence. Batterers must be made to learn to take responsibility for their acts and recognize when certain violent urges emerge, to learn to control them, and find an alternative means to express their assertiveness."

A third barrier to the law's implementation, according to Judge Kramer, is probation. He cited an article written by Andrew Klein, Chief Probation Officer of the Quincy District Court, which outlined why wife-beaters are the most significant supervision challenge of any group—batterers share traits of high-risk offenders: they don't believe what they do is criminal; they blame the victims; they have substance abuse problems; they have easy access to the victim; many times they are tied to their victims by kids and visitation rights; and they are very resistant to court orders.

Secretary David Forsberg pointed to his experiences with the U.S. Department of Housing and Urban Development and as vice president and administrator of Lutheran Child and Family Services of Massachusetts, New Hampshire, and Maine, as having provided an opportunity to witness and work with victims of child abuse and domestic violence. He pledged his support and willingness to work on the multidisciplinary approach described by Attorney General Harshbarger and Judge Kramer.

"Through this difficult fiscal period," Secretary Forsberg noted, "we were able to at least level-fund the programs that are going to form the support network: the 23 shelters, the seven safe home networks, and the two advisory counseling centers." He concluded by citing the Weld administration's commitment in the area of domestic violence, and support for programs that help women and children.

Luncheon participants voiced their concern that there were currently not enough resources for the services necessary for battered women and their children. For example, according to one participant, the Massachusetts Office of Victim Assistance receives its funding from criminal fines from federal and state offenders, but there is a cap on how much of the revenues can be allocated for that office. Others agreed with Judge Kramer, that preventing domestic violence was not only a matter of education, but of increasing public awareness of the problem and changing people's attitudes towards women, power, and control.

B. SESSION 2–JUNE 18, 1991: CLEMENCY ISSUES FOR BATTERED WOMEN IMPRISONED FOR KILLING THEIR BATTERERS

Do battered women incarcerated for killing their batterers deserve clemency? That was the question which stimulated a great deal of debate, due to the action of several governors who granted clemency to a number of women claiming to have been battered by the men they killed. The second working luncheon of the series focused on the battered woman syndrome and whether or not Massachusetts should follow the lead of several other states in granting clemency. The session featured Lenore Walker, Ed.D., Executive Director of the Domestic Violence Institute of Denver, Colorado; Antoinette E. M. Leoney, Esquire, Former Deputy Chief Counsel for Governor Michael Dukakis; and Stacey Kabat, Assistant Director of the Women's Health and Learning Center, a project of Social Justice for Women.

As Attorney General Scott Harshbarger stated, the issue is not confined to the question of clemency, but also to use the present cases to learn how "early intervention and effective support systems might have prevented the need for this type of violence. . . . Somehow the criminal justice system must help find a way to address these issues in a responsible non-violent manner."

Dr. Walker put the issue of battered women who kill into perspective. She pointed out that "in the total context of abusive relationships, women who kill make up a very small percentage of battered women. In fact, the homicide statistics show that more women are killed by abusive partners than commit homicide themselves. Most battered women eventually do terminate the battering relationships through separation and divorce, although the violence does not necessarily stop when they leave. . . . When battered women leave the relationship it is at greater peril to their lives and their children's lives. Abusive men are likely to stalk, find and kill the women who leave them."

Furthermore, Dr. Walker explained that the use of the battered woman syndrome has not led to an increase in women killing their male partners. In fact, since 1977–when Dr. Walker first pioneered the use of the syndrome as part of a justification defense–through 1991, the rate of women killing men had actually decreased. "This is explained by the fact that women will leave their abusive situations if we find some way to give them assistance and enable them to keep themselves and their children safe," said Dr. Walker.

Dr. Walker described the battered woman syndrome as a way to classify the mental health impact of domestic violence on women. "The syndrome is the collection of psychological symptoms that frequently occur as a result of repeated physical, sexual and psychological abuse. It is considered to be a subcategory of Post-Traumatic Stress Disorders.

It doesn't occur in all battered women, and it is not the only defense or the only way to conceptualize the effects of battering on a woman. . . . [It] is not simply a description of the psychological dynamics of battering. Nor does it tell us specifically what leads up to the abuse. But, the observation of the presence of symptoms that constitute the criteria for battered woman syndrome supports a woman's credibility that she has been battered, which is particularly important when she is facing legal charges and has no witnesses to the actual abuse. Presence of the symptoms that resemble the fight (high arousal) or flight (high avoidance) reaction typically expected when someone is terrified of being hurt, along with changes in the way the woman thinks, feels, and acts, constitute the syndrome. . . [and] becomes a way of explaining the battered woman's expected state of mind." Dr. Walker cited confused thinking and memory problems among the symptoms someone with the battered woman syndrome might experience. "Every time a woman is in a situation where she is about to be abused again, her fear is magnified because the new danger also reminds her of previous abusive incidents. These flashbacks contribute to her present state of mind, as well."

Dr. Walker has used the battered woman syndrome when testifying on behalf of battered women who have killed their batterers in approximately 300 cases. Until the late 1970's, she claimed, the self-defense standard for homicide cases was based on a *man*'s reasonable perception of imminent danger, and was rarely used as a defense for battered women. "Then the courts changed their interpretation to be more subjective, making the standard a reasonable *woman* who was scared," she stated. "The battered woman syndrome takes it one step further by defining what the expected perceptions are of the reasonable *battered woman* who is scared."

Two other theories are sometimes used to help explain why battered women might kill. As Dr. Walker explained, "The 'learned helplessness theory,' originally developed by psychologist Martin Seligman, talks about a person's loss of ability to predict that what she does will make a difference to what happens to her. This means she will narrow her options if she is desperate for safety. She won't think that walking out the door, or telling the man, 'Please stop it, honey,' is going to make a difference. When this man is about to seriously hurt her again, or she believes he is about to, she may then resort to a more aggressive approach to defending herself."

"The 'cycle theory' of violence can manifest itself in several ways," Dr. Walker continued. "In one example, the level of tension builds, there is an acute battering incident, followed by a period of loving contrition. Here it is reasonable to believe matters will get worse if this is the clearly observed pattern . . . this cycle does not happen in all cases, nor does it necessarily happen with loving contrition at the end of the cycle;

sometimes there is just an absence of tension. At other times, the level of tension is constantly high, always at a level of danger. . . . If they believe that the only way to be safe is to kill the man, these women may indeed premeditate it, even to the point where they hire someone else or get involved in a conspiracy case. . . . If the dynamics of the ever-escalating abuse are understood, then this type of case can also fall within the traditional self-defense laws, using the psychology of battered woman syndrome. This is also true for the so-called 'sleeping man' case where it doesn't appear that there is an acute incident at that moment, but the woman knows she is in imminent danger because of the previous pattern of escalating violence."

Dr. Walker also described how, although the homicide rate for women has been fairly stable at 12 to 15 percent, more women are being held accountable when they kill than ever before. She cited research by Ann Jones (author of *Women Who Kill*) that showed that today more of the women who kill their known abusive partners are brought to trial, are convicted and are served with long prison sentences than ever before. These women, it was asserted, would not have been prosecuted in earlier times.

Dr. Walker pointed to a rise in prosecutions of women in two new areas. "Increasingly, women have been accused of killing their children who die after a long period of child abuse. These women are not the ones who actually strike the fatal blow; it is the men with whom they live who have been abusive to both them and their children. Their own status as battered women makes it unreasonable for them to be able to protect their children any better. The second area is in the so-called 'fetal endangerment' cases. . . more women are being legally punished for the use of drugs and alcohol while they are pregnant. Most of these women are also victims of abuse."

She argued that incarceration of these women is short-sighted, does not really protect the fetus, and that the woman who perceives the need to use drugs or alcohol will not be helped in jail. Dr. Walker claimed that "research tells us that the single best predictor of whether a girl or woman will turn to alcohol or drugs is a history of violence and family abuse. . . . Few, if any, drug treatment programs include a component for helping the woman deal with current or past violence victimization. Even sadder, there are few alcohol or drug treatment programs for pregnant women located anywhere in the country." She posed the question, "Why are more women being prosecuted when, in fact, we know that the severity of violence against women is increasing, and that her risk of being seriously hurt or killed is greater when she attempts to leave the relationship? Even when these women are no longer in a relationship, the most important therapeutic intervention is to help the child bond to the mother. These enforced separations only exacerbate the problem."

In the late 1980's, several battered women who killed their batterers were granted clemency. Dr. Walker described how this issue became more visible when former Ohio Governor Richard Celeste ordered clemency for 25 battered women who killed in what they claimed was self-defense. In early 1991, before he left office, Governor Celeste granted clemency to 12 more women, and commuted the death sentences of four others, all of whom claimed that they were victims of domestic violence. At around the same time, Maryland Governor William Schaefer commuted the sentences of twelve women imprisoned in that state for killing their batterers. Efforts to gain clemency for such women are ongoing in other states and at the federal level.

Would Massachusetts Governor William Weld follow the lead of Governors Celeste and Schaefer in granting clemency to the ten women serving time in Massachusetts prisons? Ms. Leoney thought that would be unlikely because of a number of reasons: first, these women were all convicted of murder since 1985, so not enough time had elapsed for them to be eligible for commutation according to Massachusetts law; and secondly, in order to be granted clemency or have their sentence commuted, a person is required to show a fairly long period of good citizenship while in prison. "In the past," stated Ms. Leoney, "a person was able to prove him- or herself by going out on furloughs and work release programs, or by participating in various workshops—on drug and alcohol abuse, for example. . . . We don't have many of those programs anymore, and few exist in women's prisons. . . . In fact, while I was at the Governor's Office, I saw only two petitions for commutations from women who were convicted of murder, as opposed to between 10 and 15 petitions from males."

Ms. Leoney thought that, given the mood of the state with respect to pardons, furloughs and work release programs in light of the Willie Horton incident, there would be no commutations in this state in the next five to ten years.

Ms. Kabat, representing the women incarcerated in Framingham state prison, began her presentation by reciting the names and ages of the seven women murdered in Massachusetts by a male partner so far that year, and the circumstances under which they were killed. "There are 10 other women I'd like to tell you about, too," she said. "They are in prison here in Massachusetts for defending their lives and the lives of their children against their batterers. . . women who, when the system they turned to couldn't protect them, had to protect themselves."

Ms. Kabat described the experiences of the women with whom she works: "Each of them has their own horrific story of abuse. Stories that always start with verbal and mental torture and lead to physical abuse. Stories that include being kicked, beaten, strangled, knocked down and dragged through the streets. Being beaten with every type of object: billy clubs, bottles, hammers, and sticks. Many tell of being raped. One

tells of being cuffed to the bed, forced to perform various sexual acts, and having objects stuck inside her until she bled. They all have had blackened eyes and teeth knocked out; two of them have lost entire sets of teeth."

"One tells of having a knife held to her belly while she was pregnant and having her batterer threaten to cut her baby out. Another recounts tales of having cigarettes put out in her neck and hair, and nearly being run over by her batterer's van while she fled with her six-month-old son in her arms. One woman tells of taking a beating so bad that later she was rushed to the hospital and was in a coma and on life support systems for two months. Another recounts being hunted down and attacked on the job at the MBTA, having her shirt ripped open, punched in the gut, and spat on, and the MBTA officers refusing her request to arrest him because it was a 'domestic dispute.'"

Ms. Kabat stressed the importance of not viewing the issue of battered women and self-defense in a vacuum. "It's important to hear and be conscious of the magnitude and type of violence that these women face," she said. "The number of women who have died at the hands of their batterers highlights the severity of domestic violence and emphasizes it as a life-and-death issue. . . women who have killed their batterers have been doubly victimized: first, by their abusers; and secondly, by the criminal justice system that not only failed to protect them from harm, but which then failed to recognize the legitimacy of their defense."

Several luncheon participants asked why a psychological disorder such as battered woman syndrome or Post-Traumatic Stress Disorder must be used when a battered woman kills her batterer, instead of simply self-defense that would be reasonable by any standards. Dr. Walker agreed that this issue has been debated, among feminists in particular, but that the courts only allowed the testimony about battering if it impacted on someone's state of mind at the time of the homicide. She noted that for many women, these psychological symptoms disappear when they are given safety and support, and therefore, should not be viewed as psychological disorders, but rather as coping strategies. "The learned helplessness theory," Dr. Walker said, "should be viewed as a vehicle with which to organize information before the courts—it's not the be-all and end-all, and many women don't fit the criteria. It is important to emphasize that the theory does not mean that these women are helpless—rather, they have lost the ability to predict that what they do will make a difference in what happens to them."

"If a state can pass a Domestic Violence Prevention Act," she continued, "that means that the legislators agree that battered women and children need special protection. If you can get that much passed, then you can get the next step, which says that they have a right to use

self-defense if they don't get the protection they need to stop the violence."

Dr. Walker cited the laws of several states in the West and Southwest which say that if someone breaks into a house and the person living there has a reasonable belief that a felony will be committed, the person can harm or kill the perpetrator in self-defense or defense of property and not get charged. "Why is it. . . that a woman can't defend herself against a man who has a history of hurting her and her kids?" she queried.

Ms. Leoney pointed out that when a battered woman is reviewed for clemency, the question is whether or not she can be rehabilitated—an irrelevant question if the woman killed in self-defense. Ms. Kabat and other participants cited the need for special parole considerations and innovative alternative sentencing for battered women who have killed their batterers.

C. SESSION 3—SEPTEMBER 30, 1991: POLICE GUIDELINES

Several of the new amendments to the Abuse Prevention Act directly involve police response, and one of the mandates set forth was the promulgation of guidelines for police response to domestic violence.

The third working luncheon focused on these police guidelines, how effective they were thought to be, and how police were likely to respond to them. The three speakers were Joan Stiles, Public Education Coordinator of the Massachusetts Coalition of Battered Women's Service Groups; Rai Kowal, Deputy Director of the Massachusetts Committee on Criminal Justice; and Sergeant John Christensen, Director of Training for the Somerville Police Department.

Ms. Stiles reported how inconsistent police response to domestic violence incidents could be. In the past "there just was no standard practice," said Ms. Stiles. In 1985 a study on the implementation of Chapter 209A practice found across the board non-compliance. She described how in response, the Criminal Justice Training Council (CJTC) instituted a series of police trainings across the state. However, because they weren't mandatory, these sessions didn't reach all police officers or departments in the cities and towns which most needed the training.

"I remember once calling a lieutenant in a small town. . . to complain that his officers had endangered a woman by failing to arrest her abuser when they found him at her house, threatening her, and in violation of an existing restraining order," Ms. Stiles recalled, "The lieutenant told me, 'Lady, I don't care what the CJTC says, we do things our own way here.' Once, when I was a guest speaker at a luncheon, I was told by a police chief, 'Battered women love what they get and they deserve it.' It was apparent that something more than training was needed."

According to Ms. Stiles, by the late 1980's, mandatory arrest of batterers became the "progressive answer" to the question of appropriate police response. This was due to a Duluth, Minnesota, study in which there was a 47 percent decrease in return calls to the same household after a year of initiating mandatory arrest policies.

However, asked Ms. Stiles, did this occur because the violence had stopped or had women simply stopped calling the police out of fear of retaliation by their abusers? Furthermore, police departments in Connecticut reported that in their first year of the mandatory arrest policy, *both* parties were arrested in a number of cases.

After studying the issue, the Massachusetts Coalition of Battered Women Service Groups and the Battered Women's Working Group (a subcommittee of the Governor's Anti-Crime Council), with which Ms. Stiles was affiliated, concluded that mandatory arrest could be valuable, but comprehensive legislation, such as Chapter 403 and the mandated state-wide police guidelines, was needed to make it work properly.

Ms. Kowal described the new amendments to Chapter 209A which involve the police. Chapter 403 stipulates that arrest is required upon violation of a restraining order, and is the preferred response when police have probable cause to believe that a misdemeanor or a felony has occurred, if they have not actually witnessed an incident of domestic violence.

Furthermore, the police must make an arrest when an order has been violated, even if the victim is unwilling to press charges. As Ms. Kowal explained, ". . . often a victim is afraid to press charges. Either the batterer is standing right there, or she's afraid of the consequences if he gets arrested."

The new amendments also give police instructions on dealing with children. Officers are now being directed to interact with the children, ask what's been going on and how they have been affected. The police should also look for signs of child abuse.

"We view this change as a preventive measure," Ms. Kowal stated. "If we can show these children now that law enforcement is there to help them and to stop the violence, we feel that these children will become empowered, will know that someone is there to help them, will not feel responsible for the violence, and will not become our future batterers and/or victims."

She proceeded to describe how the new guidelines make it mandatory in cases of domestic violence for police to take temporary custody of all weapons, if they feel the victims are in danger or potential danger of being hurt by them.

In addition, Ms. Kowal said, police must assist a victim in obtaining emergency restraining orders if necessary, refer her to appropriate social services, assist her in getting to a safe place, and if she requests it, inform her when the abuser will be released on bail. After an arrest, a judge can order an abuser into certified batterers' treatment as a condition of probation, and, if the abuser fails to attend, a judge must hold a revocation of probation hearing.

And finally, police are urged to complete detailed incident reports, which may be needed for an effective prosecution–particularly when a victim is unwilling to testify. "Thorough record keeping will also help social scientists and statisticians get a better look at what's going on in Massachusetts in terms of domestic violence," Ms. Kowal reported.

The Massachusetts Criminal Justice Training Council received a grant from the Department of Justice to assist with the drafting of the police guidelines and to train police throughout the state. According to Ms. Kowal, all of the 6,000 to 7,000 police officers in the state will have been given the opportunity to be trained by the end of 1992.

Furthermore, she said, as a component of the federal grant, the CJTC plans to produce a small manual for every officer in the state which would contain the law as well as victims' rights cards in different

languages. In addition, in 1992, the Massachusetts Committee on Criminal Justice will also be conducting a survey of 25 to 30 police departments across the state to assess how the guidelines are being implemented.

Ms. Stiles worried that the new legislation and guidelines dictating police response would be meaningless if there was no commitment by the entire system to use them. In order to provide a true picture of how police are likely to react to the new guidelines, and how they already respond to domestic violence, Sergeant John Christensen discussed his experiences as a police officer and trainer on domestic violence issues.

"I can remember going to many, many calls for domestic violence every single night of the week. Domestic violence was definitely around in 1973–and probably 1873," said Sergeant Christensen. As a rookie, the Sergeant learned from his fellow officers how domestic violence cases were handled. As he recalled, "First thing the officer would say would be, 'Look lady, you're married to him? Well, I'm sorry, there's absolutely nothing I can do for you. You made your bed, you gotta lay in it.' [On] the next call. . . the lady would say, 'I'm not married to him, we just live together.' So I'd say, 'Okay, show me a rent receipt.' The *guy* would come up with a rent receipt and we'd be throwing the lady out the door, because she didn't pay the rent. Even though she was badly beaten up, *she'd* be the one to be put out on the street."

According to Sergeant Christensen, the police weren't actively involved and attitudes hadn't changed, even when the Abuse Prevention Act was passed in 1978. He said that even by 1986, police in the Somerville Domestic Violence Unit, supposedly one of the leaders in the field, were not conforming completely to the law–by failing to give out Victim's Rights Cards, for example.

In response, Sergeant Christensen started a formal training program of police officers on the domestic violence statutes. In 1986, Somerville was only one of three cities and towns in the state to do so.

Sergeant Christensen said he has seen a definite change in police attitudes towards domestic violence over the years. "We still have a ways to go," he said, "but the acceptance of the [new police] guidelines by police chiefs has been tremendous. . . And some chiefs are going well beyond what we have set down as the minimum standards."

However, Sergeant Christensen cited the issue of mandatory arrest as a controversial point in the amendments to the Abuse Prevention Act, and as a possible point of contention by police. He felt that there are certain circumstances where police officers should have the right to make their own decisions about whether or not arrest is the appropriate option.

Ms. Stiles pointed out, "Police response alone will never adequately address the problem of domestic violence; and the police cannot be held accountable for failing to protect battered women if, after an arrest, the

rest of the system fails. . . We are. . . still afraid for those victims who might be placed in increased danger if arrest happens without referral to services, without notification of bail release, or without incarceration of batterers with histories of serious abuse."

Her feelings were echoed by several participants, who pointed out that the attitudes of not only police, but legislators and judges, reflect the attitudes of the greater society at large, and are slow to change. It was noted that most police are very familiar with the lawsuit brought by Tracy Thurman, a severely battered woman who successfully won a 2.3 million-dollar lawsuit against a Connecticut police department for their failure to arrest her batterer. As Sergeant Christensen and others indicated, police are changing their behavior and following the law, if not because of a heightened sensitivity to domestic violence, then out of a fear of being held liable.

One luncheon participant suggested that further training needs to be done to address police officers' frustration at what they perceive to be inconsistent responses by the victims, by allowing the batterer to return home, or changing their minds about pressing charges. It was also noted that using battered women in training sessions has had a positive effect on improving police attitudes, in general, towards domestic violence.

D. SESSION 4—DECEMBER 17, 1991: THE NEED FOR TRAINING IN THE JUDICIAL SYSTEM

There is a public perception that if a woman calls the police, asks for a restraining order against her batterer, and conforms to the court procedures, that she will be assisted and her safety ensured. However, judges, clerks and prosecutors can strongly influence not only the outcome of a domestic dispute, but how victims perceive themselves and their circumstances. While no systematized training is mandated for judges and others in the judicial system, training has often been cited as a need by victim advocates.

The fourth working luncheon, held on December 17, 1991, featured Sarah Buel, then Assistant District Attorney and Supervisor, Domestic Violence Prosecution Unit, Norfolk County; The Honorable Austin T. Philbin, Presiding Justice, Gardner District Court; and John M. Connors, Esquire, Assistant Executive Secretary, Administrative Office of the District Court Department. The speakers examined the impact of the Abuse Prevention Act on judges and other court personnel who frequently deal with domestic violence cases, the needs and plans for training in Massachusetts, and model judicial training programs across the country.

As Attorney General Scott Harshbarger pointed out, members of the criminal justice system "can also determine, by virtue of how they handle the process, whether victims are stigmatized and deterred from taking control of their lives, or whether victims feel supported and empowered enough to break the cycle of violence in which they are entrapped." The Attorney General cited the 1989 Gender Bias Study of the Supreme Judicial Court as a mechanism to focus on the role of the court in domestic violence cases. "The Gender Bias Study. . . documented the fact that the court system has several major problems which have made it very difficult for women to seek relief or obtain justice from the court, or feel that they have been treated fairly."

Attorney General Harshbarger recognized the problems courts face, however. "At the same time that we passed probably the most enlightened, and maybe the most comprehensive set of amendments in this country to Chapter 209A, we were also one of the first states to face the economic recession. We reduced funding for courts, clerks, probation officers, police, prosecutors, and victim advocates. . . and for shelters and support services for battered women and their families," he stated.

Sarah Buel spoke about the gaps in the criminal justice system, from her perspective both as a prosecutor and as a formerly battered woman who was not protected by the court system. "From what I see on a day-to-day basis," she said, "we don't do a great job of protecting battered women, although there are exceptions."

"What is amazing to me," Ms. Buel continued, "is that even with the knowledge of successful programs, there is relatively little replication. We know what works. . . we don't need more committees to study this. . . we need some open-mindedness to say that we understand what the problems are and we are going to institute reforms. That we are going to stop covering up for each other and start to talk about who are the problem judges, district attorneys, and police. Because that's part of ending the silence and part of holding each other accountable."

Ms. Buel cited the need for accountability and specific changes within the judiciary. "It has to be something that we are insistent upon because of the power of judges to run their courthouses in a particular way. We must insist that probation enforces court orders, that battered women are allowed to speak at hearings, and are allowed to approach the bench and have some privacy. We must insist that the batterer is held responsible, and not allowed to take over the hearing, regardless of who he has hired on his behalf."

"It is also important to emphasize again the need for training among prosecutors, probation and parole, medical personnel, policy makers and members of the public health community–it is *not* simply any one group. We also need to emphasize that when we talk about judicial training, this is not about one two-hour segment; this has to be an ongoing process. But there must also be a willingness on the part of judges to say 'I am going to be open-minded. . . [and] listen when battered women, advocates, and batterers' treatment experts talk to me.'. . . We do judges no favor to act as though they were born knowing this information. None of us have been. And we have to be honest enough to acknowledge that and to hold each other responsible for educating ourselves and each other."

Ms. Buel leads judges through an exercise during judicial training to try to have them empathize with battered women, and see how limited their options often are, particularly if they have children and have little or no sources of income independent of their batterer.

She also described how domestic violence cases are handled by the Quincy District Court, which was chosen by the Domestic Violence Advisory Committee of the National Council of Juvenile and Family Court Judges as one of the 15 best court-based domestic violence programs in the country.

Ms. Buel pointed to the fact that with Judge Albert Kramer's leadership, "the Quincy District Court is a court where you have some sense that battered women are going to be heard. . . that there is going to be accountability and a revocation, if the restraining order is not adhered to."

Furthermore, the District Attorney's Office and Quincy Court hold briefing programs for battered women, and two psychologists who work

with the Domestic Violence Unit conduct battered women's support groups and do individual counseling and court advocacy for victims.

According to Ms. Buel, the successful court-based domestic violence programs have a common characteristic: a real involvement by all the players in the system. One way to facilitate this involvement is through a Family Violence Roundtable where judges, police, probation officers, clerks, shelter workers, and mental health and medical practitioners meet regularly to talk about the issues in that community that need attention and work.

Ms. Buel described a program in San Diego where in 70 percent of the cases where the victim cannot or will not go forward, the District Attorney's office is able to prosecute, and 85 to 90 percent of those cases are prosecuted successfully. She said this high success rate could be replicated throughout the country if there was a commitment by police to write reports, take photographs of injuries, and document all the statements of victims and witnesses in domestic violence cases.

In addition, Ms. Buel said, "The trainings for judges need to include such issues as the connection between domestic violence, child abuse, and juvenile delinquency. Our Gender Bias Study documented that in 70 percent of the cases where men attempted to get custody in this state, they did so successfully."

She also cited the need to examine our feelings about victims and who we think are "proper" ones. She urged the participants to consider how responses are different when the victim does not fit our image of what the victim should look like, i.e., when the victim is homosexual or substance-abusing, when they are elderly, or prostitutes, or differently-abled.

In his presentation, Judge Austin Philbin provided a context in which to view the problem of domestic violence. He quoted from *Women and Male Violence* (by Susan Schechter): "'Had abusive behavior been declared generally illegitimate, then a woman's right to leave and exist as a separate and independent person would have been supported with government services and resources.'" He credited the women's liberation movement as "the primary driving force in the illumination of the issue of battered women.'"

"The fact that the women's movement had to bring this issue to the forefront," Judge Philbin continued, "stands as a condemnation of the institutions of government, the church, and of male society. This cannot continue. The issue of an individual assaulting or beating a person that they love stands as an immoral act under any Judeo-Christian ethic. The issue of an individual assaulting or beating any person, loved or unloved, violates the laws of God, of the United States of America, and of the Commonwealth of Massachusetts. A beating is a beating. It is not . . . a 'domestic dispute.'"

Judge Philbin stated, "In order to combat domestic abuse on a broad scale, institutions must reflect on the aspects of their existence that support or condone violence." He cited works of Sam Keene (author of *Fire in the Belly*) and Robert Bly (author of *Iron John*) which isolated the pressures on men that compel them to employ power and control in relationships.

He also pointed out that the Abuse Prevention Law explicitly condemns violence, both legally and morally. "In addition," he stated, ". . . the guidelines recognize and require identification of the cultural and social influences that contribute to abusive behavior, but caution that such influences do not excuse the behavior. The programs must recognize that abuse is the sole responsibility and choice of the perpetrator, and is never justified."

According to Judge Philbin, however, the judicial system in some ways supports the prejudices and biases many people hold regarding victims and perpetrators. "The fact that a victim may have an odor of alcohol or have a drug history sometimes diminishes the seriousness of the violence to the victim. Repetitiveness of the victim's return to court is sometimes misunderstood."

He felt that judicial training must focus on the state of mind of the victim. "Judges and personnel within the system must understand that violence produces a dependence as a result of the victimization. In addition, the court must recognize that victims must make choices within the relationship. These choices sometimes require the victim to come into court and vacate the order so as to maintain her own or her children's safety. The court and people in the system must understand that the abuser and the victim, in most part, exist together outside of the court, and the mere existence of a judicial order does not necessarily protect the victim."

In Judge Philbin's view, the recent amendments to the abuse prevention laws have sensitized judges to the issue of domestic violence to some extent. Judges are exposed to an increased number of cases now being heard within the courts, and, because of the emergency response system for granting restraining orders, judges hear firsthand about the violence taking place in homes.

Mr. Connors pointed out the ways in which attitudes by judges and others in the criminal justice system had changed over the years, and the implications for judicial training. For example, in 1978 "It was not unusual for our office to get any number of calls complaining that people had simply been turned away; they weren't married and their cases had been screened out. This was in direct opposition to what the law said, since there was no restriction regarding the marital status of the parties. These days, I think the problems are a bit more subtle. When speaking of judicial training, we are not talking about a philosophical or political point of view that some judges may have problems with. What

we are talking about is the nature of the problem . . . domestic abuse involves cultural, societal, and to some extent, religious attitudes that run deep in society."

"To the extent that there are judges who allegedly are not sensitive to this problem," Mr. Connors continued, "this is not a question of providing memoranda, or giving speeches. It is a question of participating in a profound cultural change."

Mr. Connors recalled some of the problems encountered when the first version of Chapter 209A was enacted. "Chief Justice Zoll formed a committee to review the implementation of Chapter 209A, and a set of standards was published which sought to address those areas of ambiguity and difficulty that plagued effective implementation."

"For example," Mr. Connors said, "consider the issue of screening: the notion that someone at the counter, a clerk . . . could somehow deflect the complainant in accordance with some standard held by the people in the courthouse . . . . As an example of how this problem was addressed, the standards clearly took the position that there is to be no screening. The woman is to be assisted in filling out a complaint, and the matter brought before a judge."

He further described efforts to facilitate the smooth implementation of the law. The office of the Chief Justice has been working with the Domestic Violence Council, which is composed of pro bono lawyers and victim advocates with legal training. The office is also working on the problem of court jurisdiction, and the failure of courts to give immediate temporary support or to act on issues of custody. In addition, they will be producing a new set of standards to update the court's response with regard to the new law. Future judicial trainings will be designed to provide court personnel with a better and deeper understanding of the dynamics of domestic violence.

Mr. Connors cautioned that people must "keep in mind that the depth of the problem has to do with the background of the judges who implement the laws, and the difficulty in breaking free of some cultural traditions. Also remember that the courts, unlike some of the other agencies . . . are sworn to neutrality. And I think that the court's obligation to remain neutral can, in some instances, be misinterpreted as insensitivity."

Several of the luncheon panelists and participants pointed to the need for judicial training to be multidisciplinary. Other participants felt that judicial training should be mandatory, since currently, judges—unlike police—are not motivated out of a fear of being held liable for their actions. Alternatively, the participants asserted that other judicial procedures would need to be changed, for example stipulating mandatory sentencing of batterers.

E. SESSION 5—MAY 5, 1992: THE DOMESTIC VIOLENCE CRISIS IN MASSACHUSETTS AND THE NEED FOR AN INTEGRATED RESPONSE

In the spring of 1992, Governor William Weld declared a state of emergency in Massachusetts because of the dramatic rise in homicides due to domestic violence. By April, 1992, a woman was killed at the rate of one every nine days, in contrast to 1991's already high rate of one every 16 days. At the same time, budget constraints were of major concern, as support systems for battered women suffered from budget cuts.

The May, 1992, luncheon looked at how victims of abuse could best be served in times of dwindling resources. Guest speakers were Kim Scanlan, Housing and Direct Service Advocate, Harbor Me, Chelsea, Massachusetts; Gwen DeVasto, Program Director, Domestic Violence Program, Norfolk County District Attorney's Office; and James Hardeman, LICSW, MPA, Corporate Counseling Manager, Polaroid Corporation.

Ms. Scanlan described the plight of many battered women who seek assistance from shelters. "The problem is not only a matter of getting her to immediate safety," she said, "but of insuring that her long-term needs are met." According to Ms. Scanlan, that has been increasingly difficult as resources for subsidized housing, day care, and other assistance have become more and more scarce.

She detailed a number of obstacles that battered women face, housing being a primary one. "When a woman and her children flee the violence and go into shelter for battered women, their stay will only last between 14 and 90 days," she said. "Transitional Housing Programs after shelter last for up to one year, and there are only a handful of these programs in Massachusetts. The waiting list for Section 8 and low-income housing is at least 18 months long, and there is no new chapter 707 certificate housing available, which will also impact on Transitional Housing Programs. As a result, women and children can often wait years for housing, and they are at increased risk for homelessness."

Ms. Scanlan pointed out that battered women may find it difficult to leave their situations because they face a number of harsh economic realities, as well as society's expectations of what they should do. "The federal government estimates women are owed $18 billion in child support, and that 70 percent of absent fathers stop paying child support within three years of divorce. Women have less earning power, yet often have the primary responsibility for their children. Affordable child care is scarce, and child care vouchers have been continually cut and are almost non-existent. Twenty-five percent of batterers use child visitation as a way to control and harass their partners after separation. . . . The most difficult situation we at battered women's shelters face is working

with women and children whose batterers are in positions of power or who have connections with the criminal justice system."

She pointed to the increased level of media attention and awareness, which in turn has led to an increased demand for crisis intervention. Yet shelters require additional staff and funding to do all the work that is so desperately needed for prevention and education, the promotion of systemic changes, and finally, crisis intervention. She also noted how insufficient funding can affect the children of battered women. "On average, every battered woman who enters a shelter brings two children, yet there are only 20 battered women's child advocates across the state. Children of battered women are more likely to commit suicide, abuse drugs and alcohol, and to commit assault, and in half of the families where battering occurs, the children are abused, as well," Ms. Scanlan reported.

Ms. DeVasto described how a coordinated response system, utilizing a multi-disciplinary approach, "is the most effective way to empower women to live safer lives, while sending a strong message to batterers and society as a whole that family violence or partner abuse is a crime that will not be tolerated."

She detailed the key players in this network, and the impact they have had on domestic violence cases in their jurisdiction. "In the twelve years that the [Norfolk County] District Attorney's office has been committed to tackling this pervasive problem," Ms. DeVasto said, "we've come to join forces with the Quincy Court System, including probation, the clerks office, and judges, as well as the Quincy Police, area shelters, batterers' treatment programs, mental health and alcohol treatment programs, and housing and welfare assistance programs. We've also gone on to expand our program throughout Norfolk County."

Ms. DeVasto cited the Quincy police tracking system as the earliest outreach and first step in intervening on behalf of battered women. As she described, the District Attorney's Domestic Violence Counselors follow up with letters and phone calls to all victims of family violence incidents on which they receive police reports. Victims are also identified and assisted when they request restraining orders against their batterers. A separate restraining order office is staffed by trained clerks who assist victims. Daily briefings for all restraining order applicants are held in order to explain to victims their rights, the court process, community resources, criminal complaint options, and safety planning. Victims are encouraged to attend a six-week educational group followed by a twelve-week support group. Individual crisis counseling is also available, as is information, referrals for batterers' treatment, children's services, alcohol and mental health services, and housing and financial assistance.

In addition, Ms. DeVasto described how their specialized domestic violence prosecutor, Sarah Buel,[19] has the expertise to go forward without the testimony of the victim. Ms. Buel had trained all 27 police departments in Norfolk County on the San Diego model of investigating and gathering evidence to facilitate prosecution. Special prosecutors work closely with victims and domestic violence advocates to determine what action would lead to the greatest level of safety. Victims' safety and willingness to testify at trial are discussed and cases are evaluated to determine whether or not they can be brought forward with hearsay exceptions, photographs, medical records, and police testimony of other witnesses. As Ms. DeVasto stated, "We feel that the burden of prosecution should not be on the victim, who often fears retaliation."

Another important element of Quincy's coordinated response system is working closely with probation, Ms. DeVasto said, including enforcing intensive supervision and long-term batterers' treatment programs. Batterers are surrendered by probation immediately upon non-compliance with any condition.

According to Ms. DeVasto, community training and coordination has also been a top priority in the Norfolk County District Attorney's Office, and has reached over 5,000 professionals. "I've seen some extraordinary changes over the past decade," she stated. "Continued training has resulted in police, court personnel, and community agencies who are more enlightened and sensitive to the dynamics of violence and are therefore more effective in their intervention." She pointed out that although all court personnel and police receive domestic violence training, this model program has specially designated domestic violence police officers, probation officers, restraining order clerks, assistant district attorneys, court advocates, and counselors who are extremely sensitive to the needs of victims of violence.

Furthermore, she noted, "There is no separate funding in the court, the D.A.'s office or the police department for the Domestic Abuse Program. Each of these players altered their priorities, and reorganized and assigned staff as domestic violence specialists." People who are committed to solving the problem of family violence but who are isolated can not stop this ever-growing cycle of abuse, Ms. DeVasto noted. "All of these players must exist to work together hand-in-hand with the community. Having roundtable meetings with all players is the best way to problem-solve within any community, and to tackle the unique problem areas for each jurisdiction," she concluded.

Mr. Hardeman supported Ms. DeVasto's assertions that a coordinated response was effective. He described findings from a study he

19. AS OF THE DATE OF THIS REPORT, MS. BUEL IS DIRECTOR OF THE DOMESTIC VIOLENCE UNIT AND ASSISTANT DISTRICT ATTORNEY, SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE.

conducted comparing the effectiveness of Norfolk and Plymouth Counties to implement the Abuse Prevention Act and facilitate women's advancement through the system. Mr. Hardeman's study focused on police operation, the court adjudication process, and the influence of the district attorney.

"Data showed that before the Abuse Prevention Act was enacted, it was difficult and occasionally impossible for women to get legal protection and advance through the criminal justice system," said Mr. Hardeman. He proceeded to describe how the Norfolk County's network of integrated support–the "Quincy model"–is based on permanent educational and collaborative partnerships between existing agencies of the criminal justice system, and other agencies in the community.

"In contrast," Mr. Hardeman said, "the most heavily populated area of Plymouth County, Brockton, has advocates against spousal abuse through the local shelter, police department, and district attorney's office, but their strengths are not integrated to support one another. As a result, the Quincy Model has afforded victims improved accessibility within the system, education about their rights under the Abuse Prevention Act, and emotional support and clinical treatment, among other benefits," Mr. Hardeman explained.

Mr. Hardeman found that a greater proportion of victims in Norfolk County advanced through the Quincy District Court and appeared for judicial hearings; and that a greater proportion of civil protection orders were filed in Norfolk County than was observed in Plymouth County. He attributed this to the "partnership agreements" between the Norfolk County District Attorney/Family Service Unit, the Quincy District Court, and the Quincy Police Department.

One luncheon participant expressed concern that the "Quincy model" was missing an important component: the medical community. It was agreed that a stronger or more formal connection with the medical sector should be established.

Participants also discussed the need for other counties to develop approaches similar to the "Quincy model" in an effort to better respond to domestic violence in their communities.

F. SESSION 6—OCTOBER 23, 1992: RESPONSE OF THE MEDICAL COMMUNITY TO DOMESTIC VIOLENCE

Until recently, the role of the medical community in preventing, detecting and responding to cases of domestic violence has largely been unexplored. While mandatory reporting of child and elder abuse in Massachusetts has been legislated since 1973 and 1983, respectively, battering of women often continues to go unrecognized and unreported in medical care settings. But the medical community can play an important role in identifying and helping victims of domestic violence. Several studies have estimated that at least one out of every five women seeking medical attention in hospital emergency departments are there for symptoms related to domestic violence. Yet additional studies indicate that many such women are not correctly identified as victims of battering, and that health care professionals often fail to provide any referral or follow-up for abuse.

The luncheon session which explored these issues featured four speakers: Nancy Isaac, D.Sc., Research Associate, Injury Control Center, Harvard School of Public Health; Barbara Herbert, M.D., Attending Physician, Emergency Department, Boston City Hospital, and Assistant Professor, Boston University School of Medicine; Eli Newberger, M.D., Director, Family Development Program, and Medical Director, Child Protection Program, Children's Hospital Medical Center; and Emily Davern, L.I.C.S.W., Battered Women's Advocate, AWAKE Project, Children's Hospital Medical Center.

In her presentation, Dr. Isaac pointed out that local and national efforts have begun to encourage physicians, nurses, social workers, and other health care personnel to become more informed about domestic violence, and are providing guidelines to enable them to identify victims and help their patients live in safety.

Dr. Isaac suggested that these initiatives appear to be sorely needed. In a study she conducted with Dr. Ricardo Sanchez, former director of the emergency department at Brigham and Women's Hospital, only 14 (20 percent) of the 69 hospital emergency departments in Massachusetts studied claimed to have a written protocol in use for the identification and care of battered women. Dr. Isaac also asked emergency department chiefs to estimate the number of battered women, both confirmed and suspected, seen in their emergency departments each month. Fifty-eight percent of the respondents estimated that they were seeing five or fewer battered women each month. Dr. Isaac pointed out, "These are emergency departments which see an average of 2,400 patients each month, or 80 people each day; some departments see considerably more. But only 17 percent of the respondents estimated that they were seeing more than 10 battered women each month. . . . These numbers are quite

out of sync with much of the research that shows between 20 and 30 percent of women who come into emergency departments are battered."

While there may be differences across settings, Dr. Isaac asserted, "these numbers raise considerable concern because they suggest a widespread perception that this problem isn't presenting itself in the emergency department."

According to Dr. Isaac, one reason this is occurring is that medical students do not routinely receive training about domestic violence. She cited a 1988 study of 143 accredited U.S. and Canadian medical schools. Of the 81 percent of schools that responded, 53 percent reported that the students received no instruction in adult domestic violence. In another study, reported in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, 61 percent of physicians said they'd received no training on the issue.

A study conducted by Dr. Newberger for the Robert Wood Johnson Foundation tried to assess health care workers' perceptions of the adequacy of response to victims of domestic violence in five American communities. The researchers found that many of the health care professionals surveyed acknowledged domestic violence as a problem, but gave little attention to the identification, treatment, and follow-up of family violence cases. Dr. Newberger indicated that "professional responses within the health care sector were defined to some extent by limited knowledge, as well as by prejudice: sexism, racism, class elitism, ageism, and. . . homophobia."

Dr. Newberger cited several other findings from the study: "Little attention was given to the prevention of family violence. . . neither the problem of family violence nor service to victims appear to occupy a central position in medical practice. Furthermore, people who made career commitments to these areas were. . . not sufficiently respected as being along the mainstream of activities in medical institutions." In addition, "there was generally a lack of effective coordination among agencies responsibly addressing family violence."

Locally and nationally, steps are being taken to rectify this situation, as described by Dr. Isaac. In the fall of 1992, the Massachusetts Medical Society mailed educational packets to all physicians in the state to help them identify and respond to domestic violence victims. They have also held a training workshop for doctors, nurses, and other health care workers. The Women's Unit of the Massachusetts Department of Public Health has developed guidelines for responding to and caring for battered women within health care settings. The Massachusetts Chapter of the American College of Emergency Physicians has developed a task force, and plans an educational outreach effort to its members.

Perhaps the most far-reaching efforts, according to Dr. Isaac, are being made nationally by the American Medical Association (AMA) and the Joint Commission on the Accreditation of Health Care Organizations

(JCAHO), both of whose activities she described. The AMA's Physicians' Campaign Against Family Violence has disseminated a series of diagnostic and treatment guidelines on child abuse, child sexual abuse, domestic violence, and elder abuse. To date, approximately 2,000 physicians have joined the AMA's campaign. As of January, 1992, the JCAHO requires that all emergency departments and hospital-affiliated ambulatory care settings have protocols and training plans to address all forms of family violence in order to maintain their accreditation. Dr. Isaac also described other groups, including the American Association of Women Emergency Physicians and the Nursing Network on Violence Against Women, which have been active in the domestic violence field nationwide.

These initiatives not withstanding, Dr. Herbert asserted that there are barriers to the universal and effective implementation of domestic violence protocols. She referred to a recent study of providers' feelings towards domestic violence, where they describe taking on issues of battering as opening Pandora's box.

Dr. Herbert proceeded to describe how health care providers could get over these qualms: "We've learned that when we are comfortable asking our patients in clear, non-judgmental fashion, direct and straightforward questions. . . that overwhelmingly, our patients are willing to tell us."

She also stressed the importance of using common sense in evaluating patterns of injury which might indicate domestic violence, including injuries to the neck, face and throat, hands, elbows, and forearms. "One of the axioms we use all the time is that injury in more than three places in anyone who has not been struck by a car or had a motor vehicle accident, is due to battering until you prove otherwise," said Dr. Herbert.

Dr. Herbert cautioned that health care providers must realize that symptoms other than frank injuries may indicate battering. "Vague abdominal pain, vague headache, fatigue, non-specific gynecologic complaints. . . are problems that are traditionally cast off as the psychosocial problems of women without further exploration of their potential as indicators of trauma." This caution also applies to women who see physicians or go to emergency rooms for non-specific, "inappropriate" complaints, she said. They may be seeking sanctuary in the only place that is safe for them, yet not be able or willing to tell why they are really there. In addition, Dr. Herbert stated, health care providers should be aware that injuries during pregnancy, suicide attempts, and sexual assault should be scrutinized as possibly being related to battering.

She recommended that health care providers need to be able to tolerate their own personal discomfort when working with victims of domestic violence, and to be honest, but not judgmental. "We need to be able to say, clearly, 'The history you have given me is inconsistent

with the injuries that I see, and I am going to document that in the chart. If you ever want to talk to me or anyone else here about this, you're always welcome.' We must always remember that we could be wrong. . . but because battering has for so long been so hidden, we must maintain our index of suspicion and give the maximum room for any woman to come to us when she is ready," she said.

Dr. Herbert pointed out that there are no clear lines of distinction between victims of domestic violence and health care professionals–both battered women and batterers may be found among physicians, nurses, social workers, and others within the medical community. She also cited the fact that individual medical providers feel a sense of powerlessness because they can't always "cure" domestic violence, as they might other medical conditions. She also stated that "violence prevention requires a lot of resources, significant commitment, adequate staffing and space–and it doesn't always work. . . . A woman who's been injured and ends up leaving her husband. . . is often likely to leave behind health insurance and financial security, and come back to us less able to pay than when she was being battered." Furthermore, in an understaffed emergency department or clinic, taking the time to identify victims of battering may mean spending less time with other needy–and possibly battered–patients.

How can a health care institution effectively address these issues and overcome these barriers? One model program to address battering and child abuse is the AWAKE (Advocacy for Women and Kids in Emergency) Project of Boston's Children's Hospital, which was launched in 1986.

AWAKE is the first project to offer battered women's advocacy within a pediatric health care setting. As Ms. Davern explained, "Our goals at AWAKE are to offer to assist mothers in families where there is domestic violence, and to make the hospital a safe place to disclose abuse. As advocates, we take a stand against violent behavior, which supports victims and sends the message to hold batterers accountable. We work to support and empower mothers so that they can protect themselves and their children. . . . We also work to help mothers restore a sense of dignity, power and control over their lives. Another goal is to keep mothers and children together and safe whenever possible, which happens in most of our cases."

Ms. Davern runs a support group for survivors of domestic violence. She related the women's feelings that their doctors have no trouble asking about their history of health care, their history of disease and illness in the family, and their sexual histories, but they won't ask what's going on in their homes. The women want health care providers to ask them about abuse.

Ms. Davern cited the advantages of advocacy for battered women within a pediatric setting. "While many times batterers won't allow their partners to get health care for themselves, they often allow them to take

their children to the doctor–there is little stigma in seeking care in a pediatric setting. Furthermore, most women are highly motivated to get help for their children, and one of the key factors around motivating a mother to leave her batterer is harm to her child."

Participants and panelists agreed that more of an effort needs to be made to adequately address the needs of linguistic minorities, not only in terms of language barriers, but regarding cultural traditions, as well.

Participants also discussed under what terms a battered woman could be hospitalized for safety reasons alone. Dr. Herbert stated that in Massachusetts, admissions because of "observational status" have been covered under Medicaid and Medicare. She pointed out, however, that an institutional barrier to such admissions is not just the cost of having someone stay in the hospital, but the cost of having them stay there safely.

G. SESSION 7—DECEMBER 11, 1992: THE FAMILY PRESERVATION CONCEPT AND DOMESTIC VIOLENCE

In an effort to reduce the number of children placed in foster care, many departments of social services across the country have embraced the concept of family preservation: helping troubled families stay together by providing them with intensive support services. One key issue in the debate surrounding the family preservation model is that strict adherence to the model could result in the abusive parent being allowed to remain in the home. At the same time, there is a risk that an exclusive focus on the child might result in the child being removed from the custody of the nonabusive parent, rather than helping all nonabusive family members remain together and safe, away from their batterer.

This session explored whether or not family preservation is the best way to protect battered women and their children, and how social service workers and battered women's advocates could work together towards their common goal of keeping people safe. It featured Chris Butler, Partner, The Women's Law Collective; Pamela Whitney, L.I.C.S.W., Domestic Violence Consultant, Massachusetts Department of Social Services; and Jetta Bernier, Executive Director, Massachusetts Committee for Children and Youth, and Member, Special Committee on Family Support and the Child Welfare System.

"Trying to protect both mothers and children is difficult, and the ability of the criminal justice system or social services to sort out these overlapping yet sometimes competing interests, is fraught with danger," Attorney General Harshbarger stated. "Furthermore, if we make a mistake, if we misjudge the situation, then we may well take actions which have lifelong if not potentially lethal consequences."

Ms. Butler pointed out the inherent dilemma in trying to provide services to battered women while also trying to protect their children. She quoted researcher Angela Browne as saying that people should lose the word "should" from their vocabulary when working with battered women, because one can't presume to understand the danger, the losses, and the uncertainty that women face when they are trying to get away from their violent partners. "Yet," said Ms. Butler, "to work in child protective services. . . we are telling women what they should and shouldn't do in order to protect their children."

Ms. Butler discussed some of the problems battered women with children face. "Many women have been afraid to report violence going on in their home because they're afraid that ultimately, their children will be taken from them. And there is a realistic basis for that fear. Women have lost custody of their children temporarily and permanently

as a result of violence that occurred in the home, even though they were not the perpetrators of the violence."

"For years," Ms. Butler continued, "women often placed themselves at actual physical risk to keep their family together because they were told that that's what was best for their kids. When as a society we began to get a little better educated about issues of violence, we decided that maybe this wasn't safe, and furthermore, maybe it was bad for kids to be observing violence."

According to Ms. Butler, a result of that revelation was Project Protect, a policy of the Massachusetts Department of Social Services (DSS) that considered violence in the home to be a form of child abuse, which meant children in such a situation could be removed from the home.

"We know that when women are given support and assistance, they can do amazing things to protect themselves and their children," Ms. Butler stated. "But we have to give them the opportunity to do that. . . . We say, 'Get your kid out of a violent home,' but we don't look at the reality of what she faces: sometimes insufficient shelter space to house her and her kids, a legal system that can too often be callous and insensitive to their needs, and post-shelter housing that's practically impossible, especially for women of limited needs."

"As a society, we want to protect children," Ms. Butler asserted. "But if we take that as something separate and distinct from protecting their mothers, we're not helping kids. When children are going through. . . hard times, when they're living in fear, we're not doing them a service by taking them away from their mothers. In fact, we are giving them a very dangerous message: 'If your mother gets hurt in her house, what we're going to do is get you out to protect you.'"

Another obstacle to ensuring that women and their children are safe, said Ms. Butler, is that gender bias exists within social service systems, as well as in most other systems in our society. "It's not surprising to any of us that after a [child abuse] report is filed and an assessment is done by a social service agency, we have two very different kinds of service plans for parents in a violent home. In cases where the father is the perpetrator of violence, we still blame women, and say that the mother has failed to protect her children—either from violence at the father's hands or from observing violence of her at the father's hands." Service plans for mothers are often much lengthier than for fathers, she said, and include such stipulations as "get counselling, attend parenting classes, find suitable housing, and enforce all protective orders against the batterer."

"We tell these women to get help," said Ms. Butler, "but we don't necessarily make the commitment to them to help them see those things through—not for lack of caring but because there just aren't enough resources out there." Ms. Butler suggested that adoptions should not be

expedited in cases where battered women are doing everything that they realistically can to get help for themselves and their kids.

Ms. Butler cited a common frustration of people working with the courts on behalf of battered women: frequently, people in probate court often feel that the issues of violence have already been taken care of by another court, and tend to focus on the child's needs independent of the violence. "As if custody and visitation are decided in a vacuum," she said. ". . . Those of us who practice in the probate court, time and again are met with judges telling us that the batterer's relationship with his wife doesn't necessarily impact on his relationship with the children. That the way he treated her doesn't necessarily mean he doesn't have a wonderful, loving relationship with his kids, and should not affect how custody and visitation issues are played out in this court."

She warned that a woman could be prosecuted more often for failing to protect her children from her batterer if legislation which was filed as recently as 1992 were to pass. This legislation included language saying that anyone who allows a child to be harmed, abused or neglected, is guilty of criminal behavior and can be prosecuted, and it is feared that this would mean more battered women would be wrongfully charged. She also cautioned that a court reform bill could be interpreted to mean that when there are children involved, a woman can only file in the juvenile court system. If this is true, she predicted, it severely limits the number of courts victims of domestic violence can access, defeating one of the original purposes of Chapter 209A. Ms. Butler also pointed out that this legislation would focus on the children's needs more than the mother's needs. "We need to work together with the battered women's community to protect both women and their children," she stated.

Ms. Whitney concurred, saying, ". . . one of the major challenges facing us is how to integrate what we've learned from the battered women's movement about violence against women with what we know to be true about child abuse and neglect."

Ms. Whitney voiced her frustration at how often the public fails to make a connection between battering and child abuse. "Statistics from the National Women Abuse Prevention Project tell us that children who live in homes where domestic violence occurs are also abused at a much higher rate than the national average; yet it is discouraging that little is being done either nationally or at the state level to design services for these families," she stated. "When the problems of woman abuse and spouse abuse are discussed together, women who are mothers suddenly become undeserving victims. . . people who normally view abused children and battered women as deserving of help, rather than punishment, change their attitude when that battered woman is also a mother. We place responsibility on that mother who, it was formally agreed, needed our help not only to protect herself, but her children, as well. We believe she has chosen her partner over her children, we blame

her for failing to protect them, and we label her as neglectful. . . I firmly believe. . . that we can't separate the best interests of children from the best interests of their mothers. Any successful program we design must account for the effects of violence–not only on the children, but on women, as well. And both these factors should be considered when we evaluate any proposed programs or solutions."

She described the Department of Social Services' controversial initiative, Project Protect, designed to respond to child abuse cases where there was substance abuse and/or where children had witnessed or been directly injured by domestic violence. As she explained, "It was broadly interpreted to mean that domestic violence equalled child abuse and that all child abuse and neglect reports involving an incident of domestic violence should be automatically screened in for investigation." According to Ms. Whitney, DSS is currently revising its policy to say that any reports of child abuse involving domestic violence will be individually considered and screened in if there is obvious evidence of harm or risk of harm to children.

She discussed the concept of family preservation, the service model designed to prevent out-of-home placement of children and to preserve families. Ms. Whitney acknowledged that many battered women's advocates fear the policy will mean women will be encouraged to remain with abusive partners, but stated that this was not the Department's intention. Rather, she said, family preservation involves redirecting resources typically spent on foster and group care to fund community-based prevention-oriented services. "We're attempting to retrain social work staff to move away from an individual, problem-centered approach, and look at a more family-systems approach–one which builds upon a family's strengths and attempts to empower the family. The initiative will also streamline our existing permanency planning services so that, when appropriate, adoptions can be expedited. It is also an attempt to reduce the time that children remain in foster care if there's a hope for a family reunification," she explained.

Ms. Whitney discussed several domestic violence pilot projects at DSS to better serve families where mothers and children are being victimized. One initiative was to hire battered women's advocates for each of the four regionally-based Family Life Center teams. In the past, involving advocates has helped identify more cases of battered women during investigation of child abuse cases. A second project involves the creation of two interagency teams, one in Fitchburg and one in Roxbury. The teams include battered women's shelters, batterers' treatment providers, police, probation, and the medical community.

"We acknowledge that battered women, like others, may abuse and/or neglect their children," she stated. "However, you can't do a fair parenting assessment until a woman is safe. You can't expect that she

has the same choices available to her as does a mother who's not being victimized."

In closing, Ms. Whitney emphasized the importance of the criminal justice system and the battered women's programs to work with DSS to accomplish their agenda, and hoped her remarks instilled some hopefulness. Acknowledging that the issue is difficult and complex, she stated, "I think with the political will, the correct targeting of resources, and a real openness to tackle some of the attitudinal problems. . . we can design a system that will place equal value on the lives of women and children, and see their welfare as inextricably linked."

Speaking from the perspective of a children's advocate, Ms. Bernier outlined the ways in which battering behavior is linked to child abuse: batterers who abuse their partners may also be abusing their children; and batterers–and frequently their abused partners–may also have been the victims of abuse during their own childhoods.

She described some of the problems child abuse victims may develop as a result of lowered self-esteem due to the abuse they suffered. "One might sometimes see aggressive behavior in the male child, or behavioral problems expressed in school," she said. "In the female child, low self-esteem might, though not always, display itself in more withdrawn behavior. One may also find reduced social competence among those who've been abused. Female children may tend to turn their anger inward rather than expressing it outward at others, resulting in depression and anxiety."

Ms. Bernier added that male children may later become abusive towards their mother, girlfriend, or siblings, or become involved with alcohol and drugs. Females might express more self-abusive behaviors, including suicide attempts and runaway behavior. When two victims of abuse grow up and become involved with one another, violence may become a part of that relationship, she pointed out. She cited a study which indicated that abused women were eight times more likely to abuse their children while living with their batterers than after they had left the violent relationship.

Ms. Bernier went on to describe the recommendations of the Special Committee on Family Support and the Child Welfare System, an ad hoc group of child welfare providers, child advocates, and academics, for a new system to provide child and family services. "The Committee supports broad-based reforms at the national and state level in the areas of health care, housing, and child care. . . the child support enforcement and assurance system for Massachusetts, and other innovative reforms that would help create more economic security for families." As she explained, the Committee is urging the establishment of a comprehensive, community-based, family support system. Family resource centers, run by and for parents, could provide a variety of services, including home health visiting, community and parent education, support groups,

cultural programs, food pantries, and clothing and toy exchanges. The centers could also serve as safe and neutral visiting centers for children of battered women and their fathers.

As Ms. Bernier described, the Committee supports limiting the role of DSS to that of a child protection agency "that has a much more focused and narrow mandate: to investigate cases of the most serious abuse of children, cases in which intensive intervention is likely to be necessary." She added, "We are spending a great deal of money in our state screening out and investigating many families who don't belong in the child protection system and whose needs could be better met through a less intrusive, voluntary, community-based system of family support services. For example, of the 89,000 reports made to DSS in 1991, 61,000 were either screened out within 24 hours, or investigated but not substantiated." She pointed out that caseloads could be expected to become more manageable over time as family support services were made available to families to build parental self-esteem, increase individual coping skills, and reduce isolation.

Committee members will be taking the report across the state, meeting with battered women's advocates, adoptive and foster parents, groups concerned with issues relating to alcohol and other drugs, and additional interested parties, in an effort to refine the recommendations and build a constituency for change.

The luncheon panelists and participants debated with one another as to the best way to care for children who witness domestic violence. Everyone agreed that witnessing even a single act of violence, especially between parents, could be harmful to a child. As Ms. Butler pointed out, however, there needs to be a balance. "If we are asking DSS to screen in every child who has witnessed violence," she stated, "we will be discouraging women from disclosing the violence out of fear that once DSS comes in, they might lose their kids. Secondly, we will be overpowering a system that must prioritize cases." Participants agreed that there needs to be a greater focus on supporting families in need.

H. SESSION 8—JANUARY 27, 1993: BATTERERS' TREATMENT PROGRAMS: DO THEY WORK?

One of the 1990 amendments to the Massachusetts Abuse Prevention Act directs judges to order batterers into certified batterers' treatment programs. Historically, court-mandated batterers' treatment has been viewed as a way to help ensure the safety of women who remain in violent relationships, as a useful tool for handling first-time violent offenders, and as an important component of probation for convicted batterers. Advocates and members of the criminal justice system have been strong supporters of batterers' treatment programs for the role they can play in reducing or preventing future violence.

This luncheon explored the efficacy of such programs. The session featured Edward Gondolf, Ed.D., Professor of Sociology at Indiana University of Pennsylvania; Research Director of the Mid-Atlantic Addiction Training Institute; and Adjunct Assistant Professor of Psychiatry at Western Psychiatric Institute and Clinic of the University of Pittsburgh Medical School.

Attorney General Scott Harshbarger introduced the issue of batterers' treatment as an area of great concern. "We want to send the message, to perpetrators in particular, that acts of domestic violence are serious crimes, and that they will be dealt with severely. On the other hand, we are all aware that not all cases are prosecuted, but that even if they were, not all convictions would result in incarceration. Furthermore, incarceration may not be an appropriate response or a practical one, considering the problems of overcrowded prisons and the failures, to some extent, of the adult criminal justice system in dealing with many of these problems solely with incarceration."

Dr. Gondolf pointed out that there has been a tremendous reassessment of the last decade of efforts trying to deal with domestic violence. "The notion that dominated the 1980's—that we could treat individuals to undo the deep-seated social problems—is finally giving way to a sense that we need to face the vast range and depth of these problems in a more unified, coordinated, and systematic manner," he said. "Basically, that's the bottom line of our research and understanding about batterers' programs: that in and of themselves, they're not a magic potion by any means. But when they are coordinated with a variety of other interventions, including community services, and other legal, social, and cultural sanctions, they can reinforce the overall effort."

Dr. Gondolf asserted that most people don't view batterers' treatment with that attitude; instead, they simply want to know if they work or if they don't work, and base public policy on the answer. However, he pointed out that the reality of most treatments' effectiveness is not clear-cut.

With that caveat in mind, he described the findings of single-site evaluations of about 30 batterers' treatment programs, where comparison groups were not utilized. "About 65 to 70 percent of the men who complete these programs are free of violent behavior for six months to a year after completion, and that's verified by the partners they are with," he reported.

However, Dr. Gondolf continued, "Most of these outcome studies are based on who completes a program–the dropout rates are 50 to 60 percent. So we're really talking about a very small proportion of all men initially entering a program."

He indicated that if one were to look at the "success" rate of men from the time they first contacted the program, the statistics would be even worse. In a study he did of 200 men who contacted a Pittsburgh program, only two percent were still in the program after six months. This shows how difficult research on batterers' treatment programs is to evaluate. A further complication, according to Dr. Gondolf, is that batterers' tend to be difficult to locate for long-term follow-up.

Another problem for researchers, he reported, is that "we don't have a good picture of the other factors which may be responsible for the outcomes. The cessation of violence may not be the result of the program at all. It could be the fact that the wife or partner has received certain victim services. It could be the response of the police. It could be that the batterer no longer has access to the victim."

Furthermore, Dr. Gondolf asserted, most research findings don't examine the experiences of victims. The victims could still be living in terror from psychological abuse, including threats, while living free of physical violence. He noted that while batterers' treatment programs usually provide a much-needed timeout for victims, they may also give the women false hope. A study he conducted found that the strongest indicator for women returning to their partners was whether the partners were in counselling or not. "But by going back," he pointed out, "the woman not only endangers herself, but she undercuts the counselling. The greatest motivation for a batterer to stay in counselling and to change is the woman's insistence that she's going to leave."

Dr. Gondolf described a study which compared treatment versus arrest, and compared the effectiveness of different treatment modalities. This Canadian study found that men in a batterers' program were almost twice as likely not to repeat the crime compared to men who were just arrested. However, the results could be due to the researchers' "surveillance" represented by the repeated interviews in the more extensive follow-up with program participants.

A study done in Minneapolis several years ago, Dr. Gondolf related, compared three different types of treatment: a self-help group, a didactic group, and an intensive teaching and discussion program. All the programs were three months long. The didactic and discussion

programs had a success rate of about 60 to 65 percent, and they were much more effective than the open-ended, self-help type of treatment. Yet interestingly, Dr. Gondolf reported, "The terroristic threats measured as part of the outcome were not significantly reduced over time. Instead, what we see happening, in some programs at least, is that while the physical violence goes down, sometimes the psychological abuse goes up as a type of temporary compensation or displacement of the violence."

A third study Dr. Gondolf described was conducted in Baltimore by the Urban Institute of Washington, D.C. The study compared batterers who had been arrested with batterers who were arrested and who went through court-mandated counselling. This sophisticated study established comparable samples of arrested-only versus counselled batterers, and included an extensive follow-up of the dropouts. The results showed little difference between the two groups when the dropouts were accounted for. Moreover, those batterers in the counselling group who did repeat the abuse actually caused more injury and harm than the group that had just been arrested.

Dr. Gondolf compared the uncertainties around batterers' treatment programs to those surrounding programs for other types of destructive behaviors. In the alcohol and mental health field, for example, no one knows exactly what treatment method is most effective. "But there are some commonalities associated with the more successful programs," he stated. These include holding the batterer accountable for his behavior, having the treatment group provide a strong social support system, and a sense that the counselors and some of the clients who are in the process of changing act as role models.

"The programs are not magic potions," Dr. Gondolf noted. "But when these other things are present, change is more likely to take place. That's probably what we need to be focusing on: the social dimensions of these programs, and not simply the high-tech gimmicks that seem to be the craze today."

Dr. Gondolf cautioned that the programs can not be made to help everyone, especially those batterers with a criminal history, heavy alcohol and drug abuse, and anti-social disorders. "We need to begin to find different combinations of treatment, as well as different kinds of treatment, to deal with these problematic people. Perhaps we need to apply a different kind of treatment for batterers who abuse more sporadically, and for those individuals who have come to the courts for the first time."

He also pointed out that behavior change does not usually occur overnight, but is more a matter of peaks and valleys. Applying that to batterers, he said, "The outcome. . . is not simply stopping violence. It's stopping, and slowing down, and controlling behavior. The batterer may increase his violent behavior for a while and then he may be non-violent.

He may leave his partner for a while, then he may come back to her. He may get arrested again. We need to see these patterns and pathways more clearly, and try to orchestrate our interventions to reinforce them."

Lastly, Dr. Gondolf pointed out the importance of batterers' treatment programs being connected to other intervention systems in the community, especially those within the criminal justice system. He emphasized the importance of coordinating other services before and after batterers come in contact with a treatment program. In addition, he described how standards for batterers' treatment programs were being developed in different states, including Massachusetts. "These standards ensure that the programs are maximizing their efforts to be accountable to their community at large," he commented, "as well as to recruit the resources and cooperation of the community. In this way, batterers' treatment programs can reach out, as well as pull people in, in order to do their work."

Formal responses were invited from representatives of two local batterers' treatment programs: Susan Cayouette, Ed.D., clinical director of Emerge, and Fernando Mederos, M.Ed., co-founder and director of Common Purpose Associates.

Dr. Cayouette pointed out that using narrow criteria to assess batterers' treatment programs will produce much more positive results than using more extensive criteria, such as measuring changes in batterers' attitudes and respect towards women. She added that in the 15 years Emerge has been operating, they've learned that they need to involve women in the process. "I think it's important to give women decision-making policy control in a batterers' treatment program," she said. "Not just to take their input and not actually follow through in what they think is important. We must always be willing to listen to battered women because they are the experts when it comes to battering." She stressed that women need to be invited to critique programs, sit in on groups, and give feedback to group leaders.

Dr. Cayouette stated that Emerge's client focus is always on the safety of battered women and their children, and not on the needs of the batterers. Mr. Mederos agreed that an important part of his work with batterers is communicating with their partners and finding out exactly how violent the men have been, and warning them when they suspect an escalation of threats and violent behavior.

Mr. Mederos noted how chronic a population batterers are. "These people have not been held accountable for a long time," he noted. "In fact, we men who are violent have not been held accountable for this kind of violence ever in our history, at least in Western civilization. . . So the work is not just to change them. . . the effort is really to focus on the safety of the woman and get the different social systems and institutions working together."

Noting how intractable the behavior of many batterers can be, Mr. Mederos expressed his concern about the movement in Massachusetts to shorten the length of treatment from the current minimum of 40 hours to six or eight sessions, which was being promoted so as not to "inconvenience," he quoted, the batterers too much. "That's very worrisome," he said, "because the fact that we are able to continue working with men for at least a year and sometimes longer, allows us to hold them accountable, and to make sure they get arrested if they become very dangerous or if we know that they've issued a threat."

A participant asked about the success of anger-control programs. Dr. Gondolf noted that these often controversial programs have actually had about the same success rates in the short-term as have programs that teach a broader array of skills and programs which aim for resocialization of batterers.

Another participant asked whether there was any reliable way to predict the degree of violence a batterer would resort to. Mr. Mederos responded that he was currently working on developing a tool for assessing lethality, and that many of the most violent batterers were obsessed with their victims and had had prior contact with the judicial system. Dr. Cayouette said that a complicating factor is that many people tend to underestimate how dangerous a batterer could be. Dr. Gondolf pointed out that previous efforts to predict extreme violence have not been successful, and that characteristics which seem logical–such as possessing firearms–are not predictive.

There was a discussion of how batterers' treatment is funded. Dr. Cayouette suggested that if judges didn't continue to disproportionately refer poor people and people of color to treatment programs, wealthier batterers could subsidize the cost of treatment for those who are unable to contribute to the expense. Dr. Gondolf pointed out that making batterers' treatments more effective is not necessarily more expensive. Attorney General Harshbarger added that in the long-term, educational efforts aimed at preventing domestic violence would be the most cost-effective.

Dr. Gondolf responded to questions regarding batterers' treatment programs targeted to specific populations. He agreed that not enough research has been done on the impact of treatment methods on cultural and linguistic minorities or on teenage batterers, although he agreed it makes sense to target youth before the violent behavior becomes so ingrained in adulthood that batterers are resistant to treatment.

Participants agreed that treatment programs for batterers who abuse drugs and alcohol is also problematic. Dr. Cayouette reported that Emerge urges men to get drug treatment first, and that the two problems can't be equated. She pointed out that society does not offer the same support systems for battering as it does for alcohol abuse. For

example, Alcoholics Anonymous meetings are held frequently throughout the country.

Dr. Gondolf was asked about the effectiveness of prison-based treatment programs. He replied that batterers' treatment programs do not necessarily result in positive outcomes after prison. However, in-house programs which continue to follow-up after the batterer is released seem to have some impact.

A Survey of Domestic Violence Programs in Legal Education

Mithra Merryman*

I. INTRODUCTION

The past twenty years have seen dramatic change in the legal system's response to women who have been battered. The creation of distinct legal remedies for battered women, or their specific inclusion within the class of people protected by existing legal remedies, has occurred in a broad range of substantive areas including family law, constitutional law, criminal law, torts, civil rights, housing, benefits, and immigration. Yet in traditional legal education, the experiences of battered women and the realities of domestic violence[1] are virtually ignored.[2]

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The ideas in this article all originate from the insightful reflections of those who teach these courses and who gave unstintingly of their time for numerous interviews. This article is a tribute to their work and their capacity for inspiring others through this work. Thank you to: Beverly Balos, Mary Becker, Cynthia Grant Bowman, Susan Bryant, Christine Butler, Margaret Byrne, Naomi Cahn, Janet Calvo, Donna Coker, Karen Czapanskiy, Clare Dalton, Nancy Dowd, Michael Dowd, Lois Kanter, Catherine Klein, Nancy Lemon, Martha Mahoney, Holly Maguigan, Joan Meier, Lauren Robel, Wendy Rogovin, Susan Deller Ross, Ann Shalleck, and Morrison Torrey.

I apologize in advance for any courses or clinical programs that I may have missed. These omissions were unintentional.

Special thanks to Elizabeth Schneider who patiently supervised and guided my work throughout. I am especially grateful to Tamar and Tom Augst, Mary Bowe and Sarah Buel for their thoughtful editing and comments. Michael Kan also provided invaluable support in innumerable ways.

1. I use the terms woman-abuse, battering, and domestic violence interchangeably, although as a feminist I realize the implications of using a "generic" term which "obscure[s] the dimensions of gender and power that are fundamental to [the] understanding" of this problem. *See* FEMINIST PERSPECTIVES ON WIFE ABUSE 13 (Kirstie Yllo & Michelle Bograd eds., 1988). However, for political reasons, professors may deliberately choose a generic term when naming a course.

2. *See* Nancy Erickson, *Final Report: Sex Bias in the Teaching of Criminal Law*, 42 RUTGERS L. REV. 309 (1990) (spouse abuse covered by only one criminal law casebook of seven surveyed).

In 1984 Catherine Klein, Director of the Family Abuse Project at Columbus School of Law, Catholic University of America, lectured on ways to incorporate issues

Only one law school, Boalt Hall School of Law at the University of California-Berkeley, offers an annual seminar on domestic violence.[3] Clinical education programs are more likely to cover domestic violence law, but only thirteen clinical courses at twelve American law schools specifically concentrate on serving women who have been battered.[4]

This paper examines issues surrounding the education of law students about domestic violence, first addressing the reasons for including woman-abuse within the law school curriculum and then detailing the pedagogical advantages of teaching the subject.[5] The method for treating these issues is through an analysis of the current law school courses and clinical programs that focus exclusively or primarily on domestic violence.[6] Using examples and quotes from the professors

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of domestic violence in family law classes. Her own informal survey of family-law casebooks revealed that only one casebook raised the issue of spouse abuse and almost none of the professors who attended the lecture were covering these issues in their classes. *See* Klein, *infra* note 105.

See also Nancy Erickson & Mary Ann Lamanna, *Sex-Bias Topics in the Criminal Law Course: A Survey of Criminal Law Professors*, 24 U. MICH. J.L. REF. 189, 206 (1990). This survey of 238 criminal law professors found that: 81% taught self-defense by battered women, dedicating an average of 85 minutes of class time to the issue; and 70% discussed spousal abuse for an average of 86 minutes. *Id.* at 201. The survey also showed that more female than male professors incorporate spouse abuse into their criminal law courses. *Id.* at 227.

See generally *Symposium on Women in Legal Education: Pedagogy, Law, Theory, and Practice*, 38 J. LEGAL EDUC. Nos. 1 & 2 (1988) for articles on the inclusion of gender issues in the law school curriculum.

3. Martha Mahoney intermittently teaches a domestic violence seminar at the University of Miami School of Law.

4. Information of author as of June, 1993. See Appendix A for Methodology. The author apologizes for any omissions. I was unable to include in this paper a discussion of one clinical program and two domestic violence courses which will be taught in the spring semester of 1994. Judith Greenberg will conduct a clinical program at New England School of Law; Sarah Buel will teach a seminar at Boston College Law School; and Clare Dalton will teach a seminar at American University's Washington College of Law.

5. For a detailed analysis of a seminar course and a clinical program focusing on domestic violence, see Elizabeth M. Schneider, *Violence Against Women and Legal Education: An Essay for Mary Joe Frug*, 26 NEW ENG. L. REV. 843 (1992); Susan Bryant & Maria Arias, *Case Study, A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem Solving Vision of Lawyering That Empowers Clients and Community*, 42 J. URB. & CONTEMP. L. 207 (1992).

6. An equally important strategy in bringing issues of domestic violence to the forefront of legal education is integrating discussion of these issues into all courses and clinical programs at law schools. *See* Erikson & Lamanna, *supra* note 2, at 191. The authors offer contradictory views on which approach for incorporating feminist issues is the most productive. Early in their paper they argue that a class on gender-related topics is "less satisfying than it may at first seem, for it leaves the body of law and the core teaching of law unchanged. If gender-related topics are treated separately and discretely, the possibility of illuminating traditional topics by including the perspective provided by women's experience remains unrealized." *Id.* at 192.

who teach these courses and clinical programs, I will relate what makes these courses valuable and a desirable addition to law school curricula.

The primary intent of this paper is to aid the professor or practitioner who has contemplated the idea of either teaching a course on domestic violence or starting a clinical program that incorporates legal services to battered women. I also want to reach those students who desire to take an active role in forming their legal education by petitioning their law schools to teach the courses they find important.[7] I particularly want to emphasize the enormous potential of these courses to transform a student's legal education and the excitement that these courses generate in the students and the schools in which they are taught.

Curricular offerings on domestic violence teach students not only the theoretical, social, and legal implications of battering, but also the role that the law can play in effecting change in the lives of women who have been battered. These programs are also uniquely feminist: they are about the violence done primarily to women,[8] taught by women,[9] taken by mostly women students,[10] and involve feminist methodology. These

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However, through their survey, which tested for the effects of having in the curriculum a sex discrimination course on whether or not gender-related topics would be covered in the criminal law course, they found that the presence of a sex-based discrimination course actually increased a feminist perspective in other courses:

> [I]f a sex-based discrimination course has any general effect, it is to encourage a feminist or critical perspective on the law in other parts of the curriculum. Rather than drawing off the issues of sex bias from required core classes, sex-discrimination courses seem to create a climate in which broad issues of sex bias will be addressed throughout the curriculum.

Id. at 235.

This paper has a much narrower focus and urges the creation and inclusion in curricula of classes specifically focusing on violence against women.

7. Several of the courses in this survey started as a result of student initiative. *See infra* notes 66-71 and accompanying text.

8. Studies repeatedly show that in 95% of the cases of domestic assault, women are the victims. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 21 (1983). *See also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 8 (1989).

9. My research found no male professors teaching courses on domestic violence in law school. Michael A. Dowd runs the Battered Woman's Justice Center, a partnership between the State of New York and Pace University School of Law. He does some work with the Appellate Clinic at Pace University School of Law is not teaching at the law school. Interview with Michael A. Dowd, Battered Woman's Justice Center (Mar. 1992).

10. This is not to suggest that the exclusion of men is desired in any way. Feminist theory is about inclusion, not exclusion. *See* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

courses involve and excite women students whose interests and viewpoints are often ignored in law schools and legal education.[11]

The impetus for this paper came from my own experience as a student in such a program. As a second year student at Harvard Law School, I was a member of Visiting Professor Elizabeth Schneider's Battered Women and the Law class.[12] The experience was the most intense, challenging, and positive one that I had during law school, a sentiment shared by many of my classmates. The class formed into a cohesive and mutually supportive group almost immediately. It confirmed my conviction to dedicate my career to working with women who have been battered. Because this class had such an enormous, transformative impact on my view of law, law school, and even of myself, it raised the question of why legal education regularly excludes this topic from the curriculum.[13]

Thus, I started this paper by interviewing the directors of clinical programs and professors[14] of courses that address domestic violence.[15] Excerpts from these interviews provide the core substance of my paper. Part II provides a brief overview of the seminars and clinical programs to quickly familiarize the reader with the range of possibilities presented by the programs and the professors who teach them. Appendix B contains a full description of each course. Part III presents the reasons why courses on domestic violence should be included in the law school curriculum. Part IV highlights the pedagogical advantages of a course on domestic violence. Part V compares the substance of three seminars to illustrate the wide range of topics that can be taught and the different modes of approaching the topic. Part VI offers some suggestions of

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11. For example, when Holly Maguigan joined the Criminal Defense Clinic at New York University School of Law in 1987, the clinic began to take on as clients battered women charged with felony offenses for killing or assaulting their batterers. Shortly thereafter, the number of female students in the clinic increased. She pointed out, though, that while the work attracts women (and feminist) students to the clinic, a feminist viewpoint may be very pro-law enforcement as to other crimes. Maguigan, *infra* note 113.

12. For a full description of the course and the students' experience in the course see Schneider, *supra* note 5.

13. For an exploration of the exclusion of race issues from the core curriculum see Frances Lee Asley, *Race and the Core Curriculum*, 79 CAL. L. REV. 1512 (1991). *See also* Mari J. Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988); Kimberlee Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1988).

14. The actual titles of each of the women I interviewed is included in each course description in Appendix B. I use the term professor, although due to the marginal nature of clinical education, some of the women I interviewed are in non-tenure-track positions. *See* Elizabeth M. Schneider, *Task Force Reports on Women in the Courts: The Challenge for Legal Education*, 32 J. LEGAL EDUC. 87, 89 (1982).

15. See Appendix A for a full description of the methodology.

issues to consider when starting a course or clinical program on domestic violence.

II. OVERVIEW OF THE PROGRAMS

This paper focuses on seventeen programs at sixteen law schools.[16] Of these, all but four include a clinical component. Seven courses are seminars on domestic violence, most of which include an optional clinical component, or require some direct advocacy work with clients, even if students receive no extra credit for this work. Ten programs are in-house clinical programs with classroom components which either focus completely on lawyering skills and process,[17] or offer a mix of domestic violence law and lawyering skills.

The clinical or direct client contact experience offered to students in the programs also differs greatly. The thirteen courses with clinical components break down broadly into three groups: 1) nine offering clinical placements doing civil litigation; 2) two offering placements doing only criminal litigation; and 3) two offering a combination of both civil and criminal litigation.

Of the civil litigation clinics, three of these concentrated on obtaining civil protection orders[18] for battered women;[19] in the other three clinics students could work on a range of legal services work in addition

16. *Id.*

17. A "lawyering process" course refers to a course which focuses on learning lawyering skills and emphasizes the concepts of role and process. *See generally* GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978).

18. I use the term "civil protection order" to describe orders granted under statutes specifically enacted to provide relief for victims of domestic abuse. All of the statutes allow the court to grant "refrain from abuse" orders, and many allow for other forms of relief such as vacate orders, child custody and support, and monetary compensation. *See generally* Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43 (Spring 1989).

19. The Domestic Violence Clinic at Boalt Hall School of Law, University of California-Berkeley taught by Nancy Lemon; The Gender and the Law Clinic at University of Minnesota Law School taught by Beverly Balos; The Sex Discrimination Clinic at Georgetown University Law Center taught by Susan Deller Ross and Naomi Cahn; The Domestic Violence Clinic at Northeastern University School of Law taught by Lois Kanter; The Battered Woman's Advocacy Project at Suffolk University Law School directed by Christine Butler; and the clinical component of Stanford University Law School's domestic violence seminar taught by Donna Coker. Students in these clinical programs primarily obtained civil protection orders for battered women, and aided clients with contempt orders arising from the protection orders.

TABLE 1
COURSES BY CLASS TYPE

LAW SCHOOL	INSTRUCTOR	NO. STUDENTS CLASS:CLIN.	HOURS/WEEK		CLINICAL
			CLASS	CLIN.	
DOMESTIC VIOLENCE ONLY					
Boalt Hall	Lemon	16-32/sem.: 2-4/sem.	2	8	Optional
Harvard	Schneider	40/sem.: 17/sem.	2+1	10-20	Optional
Miami	Mahoney	12/sem.	2	-	None
Northwestern	Bowman	10/sem.	3	-	None
Stanford	Coker	18/sem.	3	1	Optional
U. of Florida	Dowd	15/sem.		-	None
U. of Chicago	Becker	20/sem.	3	-	None
DOMESTIC VIOLENCE & LAWYERING PROCESS					
CUNY	Bryant	12/yr.	4	20-24	Required
Georgetown	Ross/Cahn	10-12/sem.	4	20-25	Required
Maryland	Czapanskiy	6-8/sem.	2	16-20	Required
Minn.(civil)	Balos	6/sem.	2	16-20	Required
Minn.(crim.)	Balos	6-12/sem.	2	16-20	Required
Northeastern	Kanter	6-8/qtr.	3	20	Required
LAWYERING PROCESS ONLY					
American U.	Shalleck	8/yr.	3	20	Required
Catholic U.	Klein	20/sem.	4	16	Required
New England	Engler	8-16/sem.	2	18	Required
N.Y.U.	Maguigan	16/yr.	5	15-20	Required

to obtaining protection orders[20] including divorces, child support,

20. The Women and the Law Clinic at Washington College of Law, American University taught by Ann Shalleck; The Family Abuse Project in the Civil Litigation Clinic at Columbus School of Law, Catholic University of America taught by Catherine Klein; and The Battered Women's Rights Clinic at City University of New York Law School at Queens College taught by Susan Bryant.

TABLE 2
STUDENT'S CLINICAL EXPERIENCE

LAW SCHOOL	PROTECTION ORDERS	LEGAL SERVICES	CRIMINAL PROSECUTION	CRIMINAL DEFENSE
American U.	X	X		
Boalt Hall	X			
Catholic U.	X	X		
CUNY	X	X		
Georgetown	X		limited	
Harvard	X	X	X	
Maryland	X	X	limited	limited
Minn. (civil)	X			
Minn. (crim.)			X	
Northeastern	X	limited	limited	
N.Y.U.				X
Suffolk	X		limited	
Stanford	X			

abuse and neglect, benefits, housing, and immigration.[21] One criminal program[22] assists in the prosecution of misdemeanor level domestic assaults by batterers. The other criminal program[23] does criminal defense work exclusively, some of which involves defending battered women who are charged with felonies for killing or assaulting their batterer. Finally, there are three clinical programs[24] which combine both civil and criminal work. Students in these clinics engage in general

21. Not all clinics provide legal services in every one of these areas. This list is only intended as an example of the type of legal services work a student might do with a battered woman client. For a full description of each clinical program's work see Appendix B.

22. The Domestic Abuse Prosecution Clinic at the University of Minnesota Law School taught by Beverly Balos.

23. The Criminal Defense Clinic at New York University School of Law taught by Holly Maguigan.

24. Karen Czapanskiy's practice group at the University of Maryland School of Law Clinic; the clinical component of the Battered Women and the Law seminar at Harvard Law School taught by Elizabeth Schneider.

civil legal services and may provide criminal defense or work with assistant district attorneys prosecuting misdemeanor level domestic assaults. The emphasis in all of the mixed clinics is on civil work.

III. THE IMPORTANCE OF TEACHING ABOUT DOMESTIC VIOLENCE

Part of teaching about any subject involving feminist theory seems inherently to involve educating others about why the particular subject should be taught in law school.[25] As many professors doubt the necessity of discussing woman-abuse within highly relevant courses, such as criminal law or family law,[26] the idea of teaching an entire course on the subject may provoke disbelief among colleagues and deans.[27] I offer this section as a beginning point for the further articulation of the importance of including domestic violence courses in legal education.[28]

The first and foremost reason why it is crucial to teach about domestic violence is that it is an enormous social problem that the law and lawyers need to address. In the United States, domestic violence is the leading cause of injury to women between the ages of fifteen and forty-four.[29] Statistics from the F.B.I. show that women are nine times safer on the streets than in their own homes.[30] The failure to stem the tide of violence against women results in the death of more than 1,000 women per year at the hands of their abusive partners.[31]

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25. *See, e.g.*, Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989) (discussing of the applicability of feminist theory to tort law).

26. For a discussion of domestic violence in family law courses see *supra* note 2.

27. *See, e.g.*, Deborah L. Rhode, *The No-Problem Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1733 (1991) (recounting her dean's reaction when she first expressed an interest in teaching a course on sex discrimination at Stanford: "Not only was it a field he diplomatically described as 'mush,' but it would 'brand me as a woman.'").

28. *See also* Schneider, *supra* note 5. There have also been at least two panels on teaching about domestic violence. The first, *Teaching About the Battering of Women: Women's Experiences, Legal Responses and the Educational Project*, was held at the Women and the Law Project Meeting of the 1992 AALS Annual Meeting. *Women and the Law Project Meeting at the 1992 AALS Annual Meeting, in* the AALS-WLE NEWSLETTER, Mar. 1992 [hereinafter AALS-WLE NEWSLETTER] (including a summary of the panelists' discussion). The second, *Panel on Teaching About Battering at Policy in the Nineties: A Crit Networks Conference*, was held on April 12, 1992. A copy of a summary of the panel discussion is on file with the author.

29. Antonia C. Novello, M.D., M.P.H. et al., *From the Surgeon General, U.S. Public Health Service: A Medical Response to Domestic Violence*, 267 JAMA 3132 (1992) (citing 134 AM. J. EPIDEMIOL. 59-68 (1991)).

30. *Id.*

31. KRISTINA ROSE & JANET GOSS, DOMESTIC VIOLENCE STATISTICS, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE, BUREAU OF JUSTICE STATISTICS 12 (1989).

The consequences of domestic violence do not end with their effects on women; instead, they are felt throughout society. For example, an estimated forty percent of the homeless population is women and children fleeing abuse.[32] In 1987, the total estimated health care costs resulting from domestic violence was approximated at $44.4 million with indirect costs of 175,500 days lost from paid work.[33] The current estimate is between five and ten billion dollars each year.[34] The largest costs to society, however, result from the transmission of violent behavior from batterers to their children; witnessing violence is enough to cause children to behave delinquently.[35] Stopping violence in the home may be a key factor to slowing the explosion of criminal violence in our society.[36]

Statistics indicate that some of the clients that lawyers serve, whether they are aware of it or not, will be victims of domestic violence. Knowledge of the dynamics of abuse and of the legal remedies is important to students who pursue a wide variety of careers. While it is clear to many that legal services and family law attorneys deal regularly with battered women, the criminal defense lawyer may not know that in the United States, sixty-three percent of the males between the ages of eleven and twenty doing time for homicide, killed their mothers' batterers.[37] The prospective prosecutor may not realize that a major portion of her misdemeanor caseload will be domestic violence cases[38] or that thirty-one percent of all women killed in America are murdered by their husbands, ex-husbands, or boyfriends.[39] Victims of domestic violence are also increasingly successful in their civil suits for damages, not only against their batterers, but also against third parties such as municipalities and their law enforcement agencies, and insurance

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32. Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 420, 421 (1991).

33. Susan V. McLeer & Rebecca Anwar, *A Study of Battered Women Presenting In Emergency Departments*, 79 AM. J. PUB. HEALTH 65-66 (1989).

34. *What You Can Do About Family Violence: A Federation Guide to the Physicians' Campaign Against Family Violence*, AMA Report (July 1992) [hereinafter *Physicians' Campaign*].

35. *See generally* Gerald T. Hotaling & David B. Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Correct State of Knowledge*, 1 VIOLENCE & VICTIMS (Summer 1986).

36. Jeffrey Fagan & Sandra Wexler, *Crime at Home and in the Streets: The Relationship Between Family and Stranger Violence*, 2 VIOLENCE & VICTIMS 5, 11 (1990).

37. Sarah Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213 (1988).

38. Celestine Bohlen, *Domestic Violence Arrests Quadruple in New York City*, N.Y. TIMES, Dec. 28, 1988, at B3 (the number of domestic violence cases referred for prosecution in Manhattan rose from 1,003 in 1987 to 3,271 in 1988).

39. Zorza, *supra* note 32, at 421.

companies under homeowners, life, general liability, and professional liability policies.[40]

It is professionally responsible to teach about domestic violence. The medical profession has already acknowledged the pervasive and harmful effects of domestic violence in society.[41] The American Medical Association has launched a National Campaign Against Family Violence in order to educate physicians about woman-abuse and their role in responding to it.[42] The American College of Obstetricians, among others, has already included issues of domestic violence within their medical training programs, and other medical organizations have followed.[43] The legal profession should do the same.[44]

A course in domestic violence also offers professors an immensely rich subject which covers a wide-range of legal doctrine, invokes a number of different jurisprudential frameworks, and engages students in an interdisciplinary examination of responses to woman-abuse. Because the experience of battering affects the whole spectrum of a woman's life, it also involves the response of the entire range of legal and administrative systems. For example, in her domestic violence seminar[45] at Boalt Hall School of Law, University of California-Berkeley, Professor Nancy Lemon teaches: civil litigation issues, including tort law, temporary restraining orders, custody issues, mediation and visitation disputes; criminal litigation issues, including prosecutorial policy, evidentiary issues, battered women as defendants, and marital rape; and administrative and federal issues such as welfare and immigration law. The legal response to domestic violence is grounded in a wide range of substantive legal areas. That doctrine forms the core, although by no means the whole, of a domestic violence course.[46]

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40. *See* LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS, FAMILY VIOLENCE, CONFLICT & SEXUAL ABUSE (1989 & 1990 Supp.). The prospect of tort liability has done a great deal to increase awareness of battering. Cities and towns throughout the U.S. standardized training and response to domestic violence calls after Tracy Thurman won a $2 million judgment against the City of Torrington. Thurman v. Torrington, 595 F. Supp. 1521 (D. Conn. 1984).

41. *See generally* Novello, *supra* note 29.

42. *See generally Physicians' Campaign, supra* note 34.

43. Teri Randall, *ACOG Renews Domestic Violence Campaign, Calls for Changes in Medical School Curricula*, 267 JAMA 3131 (1992). Dr. Elaine Alpert, Assistant Dean for Student Affairs at Boston University School of Medicine, has created a four-year curriculum on family violence for medical students.

44. To date, there have been no proclamations by the American Bar Association on the legal profession's responsibility to assist victims of domestic violence or to train lawyers in this field.

45. Syllabus and materials available from Professor Nancy Lemon at Boalt Hall School of Law, University of California-Berkeley School of Law.

46. See *infra* Part V for a discussion of the substance of three seminars.

In addition to the study of legal doctrine, there are also a number of jurisprudential frameworks that address the way the law responds to domestic violence, including feminist theory,[47] law and society, Critical Legal Studies, and Critical Race Theory.[48] Students can learn and compare the approaches of the different jurisprudential frameworks and their ability to provide theoretical solutions to the problem of woman-abuse.

Studying the issue of domestic violence also requires an interdisciplinary approach because much of the legal response to battering builds on and grows from cultural assumptions.[49] Psychology and sociology are two of the disciplines students will examine. In representing women who are abused, the lawyer must understand theories of the psychological responses of battering and the social and cultural assumptions that not only allow battering to occur in society but also discourage doctors, police, prosecutors, and judges from intervening to stop the violence.[50] For example, criminal self-defense cases, which comprised much of the early and continuing litigation on behalf of battered women, involved expert witness testimony originally based on Lenore Walker's psychological analysis of battered women.[51] Alternative visions of women's behavior in battering situations are also emerging from these disciplines.[52] Historical and cross-cultural accounts and perspectives on domestic violence add to a more complete understanding of the law's role in responding to battering.[53]

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47. *See, e.g.*, Christine Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23 (1989).

48. *See, e.g.*, Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

49. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

50. *See, e.g.*, Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973-99 (1991). *See generally* Nancy Kathleen Sugg, M.D., M.P.H., & Thomas Inui, M.D., Sc.M., *Primary Care Physicians Response to Domestic Violence: Opening Pandora's Box*, 267 JAMA 3157 (1992).

51. *See generally* LENORE E. WALKER, THE BATTERED WOMAN (1979).

52. *See, e.g.*, EDWARD GONDOLF & ELLEN FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 11 (1988); Margaret H. Launius & Carol U. Lindquist, *Learned Helplessness, External Locus of Control and Passivity of Battered Women*, 3 J. INTERPERSONAL VIOLENCE 307 (Sept. 1988); Claire Renzetti, *Violence in Lesbian Relationships: A Preliminary Analysis of Causal Factors*, 3 J. INTERPERSONAL VIOLENCE 381 (1988). *See generally* ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987).

53. *See generally* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880-1960 (1988); DAVID LEVINSON, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVE (1987); Angela Ginario & Jane Reno, *Violence in the Lives of Latina Women* (*cited in* WORKING TOGETHER TO PREVENT SEXUAL AND DOMESTIC VIOLENCE (1985)); Beth Richie, *Black Battered Women, A Challenge for the Black Community*, THE BLACK SCHOLAR (Mar./Apr. 1985).

A course on domestic violence is also uniquely feminist[54] both in its goals and its methodologies.[55] Its goals include showing students who "may have some personal experience with domestic violence that it is a systematic, political issue . . . ."[56] Feminists "study women's oppression in order to understand what it is, how it happened, the subtle way it works and how oppression, exploitation and exclusion affect different aspects of our lives and thinking."[57]

For many students the issue of battering is compelling because violence has been a part of their own lives and the connection of emotion with legal subject is commonly ignored in law school. In Professor Elizabeth Schneider's seminar "students expressed how the deep connection of the subject matter to their personal life gave special meaning to the class."[58] A course in domestic violence explicitly acknowledges the centrality of emotion to both advocacy and scholarship.[59]

Even when students have not been affected directly by violence in their lives, the strong emotional reactions students have on a personal level, and not just an intellectual level, make the subject of battering immediately compelling, interesting, and engaging to the student. Male students also feel an emotional connection to the subject matter. When discussing domestic violence in her first year Torts class at Northeastern University School of Law, Professor Clare Dalton attempts to acknowledge women's generalized anger at men for perpetuating violence against women, as well as attempting to:

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54. Other goals are also involved in creating a course on domestic violence. For example, a desire to teach and train students in poverty law and public interest lawyering, and to improve student's lawyering skills inform many of the courses' goals and methodologies. *See, e.g.*, Bryant & Arias, *supra* note 5.

55. Feminist methodology may include: using personal experience as the starting point for learning; focusing on the concrete, contextual legal and historical frameworks in which law is made; and, integrating affective with intellectual learning. *See generally* Bender, *supra* note 10; *see also* Carrie Menkel-Meadow, *The Fem-Crits Go to Law School*, 38 J. LEGAL EDUC. 66 (1988).

56. AALS-WLE NEWSLETTER, *supra* note 28, at 5 (paraphrasing Professor Clare Dalton's two approaches to incorporating "issues of battering into the first year experience").

57. Bender, *supra* note 10, at 4.

58. Schneider, *supra* note 5, at 859.

59. *See* Robin West, *Love, Rage and Legal Theory*, 1 YALE J.L. & FEMINISM 101-03 (1989):

> While love informs a feminist sense of morality, and hence of ideal conceptions of law, rage informs the feminist sense of justice. We are enraged, and we are moved to act, by our identification with the gendered injuries that distinctively destroy women's selfhood and security, typically with the full endorsement of legalism.

Id.

> [A]ddress[] the ways that men are harmed by violence in their families. By looking at how children are harmed when their mothers are battered, by identifying the men who are in prison for assaulting or murdering their mothers' batterers, men can see themselves not as the perpetrators of abuse, but as its victims.[60]

Professor Lois Kanter, who teaches the Domestic Violence Clinic at Northeastern University School of Law, believes this personal connection also makes the topic more accessible to students.[61] "The students bring their own knowledge and perspectives to the class. We all know students learn better when they are doing the thinking and making the contributions themselves."[62]

The immense interest of female students in learning about domestic violence may be the most important reason that these issues should be addressed in the law school curriculum. Women students often feel alienated from and marginalized by law school.[63] Part of this alienation stems from feelings that the law school does not address issues of fundamental concern to them as women. Teaching these courses sends the message that domestic violence is of fundamental concern in the law and a valuable part of legal education.[64]

Professor Martha Mahoney, who teaches a seminar on domestic violence at the University of Miami School of Law, stated: "[t]he extent of student initiative is, in a sense, an 'invisible movement' which we may never know the size of because of the incredibly fast turnover of law school student populations."[65] Students have expressed their desire to do this work and have created opportunities to work with battered women in a number of ways. One way is by working at the margins of

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60. *See* AALS-WLE NEWSLETTER, *supra* note 28.

61. Professor Susan Bryant also found that when students were involved in the development of her clinical program's intake criteria, they had a level of "insight and enthusiasm" that was lacking in students who did not participate. *See* Bryant & Arias, *supra* note 5, at 214-15.

62. Interview with Lois Kanter, Northeastern University School of Law (May 1991). *See also* Eleanor Fox, *The Good Law School, The Good Curriculum, and the Mind and the Heart*, 39 J. LEGAL EDUC. 473 (1989):

> There is a new awareness that people learn and are educated by being involved, by being heard, by getting feedback, by being addressed in language and metaphor that they can relate to and that includes them, by having some meaningful choice and control, by knowing that their work is relevant, and by feeling that they are progressing along their chosen path.

Id. at 482.

63. *See* Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988).

64. *See generally* Fox, *supra* note 62, positing that there is a gap between what law schools teach and what law students want to learn, and suggesting the use of a demand-side perspective from which to evaluate a good curriculum.

65. Interview with Martha Mahoney, University of Miami School of Law (Apr. 1991).

the law school, virtually on their own and receiving no credit for their work. A number of law students have begun their own student run advocacy projects.[66]

In addition, professors have started projects on their own with little or no financial support from their law schools. At Indiana University-Bloomington School of Law, Professor Lauren Robel began a court accompaniment program to help women obtain restraining orders. The program now trains over forty-five student volunteers per semester over a two-day weekend. Currently, out of a student body of 600 students, over 100 have been trained through her program.[67]

Students have also demanded that their law schools create these programs. At the University of California-Berkeley, a group of students conducted their own search and interview process because they wanted someone to teach a seminar on domestic violence. The result was that in the fall of 1988 Professor Nancy Lemon taught the first law school seminar focused exclusively on domestic violence. She has taught the seminar for four years at Boalt Hall School of Law.[68]

Students have created places outside the traditional classroom where they can do this work. By enrolling in clinical courses and requesting battered women's cases, students have motivated clinical instructors to learn and teach about domestic violence. At the Women and the Law Project convention of the 1992 Association of American Law Schools Annual Meeting, over 75 professors and clinical instructors attended a discussion on teaching about the battering of women.[69] Many indicated that they include issues of battering in their courses, largely as a response to student demand.[70]

The desire of students to take these courses also signals another reason why they are so important: they give meaning to legal education. Professor Robel spoke of the "spirit" that students capture from working with battered women.

> Students are motivated by the [Indiana Protective Order] Project's successes. Clients routinely get out of horrible situations and go on to reconstruct their lives. This is a wonderful thing to see and the most satisfying kind of legal practice you can have. The students talk to each other about the successes and it becomes a 'spirit' of doing the work that

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66. For example, Yale law students started a TRO Project and Harvard law students started a Battered Women's Advocacy Project. *See* Gary Brown et al., *Starting a TRO Project: Student Representation of Battered Women*, 96 YALE L.J. 1985 (1987).

67. Interview with Lauren Robel, Indiana University-Bloomington School of Law (Feb. 1991).

68. Interview with Nancy Lemon, Boalt Hall School of Law, University of California-Berkeley School of Law (Mar. 1992).

69. AALS-WLE NEWSLETTER, *supra* note 28.

70. *Id.* at 3.

attracts students. Work with battered women provides re-enforcement for the idea that attorneys can make a difference in people's lives.[71]

There is a growing national awareness of the seriousness and pervasiveness of woman-abuse, and the desperate need for this country to respond with solutions and action for ending domestic violence. The medical profession, government agencies, the Congress, and state legislatures have all begun to address formally the issue of domestic violence in our country, yet the legal profession lags behind. Training America's lawyers on domestic violence is a necessary part of a successful response to the crisis of violence in our country. The next part of this article examines and highlights the features of the current courses in law school which can serve as models of effective legal education on domestic violence.

IV. THE PEDAGOGICAL ADVANTAGES OF TEACHING ABOUT DOMESTIC VIOLENCE

The subject of domestic violence provides enormous and unique pedagogical advantages and allows for a great deal of innovation and creativity in structuring a course or clinical program. This part presents the unique pedagogical advantages of using cases involving domestic violence to teach about the law. Professors may use the subject as a vehicle for integrating theory with practice. They can explore with students the often limited ability of the law to address the complexities of battered women's lives, while also displaying the law's capacity to bring about change for battered women. The highly charged emotional issues presented by the subject matter can also be used to analyze the role of the "lawyer" and what that role entails. In addition, these cases frequently provide an opportunity to examine conflicts that arise between personal mores and professional responsibilities of lawyers. Finally, domestic violence cases can be excellent tools for teaching practice skills.[72]

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71. Robel, *supra* note 67.

72. Many of the advantages of domestic violence courses arise from the fact that they use both clinical education and feminist methodologies. However, the focus of this paper is on illuminating the issues that arise in domestic violence courses, not on reiterating a discussion of the advantages of either clinical education or feminist methodologies. For a discussion of clinical education methodologies see Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980). For a discussion of how clinical education and feminist methodologies can be combined see Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991).

A. *Linking Theory and Practice*

To study domestic violence is to pay attention to the way that concrete experiences of women lead to the building of theories arising from reflection on these experiences. Historically, this outlook has characterized a feminist approach to lawyering,[73] and served as a way of connecting theory with practice. Professor Lemon at Boalt Hall School of Law voiced the sentiments of almost all the professors doing this work: "Domestic violence offers a rare chance to link the theoretical learning that students do in the seminar to the practical work they do as lawyers. They get to see the politics and sociology and how it all comes to bear on the legal world."[74]

The teaching methods used to link theory and practice and scholarship and activism in domestic violence courses vary widely. One method often used in seminars is to have students write papers that directly relate to projects on which activists and lawyers in the community are working.[75] Professor Dowd, who employs this method in her seminar at the University of Florida, noted that students were very motivated because they knew their papers would be of use to others.[76]

A second method of linking theory and practice is through the depiction in class of how the system itself works to serve or disserve battered women. For example, in Professor Mahoney's class on custody and visitation litigation, guest speaker Attorney Kim Hanson presented a case she had tried, with original materials from the case. One of the exhibits in the litigation material was a social worker's custody evaluation on both parents screened to remove all identifying details. The report was typical of the type that lawyers representing battered women might encounter in custody litigation. In this case, both parents had emotional problems and drank to excess. The facts might have seemed highly favorable for the mother because they included a description of violence and threats by the father against the mother, allegations of violence against his children from a previous marriage, and a description of his failure to consistently take medication to control mental illness. The conclusion, however, was that the mother was manipulative; it was

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73. *See* Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

74. Lemon, *supra* note 68.

75. In Professor Nancy Lemon's seminar, students had the option of writing a paper or taking an exam. In Professor Martha Mahoney's seminar, students could write one scholarly piece or several short memos, based on the readings each week, combined with a longer paper. In Professor Elizabeth Schneider's seminar, a scholarly paper was required, in addition to three short "reflection" pieces. For a discussion of scholarship in the Battered Women and the Law course see Schneider, *supra* note 5, at 851-53.

76. Interview with Nancy Dowd, University of Florida College of Law (July 1993).

unclear who had caused more violence; they both needed substance abuse treatment; and the father should get custody of the child.[77] The report revealed the bias of actors in the system and taught students to examine the discrepancies between facts and conclusions. The class was asked how they would deal with this piece of evidence and an angry, distressed client in litigation, thus presenting the students with a practical problem within the classroom. "Students had an initial tendency to read facts selectively to be consistent with the social worker's conclusion, and the resulting discussion showed the need to further train students in critical reading and rejecting stereotypes of clients."[78]

The use of a clinical component to accompany a seminar, or conversely, the use of a classroom component within a clinical program, are other ways professors have linked theory and practice. Professor Beverly Balos, along with Professor Mary Louise Fellows, created a Gender and the Law Class and Clinic at the University of Minnesota Law School specifically to integrate theory and practice. They co-taught the class in the fall, and then Professor Balos taught the clinic in the spring. The Gender and the Law Class focused on the broad topic of violence against women, including pornography, rape, and sexual harassment. Theory and practice were integrated mainly by adapting clinical teaching methods to the classroom. Students engaged in a number of simulations including negotiating a sexual harassment case, interviewing a battered woman in the role of a prosecutor, and acting as a feminist United States Supreme Court issuing opinions. The class was a prerequisite for the clinical program which focused on battering. The clinical program drew upon the students' theoretical background gained from the class, focused this attention in the area of battering, and allowed students to apply their knowledge through individual representation of battered women.[79]

Professor Schneider also structured her seminar at Harvard with a clinical component specifically aimed at connecting theory and practice. The seminar included an optional clinical component. Students taking the clinical component attended a special one-hour weekly session also taught by Professor Schneider with the clinical supervisor, Sarah Buel, an attorney who is also a formerly battered woman. In this hour, students focused on the relationship of the concepts discussed in that

77. For discussions of how child protection workers can help battered women protect themselves and their children, see *Protecting Abused Children, Supporting Battered Women: A Model Policy for Child Protective Service Intervention*, 2 THE EXCHANGE (National Women's Abuse Prevention Project) Aug. 1988; PROGRAM DESCRIPTION, ADVOCACY FOR WOMEN AND KIDS IN EMERGENCIES (Boston Children's Hospital, Boston, Mass.).

78. Mahoney, *supra* note 65.

79. Interview with Beverly Balos, University of Minnesota Law School (Mar. 1992).

week's class to the students' experiences of those issues at their clinical placements.[80]

In clinical programs, the classroom component becomes the place to link theory with practice. In the class meetings of Professor Karen Czapanskiy's practice group at University of Maryland School of Law, she includes a theoretical discussion as a way to frame the practical situation that a student is facing in a case that week. For example, when a student was preparing for a visitation hearing where the child had also been abused by the batterer, the student first mooted the opening and direct for the class. The class then discussed the technical points of opening statements and direct examinations. They moved on to discuss the theoretical issue of how society views the mother when her child is also being battered,[81] gender bias in the courts, woman blaming,[82] how state custody statutes take into account domestic violence,[83] and practical considerations of choices a mother has in these situations. Finally, the class ended by drawing on the implications of the theoretical issues raised to improve the student's presentation of the mother's situation to the court.[84]

B. *The Role of Law: Its Promises and Limitations*

Another pedagogical advantage offered by the study of domestic violence is that it allows students to examine the role of law in society. From a feminist perspective, this often means confronting both the limits of law and the potential of law for creating both change in a battered woman's individual life as well as in the lives of battered women as a group.[85]

Professor Susan Bryant of the Battered Women's Rights Clinic at City University of New York Law School at Queens College (CUNY) aims at teaching students to recognize the limitations of the law by discouraging students from using the law to define the client's problems:[86]

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80. *See generally* Schneider, *supra* note 5.

81. *See, e.g.*, Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 1, at 158-74.

82. *See* PAULA CAPLAN, PH.D., DON'T BLAME MOTHER 39-67 (1989).

83. *See, e.g.*, Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

84. Interview with Karen Czapanskiy, University of Maryland School of Law (May 1992).

85. Feminist legal scholars have debated the issue of whether law can be an effective tool for social change. *See, e.g.*, Martha L. Fineman, *Illusive Equality: On Weitzman's Divorce Revolution*, 1986 AM. B. FOUND. RES. J. 781 (1986); Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law, in* THE POLITICS OF LAW 117 (D. Kairys ed., 1982).

86. Bryant & Arias, *supra* note 5, at 222. "[S]tudents who are encouraged to see problems from the clients' perspective are more likely as lawyers to recognize the limits of the law and the need for changing it." *Id.*

> Once a woman is a client, any problems she has the clinic handles. The philosophy is to make students look at the problem from the point of view of the client. If you just do a restraining order then you are using the law to define the problem and you may ignore other genuine problems that the woman may have.[87]

Professor Ann Shalleck's Women and the Law Clinic at the Washington College of Law, American University, uses the same approach. For those clients that are battered women there is no additional screening that would exclude the woman from obtaining representation, except financial screening.

> The initial task of the students is to figure out what the woman wants to do. It is not just to direct her towards what she might file in court, but towards examining what is going on in her life and what she might need to make the whole situation better.[88]

Professor Bryant uses the interview, "[o]ne of the first places that the legal definition of the problem can overwhelm the client's definition, . . . "[89] as the place to emphasize the importance of listening to the client and understanding her needs. She believes that:

> When the students can really listen, can really hear all that the client needs, then they can begin to understand the ambiguity and complexity of her life. They will then be less likely to think that everything can be wrapped up neatly in a pleading to be filed in court the next day, less likely to think that the client's problems can be magically solved.[90]

Professor Kanter at Northeastern University School of Law echoes this viewpoint. "The best tool we have as attorneys for battered women is our relationship with them. Students need to urge women to think about their situation and their options. Instead, students tend to use the law as a way to deal with every case."[91]

Assuring a woman's safety is a unique aspect of courses on domestic violence. Professor Christine Butler, Director of the Battered Women's Advocacy Project at Suffolk University Law School, noted:

> Students often get so focused on the legal problem presented by a woman that they fail to help her appraise her entire situation. Safety planning is a necessary part of lawyering in every case. It is something lawyers and legal advocates have learned from the shelter movement and something we as teachers must emphasize to students.[92]

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87. Interview with Susan Bryant, City University of New York Law School at Queens College (Apr. 1991).

88. Interview with Ann Shalleck, Washington College of Law, American University (Mar. 1991).

89. AALS-WLE NEWSLETTER, *supra* note 28, at 4.

90. *Id.*

91. Kanter, *supra* note 62.

92. Interview with Christine Butler, Suffolk University School of Law (June 1993).

Domestic violence cases, as opposed to, for example, eviction cases, allow students to confront the fact that invoking the law in an individual case may only make matters worse.[93] Professor Karen Czapanskiy at University of Maryland School of Law says that a successful resolution of a client's case may be just letting the client go home.[94] "[I]t became a goal of mine to train my lawyers somehow to accept our clients wherever the clients were."[95] She developed two particular classes in which she encourages students to realize that as attorneys they become participants in a biased judicial system that has treated battered women poorly and which may, ultimately, be unable or unwilling to prevent them.[96]

In the first of two classes she showed the video "A Plea for Justice,"[97] and for reading assigns the chapter on domestic violence of the Maryland Gender Bias Committee's report.[98] She presented these together in order to "get across to students . . . that the[] stories that are shown on the videotape take place in a social context of a judicial system that is pretty unresponsive . . . ."[99] In the first week, the discussion is focused on the stories of the women in the tape, postponing discussion of legal remedies until the next week. By centering on the women's stories, students learned about "[t]he multiplicity of life experience" of battered women. The students examined the differences in the stories of the four women according to their backgrounds, "their experiences in terms of the nature of the threats," their physical and sexual abuse, and the nature of the killings. After this examination, students recognized the one thing the women share: "that they are in an environment, in terms of our political and social structure, which could not find any way to respond to who they were and their needs . . . ."[100] Through this examination of women's stories and their needs, the students can "develop a social critique in their lawyering."[101] In the following class, Professor Czapanskiy shared with the class the way in which the Clinic represented some of the women, and then the class

93. The most dangerous time for a woman in a battering relationship is when she is trying to leave the relationship. *See generally* Mahoney, *supra* note 49.

94. Karen Czapanskiy, Address at 1992 AALS-WLE Annual Meeting, *supra* note 28.

95. *Id.*

96. *Id.*

97. "A Plea For Justice" is a video which was produced by the Maryland Public Justice Center during their clemency drive. The video is about four women incarcerated in Maryland for killing their batterers and weaves the narration of the women's stories with an outline by Dr. Lenore Walker of her model of battered women's behavior. A PLEA FOR JUSTICE (Maryland Public Justice Center) (on file with the Maryland Public Justice Center).

98. Czapanskiy, *supra* note 94.

99. *Id.*

100. *Id.*

101. *Id.*

discussed what role they, as lawyers of the clinic, could have played in these women's lives.

In addition to making students aware of the limits of the law, there is also the interrelated goal of teaching students the role that law can play in creating broad social change. Professors have devised a number of different ways of doing this.

In some clinical programs, the students work on law reform projects, in addition to handling case work.[102] Community education or public policy projects serve as a means for students to examine the broader problems faced by battered women as a group. Professor Bryant at CUNY sees the use of law reform projects as part of her clinic's philosophy to teach students to be good public interest lawyers. "Students should be asking questions such as: does the law need to change? Does the attorney have an obligation to educate the client? How do laws affect clients as a group instead of just as individuals?"[103]

Catherine Klein, who directs the Family Abuse Project at Columbus School of Law, Catholic University of America, agrees. She notes that lobbying or drafting legislation is one way of "getting students to see the flaws in legal response and to think of how they can change the system to make it better."[104]

At the University of Maryland School of Law, Professor Czapanskiy creates a new project for students to work on each year. Typically, she seeks to work with community activists to develop projects from the "ground up." Her students started the nation's first clemency project in this way. A non-lawyer advocacy group had been working in the prison with the women, and invited Czapanskiy's students to the prison. The students listened to the women and what they needed from lawyers. This led to the beginning of the Maryland clemency project, which resulted in the release of eight battered women who were imprisoned for killing their batterers.[105] This project has been replicated nationwide.[106]

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102. *See, e.g.*, descriptions of the clinical program at City University of New York Law School at Queens College and University of Maryland School of Law in Appendix B.

103. Bryant, *supra* note 87.

104. Interview with Catherine Klein, Columbus School of Law, Catholic University of America (Mar. 1991).

105. *See* Peter Jensen, *Schaefer, Moved By Tales of Abuse, Commutes Sentences of 8 Women*, BALTIMORE SUN, Feb. 20, 1991, at 1A; Fern Shen & Howard Schneider, *Freedom in a Divided World: 8 Maryland Women Who Killed Mates to be Released Amid Debate over Their Deeds*, THE WASHINGTON POST, Feb. 21, 1991, at B1.

106. Ohio, Massachusetts, and California are three of the states in which clemency efforts have been undertaken. Currently in New York the Battered Women's Rights Clinic and the Appellate Litigation Clinic of Pace University School of Law are working together both to recruit lawyers and to write clemency petitions.

At Georgetown's Sex Discrimination Clinic, students concentrate during the semester on individual representation and spend the last class, entitled "Strategies for Change," discussing public policy issues. Professor Naomi Cahn explains that in this last session students offer "concrete suggestions on what needs to be changed and how it can be changed. The suggestions are then passed on to the local domestic violence coalition or other appropriate law reform groups."[107]

The programs have also had a great impact on transforming the attitudes of the legal communities in which they work, leading to marked improvements in the community's treatment of battered women. For example, when Professor Robel started her volunteer advocacy project, the Indiana Protective Order Project, she met with a great deal of hostility from the prosecutor's office.[108] Prosecutors generally felt that battered women were "abusing" the legal system because they would drop criminal charges and return to the batterer. Over the course of time, though, prosecutors began attending the restraining order hearings, which were now being tried by pro bono attorneys who worked with Professor Robel's students,[109] and realized the importance of the restraining order hearing to their jobs. The hearing allowed them to see the evidence, assess the credibility of the witnesses, and hear the batterer's side of the story to which they might not otherwise have access. The relationship between the prosecutor's office and the Project is now a cooperative, friendly one, and, more importantly, battered women in the community are better served.

Professor Kanter has focused the efforts of her clinic at Northeastern University School of Law on creating coordinated, quality service to battered women within one community, Dorchester, Massachusetts. The students often do intake on site at the Dorchester courthouse, at a local shelter, and at a local hospital. Students work with court officers, the prosecutor's office, police, doctors, and other service providers.[110] Professor Kanter believes that with time, the students' presence will heighten community awareness, and will result in an integrated and therefore more effective community response to battered women.

The potential for law school programs to impact surrounding communities is enormous, and can be even greater when the law schools work together. As Professor Klein related, in Washington D.C., the clinical programs at Georgetown, Catholic, and American, among others, collaborated to gather information, prepare joint press conferences, and organize a campaign to improve police response. The end result was

107. Interview with Naomi Cahn, Georgetown University Law Center (Mar. 1992).
108. Robel, *supra* note 67.
109. *Id.*
110. Kanter, *supra* note 62.

that formal police procedures for responding to domestic assault calls were adopted, and police response has improved dramatically.[111]

In Illinois, private attorneys, law professors, law students, and providers of direct services to battered women in the community have banded together to prepare and present clemency petitions to the Illinois Prisoner Review Board on behalf of battered women imprisoned for killing or injuring their abusers.[112] Two seminars have been structured specifically to involve students in the Illinois Clemency Project for Battered Women. Mary Becker at the University of Chicago Law School and Professor Cynthia Grant Bowman at Northwestern University School of Law each taught a seminar on domestic violence in the fall of 1993. Students in the seminars will prepare a clemency petition to fulfill their writing requirement. Other area law schools, such as DePaul University, have structured extra-curricular programs to provide training for members of the community who wish to work on petitions.

Another way of creating community change is by bringing together professionals and lay advocates who work with battered women, and forming teams that address the specific problems that battered women face. For example, before Professor Holly Maguigan joined the Criminal Defense Clinic at New York University School of Law, she was defending battered women in criminal cases.[113] She envisioned a system where a crew of lawyers could become experts in the area of criminal defense of battered women and work on these cases in a cooperative arrangment with lay and professional battered women's advocates, as well as with expert witnesses. Law students would add another dimension to this team effort. Now, in battered women's cases at the Criminal Defense Clinic, students work with a team which includes the student, an attorney, an expert witness (usually a psychologist), and lay and professional battered women's advocates. A community of advocates with complementary perspectives has been built around the criminal defense of battered women, and students enter this community when they represent battered women. As Professor Maguigan pointed out:

> [T]he collaborative working arrangements prove to be a very rich experience for the students. With the relatively large amount of writings on these cases, and the access to a number of different people to talk to about their cases, the students find that they are better able to develop a coherent analysis of how to approach the case. This is in stark contrast to the relative lack of resources in their other [criminal misdemeanor] cases [not involving battered women].[114]

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111. Klein, *supra* note 104.

112. For a full description of the project see Appendix B.

113. Interview with Holly Maguigan, New York University School of Law (Apr. 1992).

114. *Id.*

C. *Emotions and Learning in the Role of the Lawyer*

Domestic violence cases present students with enormous emotional issues, because they are faced with intensive study or work with women who are often physically and emotionally brutalized. Encouraging students to discuss the feelings and emotions that client stories evoke in them is one of the hardest parts of teaching domestic violence and also, for many practitioners, one of the most satisfying. "This is the hard part of the clinic, but also the rich part," says Professor Janet Calvo from CUNY, who directs the Immigrants' Rights Clinic and works closely with the Battered Women's Rights Clinic on issues involving battered immigrant women.[115]

One of the advantages of the emotionally charged situations is that students have an opportunity to reflect on their role as attorney and on the boundaries between client and attorney. As Professor Calvo noted, these cases "open up discussion on the problems of figuring out what the proper attorney role is. How far should a student go in representing a client? What helps a woman and what doesn't?"[116]

One way that emotional involvement might manifest itself is through a student's identification with a client. In Professor Lemon's Domestic Violence Clinic at Boalt Hall School of Law, one student's first client was a doctor's wife.[117] As it turned out, the student, who was also a doctor's wife, became overly involved in the case. Part of the role of supervising involved working with the student to separate what actions the student was taking to help the client from what the student was doing to alleviate fears about her own relationship.

Professor Shalleck, at Washington College of Law, American University, mentioned that the intimacy of the relationship between attorney and client and the power of the emotions present in domestic violence cases is one of the pedagogical reasons she has students work on these cases:

> I want students to analyze and be aware of their feelings. You can't begin to be a good attorney in a case until you examine and confront your own feelings about the case. The model of lawyering that says 'I don't have feelings about my cases; I just do my casework' is false.

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115. Interview with Janet Calvo, City University of New York Law School at Queens College (Sept. 1991).

116. *Id.* For a discussion on student advocates, as compared to attorneys, in domestic violence cases with regard to client satisfaction, see Molly Chaudhuri & Kathleen Daly, *Do Restraining Orders Help? Battered Women's Experience With Male Violence and Legal Process, in* THE CRIMINAL JUSTICE RESPONSE TO FAMILY VIOLENCE (Eve S. Buzawa & Carl G. Buzawa eds., 1991).

117. The profession has been changed to protect the identity of the client and the student.

> Emotions reign in these cases, and being aware of your emotions is the first step to being a good lawyer.[118]

In battered women's cases, the issue of the attorney-client relationship has an additional dimension–learning to avoid replicating power and control dynamics of the client's other relationships. "Is the student as an attorney going to simply replicate the battering by controlling the decision-making process?"[119] asked Professor Calvo, "or will she or he be able to recognize the importance of allowing the battered woman to make her own decisions as part of the process of recovery, even if the decisions the woman makes seem 'wrong' to the student?"[120]

Professor Klein, at Columbus School of Law, Catholic University of America, added that students must "learn that they can't make decisions for their clients. Their clients' lives are not their lives, and clients have good ways to deal with their situations, even when those methods are not the ones the students want them to use."[121]

As Professor Susan Bryant noted, "[t]he student needs to be able to reject viewing the client as helpless and viewing the client's decisions as 'wrong.' Instead, the student must be able to understand the client's ambivalence."[122]

Professor Mahoney aims in her seminar to challenge directly students' concepts of battered women as helpless, different, and exceptional. One way she attempts to break these stereotypes is through the attendance, as guest speakers, of strong women who have experienced domestic violence in their relationships. She finds that students cling to these stereotypes. For example, in a class on the prosecution of batterers, student arguments in defense of "no-drop" policies "invoked views of battered women as utterly unable to make their own decisions or to act in their own best interests."[123] She felt that this stance was "rooted in the idea that battered women could not handle their own lives. These [students] had great difficulty dealing with the contradictions created by ideas of victim empowerment that might be at odds with [mandatory] prosecution."[124] She feels that students are defending a complex set of ideas when they view battered women as mysterious and helpless: "they are protecting ideas about themselves, their relationships,

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118. Shalleck, *supra* note 88.
119. Calvo, *supra* note 115.
120. *Id.*
121. Klein, *supra* note 104.
122. Bryant, *supra* note 87.
123. Mahoney, *supra* note 65. A prosecutor's office with a 'no-drop' policy will continue to prosecute a domestic violence assault even when the victim does not wish to go forward with her case or refuses to testify. *See generally Prosecution Policies, Protocols and Pre-Charging Investigation, in* DOMESTIC VIOLENCE: THE LAW AND CRIMINAL PROSECUTION 11-15, (Family Violence Project, San Francisco, Mar. 1990).
124. AALS-WLE NEWSLETTER, *supra* note 28, at 4.

and their own family."[125] They are also protecting their ideas of law, and the conception that law will fix things, and that law is not a tool of oppression. As Martha Mahoney notes, "it is very hard to shake the[ese] idea[s] without discouraging student optimism about using the law as a means of bringing about social change."[126]

Professor Shalleck, at Washington College of Law, American University, emphasizes that the students have to learn "to recognize the integrity of the client's feelings and her understanding of the world."[127] At the same time, this understanding is sometimes especially difficult for students working with battered women, who often become angry at clients for what the students perceive to be the woman's inability or unwillingness to take control of her life. As Professor Klein advises: "We need to find an answer for how to prepare students for what it feels like to have a client return to a violent situation."[128]

The most common way of teaching students to understand the battered woman's perspective is to incorporate psychological and sociological issues, including the cycle of violence and the obstacles to leaving, into the student's training. As Professor Klein points out, though, we still need to "better integrate a social worker's perspective into work with battered women. It is very difficult for women, for anyone, just to break and separate from their pasts and move on successfully."[129]

Professor Butler, at Suffolk University Law School, has noted the possible harmful consequences of a student's failure both to empathize with the client's situation and to connect emotionally with the client:

> Students must realize that the people they are assisting are experiencing strongly conflicting feelings: they are confused, upset, scared, angry, and worried about possible consequences for themselves, their kids and their partners. When a student doesn't acknowledge these feelings and distances herself from the woman on an emotional level, she runs the risk of not connecting at all with the woman. If the woman feels her advocate cannot understand her situation, she is less likely to open up and convey important information about her situation. This result can be very dangerous in battered women's cases where part of the student's work is to assist the woman in planning a course of action that will limit some of the common risks and maximize her safety. When students fail to connect with women they may inadvertently place them at greater risk.[130]

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125. Mahoney, *supra* note 65.
126. *Id.*
127. Shalleck, *supra* note 88.
128. Klein, *supra* note 104.
129. *Id.*
130. Czapanskiy, *supra* note 84.

Professor Czapanskiy has a social worker from the Maryland School of Social Work intern at the clinic. The social worker and the student often interview and work with clients together. While law students frequently approach the problem from an individualistic perspective, the social workers concentrate on how this client is connected with her family and the community. Professor Czapanskiy finds that the law students and social workers learn from each other and the client gains because she is given more options.[131] Professor Klein also suggests broadening the students' view to include the situation faced by the client:

> Students can't see the woman's failure to follow through in one case as a defeat. If the student has given her good information as to the legal recourses available to her and made her presentation of the woman as non-judgmental as possible, then they have done as much as they can for the woman. We who stick around longer see what the students don't: the women do call back and do take further steps. The separation process takes time and students are just there for a part of that time.[132]

Professor Shalleck has no formal training component that focuses on domestic violence or the social, psychological and historical issues of domestic violence in her clinical program. She feels instead that there is a value in not having:

> [A]n extensive conceptual structure as the beginning point and instead having the students begin with their actual experience and contact with a battered woman. Then, through individual supervision I can challenge the conceptual structure that the student begins with, even if they are not aware of it, and replace it with a different conceptual structure. Once they have had the experience of talking and meeting with a battered woman I begin to introduce some of the materials that provide an alternative framework for understanding the issue.[133]

Professor Kanter, at Northeastern University School of Law, challenges students' perceptions of battered women by having them read and spend a class session discussing the article "Love and Violence."[134] She uses this piece "to show students that the subject of domestic violence is more complicated than the standard Lenore Walker cycle of violence theory suggests. What is going on in any given situation is not simply a standardized pattern where the student can simply intervene in a proscribed way."[135] She encourages students to listen and build relationships with clients, and if the clients don't go through with "leaving," to maintain the connection with the client which will allow for future communication.

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131. *Id.*
132. Klein, *supra* note 104.
133. Shalleck, *supra* note 88.
134. Virginia Goldner et al., *Love and Violence: Gender Paradoxes in Volatile Attachments*, 29 FAM. PROCESS 1 (Dec. 1990).
135. Kanter, *supra* note 62.

Professor Donna Coker starts her seminar at Stanford University Law School by studying the sociological and psychological information available on men who batter.[136] She uses this as a "counter-ideology move that attempts to turn the focus from why does she stay and who is she to a focus on the batterer's violence as the social problem and an examination of what it is about our culture, mores and laws that supports his controlling behavior."[137]

Professor Mahoney, at University of Miami School of Law, focuses the student's attention away from why the woman stays to what the batterer is doing to prevent her from leaving.[138] She also tries to show students that "their agendas as lawyers may be different than the concern of the woman whose life intersects the legal system as she tries to resolve multifaceted questions of family and survival."[139]

Professor Maguigan, of the Criminal Defense Clinic at New York University School of Law, also finds that students have to decide whether they will rely on stereotypical images of battered women to present their cases to judges and juries:

> As the media pays more attention to battered women's self defense cases, they also reinforce an image of the righteous battered woman defendant. Of course, a real defendant never fits the common stereotype. This presents interesting issues for the students because they realize that juries and judges hold the same stereotypes they held at the start of the clinic. Students must work with the expert witness to decide whether they will try to fit this woman into the "typical" battered woman category. If not, they must decide how they will present the woman and her situation to the jury.[140]

C. *Personal Mores and Professional Responsibility*

Ethical and moral issues are also highly palpable in domestic violence cases. Professor Calvo at CUNY observes that one of the main questions students confront is: "How far does the student's moral responsibility to the client stretch and is it the same as the student's professional responsibility?"[141]

Professor Maguigan at New York University School of Law notes that students handling battered women's self defense cases are placed on the "moral high road:"

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136. Students will read extensively from ELLEN PENCE & MICHAEL PAYMAR, EDUCATION GROUPS FOR MEN WHO BATTER: THE DULUTH MODEL (1983). The book, which includes quotations and experiences as related by men who batter, provides valuable insights into the thinking of batterers and the myriad of ways in which abusive men control their partners.

137. Interview with Donna Coker, Stanford University Law School (June 1993).

138. *See* Mahoney, *supra* note 49.

139. Mahoney, *supra* note 65.

140. Maguigan, *supra* note 113.

141. Calvo, *supra* note 115.

> While the students confront a world which is constantly asking them how they can defend the people they represent in the rest of their practice, they receive a completely different response to their defense of battered women. In battered women's cases the outside world is very supportive of their work. Because the students at the clinic see the injustice of the criminal justice system in all their cases, they have to work through the reasons why the world perceives their work with battered women defendants as better than their other work.[142]

Professor Balos of the University of Minnesota Law School finds that in her Domestic Abuse Prosecution Clinic, students sometimes have enormous moral dilemmas in their role as prosecutor, especially when the woman does not want the state's case against her batterer to go forward:

> The prosecutor's duty to do justice may be different and conflict with the survivor's view of justice and what she wants or how she feels the situation should be resolved. Law students don't talk much in law school about the concept of 'justice' and what it means. In these cases doing justice may be more complicated, especially because of the biases in the criminal justice system and the costs to battered women who do not want to go forward.[143]

Civil cases also present complex ethical and moral dilemmas. In battered women's cases, Professor Naomi Cahn at Georgetown's Sex Discrimination Clinic finds that students frequently face a situation in which they represent the mother in a child custody dispute and the mother/client admits to the student that she uses drugs and/or that she abuses the child.[144] In this situation, a student may be "caught in a web of opposing duties and emotions."[145] Under the Rules of Professional Responsibility, the student has an obligation to represent the client zealously[146] but may also have to reveal a confidence protected by the disciplinary rules if she believes that her client's behavior is "likely to result in imminent death or substantial bodily harm."[147] Another conflict may arise if the state's mandatory child abuse reporting law does not exempt lawyers from reporting requirements.[148] Apart from the student's duties as a lawyer, she or he may have to confront her own moral obligations. These may include strong beliefs that children should not be hit and therefore, that custody for her client is not in the

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142. Maguigan, *supra* note 113.

143. Balos, *supra* note 79.

144. For a detailed examination of the ethical implications of and possible solutions to this hypothetical, see Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23 (1990).

145. *Id.* at 38.

146. *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983)).

147. *Id.* (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1992)).

148. *Id.*

best interest of the child. In the setting of the clinic, the student is given an opportunity to attempt to resolve these dilemmas. To do so, she or he must review the applicable law, examine her moral versus her professional obligations and decide how she will handle the situation.

D. *Domestic Violence Cases: Skills Training*

A primary aim of clinical education is to teach students a basic set of lawyering skills. This set of skills generally includes: interviewing clients and witnesses, collecting evidence, developing a theory of the case, drafting pleadings and briefs, negotiating, and of course, presenting the case in court through opening and closing statements, examination of witnesses, and the proper use of evidence and the evidentiary rules. However, this aim is often hampered by the disparity between the limited time a student can spend in a clinical program and the extended time most cases take to wind themselves through the legal system. The "typical" domestic violence case, the civil protection order ("CPO"), is an ideal teaching tool for a clinical setting because it is, in essence, a compact version of a full trial.[149]

In many states obtaining a CPO–a restraining order that provides that the defendant will refrain from abusing the plaintiff–involves preparation and presentation similar to a trial, but in a shorter time period and often with less complex legal issues.[150] Thus during a

149. Many clinical programs in this survey handle civil cases and criminal cases for women who are in abusive relationships. Discussion in this section is limited to protection orders because they are markedly different from other civil cases such as housing, benefits or divorce cases and from long criminal trials. While the latter cases, when the client is in an abusive situation, provide students with the same experiences discussed in the previous sections, they do not have the simple statutory scheme and short time frame that make CPOs ideal pedagogically for some clinical settings.

150. A brief comparison of selected jurisdictions (i.e. California, the District of Columbia, Massachusetts, and Minnesota) offers a summary of what is involved in obtaining a CPO. Because orders are usually obtained at a time of crisis, the court holds an initial ex-parte hearing and a second evidentiary hearing. The time between the two hearings varies from two weeks (Mass. & D.C.), four weeks (Cal.), or up to seven weeks (Minn.).

The second hearing is a full evidentiary hearing in some places (D.C.), but in others it is almost always treated as an informal hearing (Mass.). Courts often encourage settlement agreements to reduce the number of hearings. Thus, before a hearing is held some courts require mediation (Cal.) and others hold informal fifteen-minute hearings in front of a referee (Minn.).

Finally, the remedies available vary by state. In states with comprehensive protection order statutes, such as Mass., Cal., and Minn., petitioners can obtain, among other relief, the following orders: refrain from abuse, vacate household, child custody and support, and monetary compensation for losses suffered as a result of the abuse.

single semester, students can handle several cases which they follow from beginning to end through the entire legal process. The statutory scheme is limited and therefore easy for students to grasp quickly, but has enough intricacies to also challenge students.

The Sex Discrimination Clinic at Georgetown University Law Center changed their caseload from sex-based employment discrimination cases to domestic violence cases in 1989 to take advantage of the skills students could learn by working on CPOs. As Professor Cahn states, "in employment discrimination cases, the students would do one piece of a large case and that would typically consist of a deposition or some piece of discovery. With protection orders, students in the clinic now get to write complaints with affidavits, negotiate and do some oral and trial advocacy . . . [as well as] deal with evidentiary and ethical concepts in depth."[151]

The compact nature of the cases allows students to be in court several times in the course of a semester, which satisfies students who seek out clinical courses precisely for this real life, practical litigation experience. It also allows students to familiarize themselves with the court process, overcome their fear of being in court and arguing in front of a judge, and develop a critical eye toward the court process and court administration.

A student caseload may include from three to five or more CPOs in one semester, depending on the complexity of the cases and the time the student dedicates to the clinical course. This makes CPO cases especially appealing for clinical programs where students do less than ten hours of clinical work per week. But CPO cases alone might not be enough if the students spend more time at the clinic. In the latter case, professors may want to include longer, more complex cases or a public policy project in the students work load. The CPO offers an opportunity for students to practice a broad range of lawyering skills. To prepare for the hearing students generally interview clients, family, neighbors, doctors or police and collect police incident reports, medical records as well as financial records. Students will engage in negotiation with opposing counsel or the defendant, and prepare to deliver arguments whether in front of a mediator or judge. In jurisdictions such as Washington, D.C., and Minnesota where courts hold evidentiary hearings, students also practice trial advocacy skills.

Because of the *pro se* nature of many abuse prevention statutes, students are less likely to draft pleadings or write briefs, but an instructor can compensate for this in different ways. In most states, the CPO statute is tailored for pro se filings and thus the pleadings are often

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See Peter Finn & Sarah Colson, *Statuatory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 653-68 (Spring 1989).

151. Cahn, *supra* note 107.

pre-drafted, except for the affidavit. The Sex Discrimination Clinic avoids using pre-drafted pleadings and instead has students write the complaint and supporting affidavit. This gives students practice in drafting pleadings and, according to Professor Cahn, "assures that the students know the case very well by the time the papers are filed. It also gives judges a sense of what the level of violence is before the actual hearing. It also puts these cases on par with other cases so that they gain a sense of importance that is sometimes lacking in the way the judicial system views the cases."[152]

Other ways to involve writing include having students write briefs supporting arguments on complicated issues, or if an appellate issue arises allowing the student to write an appellate brief. For example, in the clinic component of Harvard's seminar one student wrote an appellate brief concerning the issue of mutual restraining orders and argued in front of the state intermediate appellate court.

Just as cases give students practice in the full range of lawyering skills, the substantive law involved in CPOs "offers different layers of complexity."[153] Cases can be very straightforward, especially where there are no issues involving children or property. Even a "simple" case presents students with the complexities that come with working with women who have been abused, such as ensuring that she is aware of her legal options and that practical concerns about her safety are addressed. Students must learn to interview the woman and get a story from her which she may be reluctant to tell, and then be able to present the case in a way that breaks through stereotypes of abusive relationships that judges may hold.

Cases become more complex as the remedies sought increase and as other parts of the legal system are invoked. Professor Cahn states that while the CPO "statute itself is very manageable, students don't usually work completely within the confines of the statute. When children are involved students almost always have to draw on other more general domestic relations law."[154] In addition, students often monitor and assist a client through the criminal justice system. For instance, the issue of double jeopardy arose in Washington, D.C., when a criminal contempt complaint for violation of a CPO was brought.[155]

There are also disadvantages to the short time frame of the CPO: each case requires intense preparation and leaves little time for reflection during the process. Professor Kanter at Northeastern University School of Law noted the dilemma that this poses: "the cases go so fast and some cases may be so complex with different aspects such

152. *Id.*
153. *Id.*
154. *Id.*
155. United States v. Dixon, 113 S. Ct. 28, 49 (1993).

as the criminal system and the child welfare system involved, that it is very hard to do what is traditionally considered excellent lawyering."[156] While this may mirror real world practice, it can create an unsatisfying situation for both student and professor.

Professors have dealt with this dilemma by having students work in teams of two. Catherine Klein finds that "teaming students in domestic violence cases has worked well in the Family Abuse Project at Columbus School of Law. It gives the students another resource of information and trains them in collaborative legal work. It also empowers students because in meetings everyone's ideas are voiced and heard. Dividing the work alleviates the possibility that a student will feel overwhelmed."[157]

Professor Bryant at CUNY adds that teaming aids the learning process because "not only do students have different approaches but they hear clients differently. Working as a team allows the student to see how their own perspective and biases have entered into their decision making."[158]

In sum, the CPO case offers features such as the short time frame from initiation to resolution and a straightforward statutory framework that may make the cases highly desirable as a pedagogical tool in clinical courses. For students who are gaining their first litigation experience in a clinical setting, the cases are often ideal, giving them a great deal of client contact and courtroom experience.

V. SUBSTANCE OF THE COURSES

This part compares the substance of three seminar courses to illustrate the different approaches of the professors to teaching the seminars. The discussion provides examples of the range of issues that conform to the substance of a seminar. A description and comparison of three seminar courses on domestic violence: Elizabeth Schneider's Battered Women and the Law, Professor Martha Mahoney's Domestic Violence Seminar, and Professor Nancy Lemon's Domestic Violence Law, illustrates the wide range of issues that may be covered in a seminar as well as the different emphasis each professor brings to the course.

Professor Schneider's Battered Women and the Law seminar aims to teach students to link theory with practice and scholarship with activism.[159] She does this, in part, by including in all of the discussions of substantive law throughout the seminar the impact of different

156. Kanter, *supra* note 62.
157. Klein, *supra* note 104.
158. Bryant, *supra* note 87.
159. For a full description of the class including the syllabus see Schneider, *supra* note 5. A brief discussion of the course materials is also included in the AALS-WLE NEWSLETTER, *supra* note 28, at 3.

jurisprudential theories, such as feminist legal theory, law and society, critical legal studies, and critical race theory.

The materials for the course are divided into four sections. The introductory section situates the problem and includes conflicting definitions of battering, the historical and social context of battering (including cross-cultural issues and gay and lesbian battering), and battered women as mothers (including child custody and welfare issues).

The second section focuses on social and legal reform efforts to assist battered women, including shelter, civil restraining orders, mandatory arrest and prosecution, and domestic violence actions. This section also covers alternative procedural frameworks, including civil rights, mediation and international human rights. The final part of this section discusses the legal representation of battered women and batterer's programs.

The third section addresses the criminal defense of battered women who kill their batterers. The fourth and final section returns to the relationship of theory and practice by assessing the contributions of and dilemmas posed for different jurisprudential frameworks by examining the implications of the theories on both issues of public policy and client representation.

Professor Mahoney's course[160] is structured similarly, but one of her goals in teaching the course is to "change student consciousness about battered women,"[161] and to examine how law interacts with social problems. Throughout the course she seeks to have students question their assumptions about battered women. Although she covers many of the same topics which Professor Schneider does, she also pays special attention to different aspects of the battered women's experience. For example, she includes sections on emotional and sexual abuse, and she also shows "A Plea for Justice"[162] and the short film, "A Jury of Her Peers." Because her article referred to her own experience of domestic violence, her presence in the classroom inherently affects student concepts of battered women. She also includes two guest speakers. One is Kim Hanson, an attorney from Minneapolis who presents to the class her experience of litigating two cases:[163] a case involving married heterosexual parents with substance abuse problems and a case involving visitation rights between lesbians who had co-parented the child of the battered partner. The other guest speaker is Cindy Lederman, a judge who founded a program in Dade County

160. Syllabus and class materials available from Martha Mahoney, University of Miami School of Law, Miami, Florida.

161. Mahoney, *supra* note 65.

162. *See supra* note 97 and accompanying text.

163. For further discussion of this case study, *see supra* notes 77-78 and accompanying text.

which focuses on the early intervention and treatment of batterers at the misdemeanor stage. Throughout the course, the aim is to "give the students a sense of the depth of the harm that is done to women and the complexity and difficulty of law reform and legal work in this area, without discouraging or alienating them from the subject."[164]

Professor Lemon's Domestic Violence Law seminar aims to link theory and practice in a very practical manner. The class largely focuses on substantive areas of law and issues that arise in practice, and she invites guest speakers from the community to many classes. In this way, students learn from the players in the community how the theory and substantive law they read is applied in practice. Her course is divided into four sections. The first section is a general introduction to the problem of battering. Students first view the video "A Plea for Justice,"[165] and then spend the next four weeks on topics such as the psychological and political aspects of battering, marital rape, historical and cross-cultural issues and lesbian and gay battering. The second section covers issues that would arise in civil litigation. In this section the class covers tort law, temporary restraining orders, custody issues, and mediation and visitation disputes. The third section covers issues that would arise in criminal representation, including police, prosecutor and judges' response to domestic violence, evidentiary issues in criminal cases, and battered women as defendants. The final section covers administrative and federal issues such as welfare and immigration law.[166] Professor Lemon also has an optional clinical component, but it is separate from the seminar. At the end of her course, students have studied and learned the practical nuts and bolts of what it means to represent a woman who has been battered in a wide range of legal settings.

The three seminars illustrate the various goals of teaching a course on domestic violence and how these goals influence the content of a course. Professor Schneider's seminar is very theoretical, with special attention given to issues of jurisprudence and whether current theory is adequately addressing the realities of battered women's lives. Professor Lemon's seminar, on the other hand, is much more practical, exploring the issues that arise when an attorney represents a battered woman client and examining the different legal forums in which these domestic violence cases are litigated. Professor Mahoney's seminar presents yet another approach, one which examines the cultural assumptions made about battered women which are reflected in the legal system's response

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164. Mahoney, *supra* note 65; *see also* AALS-WLE NEWSLETTER, *supra* note 28, at 5.

165. A PLEA FOR JUSTICE, *supra* note 97.

166. Syllabus and materials available from Nancy Lemon, Boalt Hall School of Law, University of California-Berkeley.

to battered women. The three seminars, while covering much of the same material, exemplify the richness of the subject matter and the ability of the professor to tailor it to meet their pedagogical goals.

VI. THOUGHTS ON STARTING A COURSE OR PROGRAM

Deciding what course to teach or how to structure a clinical program is an intensely personal and contextualized decision. The professor's interests, prior practice, scholarly interests, and personal background all impact upon the decision, as does the environment in which the professor works, including collegial and administrative support, existing programs at the school and the general philosophy and goals of the law school. The purpose of this essay is to encourage the creation of new courses on domestic violence, but a specific "how to" description is impossible given the variables mentioned above and the variety of ways in which this subject can be taught. Therefore, this part will relate general considerations on forming a course on domestic violence and some of the lessons learned from the successes of existing programs.

The programs included in this article illustrate three ways that domestic violence can be the focus of a course or clinical program. The first way is through a seminar on domestic violence. The second is through a clinical program that focuses specifically on domestic violence, both in the classroom and the clinic. The third, and perhaps easiest to replicate, is through the inclusion of domestic violence cases in the caseloads of students at a pre-existing civil or criminal litigation clinic. A fourth way, not discussed in this article, is to include issues of domestic violence in a student's legal education is through the integration of these issues into established courses in the curriculum, especially first year courses.[167]

A. *Seminars*

From my personal experience in such a seminar, I offer this suggestion: involve students in a way that makes them understand that their work is part of a larger effort. One of the most rewarding (and difficult) requirements of Professor Schneider's class was the paper requirement[168] because it instantly involved me in the larger battered

167. For concrete examples of how to include domestic violence in criminal law courses, see Erickson, *supra* note 2; tort courses, see Finley, *supra* note 25, and AALS-WLE NEWSLETTER, *supra* note 28, at 3; and civil procedure courses, see Schneider, *supra* note 5, at 864 n.33.

168. The requirement was for an "original" and "scholarly" research paper which would be "useful to activist[s] and scholars in the field" with the expectation that the paper would be either published or distributed. *See* Schneider, *supra* note 5, at 852.

women's community.[169] The experience of collaborating with people who are devoted to these issues is one that, for many, can't be replicated by simply sitting in a library. For many students who feel alienated from the law school atmosphere[170] and curriculum, it is immensely motivating to feel connected to a community working for change.

The overriding recommendation of those who taught these courses is that they should include some way of exposing students to the real impact of domestic violence in the community. As discussed previously,[171] there are a number of different ways for a seminar course to link theory and practice. Even if a seminar course does not include any of these methods, there are other ways students may gain a sense of the intricacies of working with women who have been battered. For example, some schools offer credit for externship clinical work in community organizations eager for volunteers.

Moreover, a seminar on domestic violence cannot adequately address the issues of the lives of women who are battered if it does not address issues of battering within communities of color, poor communities, immigrant and refugee communities, and lesbian and gay communities. The Battered Women's Movement has been criticized for excluding cross-cultural and class issues and for ignoring lesbian battering.[172] Yet, these are areas where some of the most challenging issues which define the movement can be found.

The primary theory offered by the movement for why battering occurs is that battering is an aspect of traditional, patriarchal power of men over women, an extension of unequal gender relations in our society.[173] Yet the occurrence of battering in lesbian relationships requires a re-examination of the underlying assumptions the movement holds about the root causes of battering. It threatens the gendered foundations of theories that explain domestic violence.[174] An examina-

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169. *Id.* at 858 ("In reading students' comments, it is apparent that the creation of an intellectual community was particularly important because it was unusual in their law school experience.").

170. *See generally* Weiss & Melling, *supra* note 63.

171. See *supra* notes 73-84 and accompanying text for a discussion concerning the integration of theory with practice.

172. *See generally* SUSAN SCHECTER, WOMEN AND MALE VIOLENCE 257-87 (1982).

173. *See generally* DEL MARTIN, BATTERED WIVES (1983); *see also* Michelle Bograd, *A Feminist Perspective on Wife Abuse: An Introduction, in* FEMINIST PERSPECTIVES ON WIFE ABUSE, *supra* note 1, at 11-20; SCHECTER, *supra* note 172, at 43-52; CATHERINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF STATE 178 (1989) ("The battery cycle accords with the rhythms of heterosexual sex. The rhythm of lesbian sadomasochism is the same.").

174. *See generally* NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986) [hereinafter NAMING THE VIOLENCE]; *What We Know/Believe About Lesbian Battering: Is Lesbian Battering the Same as Straight Battering?*, LESBIAN BATTERING INFORMATION PROJECT (1990); Ruthann Robson, *Lavender*

tion of lesbian battering challenges students to question and critique current knowledge and theories of battering, especially stereotypes of who is battered and why.

Similarly, students can examine the differential impact of policies the battered women's movement supports for their impact on women of color, women in low income communities, and immigrant women, among others. For example, what does it mean to women of color to have abuse prevention statutes which include mandatory arrest provisions?[175] People of color have historically experienced indifference, harassment and often violence at the hands of the criminal justice and law enforcement systems and may be suspicious of mandatory arrest policies. On the other hand, the same community may feel that they are adversely affected by discretionary arrest policies because the police may arrest men in their community in disproportionate numbers.

Interesting issues are found in discussions of the meaning of family violence in different cultures,[176] and how students can enable battered women to raise the issue of domestic violence in a manner that can be effective in the communities in which such women lives. For example, students can think of innovative ways to stimulate discussion and awareness within the particular communities they serve. Professor Coker at Stanford relates an example from Hawaii. A group of American Samoan women created a puppet show on domestic violence which was performed at the local community center. Many members of the community were present, including the most influential members of the society, the high talking chiefs. In the puppet show, a woman puppet in a violent relationship spoke to a high-talking chief puppet about her situation, and he responded in a supportive manner. More importantly, his explanation of why the violence she was experiencing was inappropriate drew on the traditional cultural values of the American Samoan community. The puppet show was a means of centering discussion on the issue of domestic violence within the community, using the traditional methods and values of the culture.[177]

Bruises: Intra-Lesbian Violence, Law & Lesbian Legal Theory, 20 GOLDEN GATE U. L. REV. 567, 586 (1990).

175. *See, e.g.*, Richie, *supra* note 53, at 40; Caroline Forrell, *Stopping the Violence: Mandatory Arrest and Police Tort Liability for Failure to Assist Battered Women*, 6 BERKELEY WOMEN'S L.J. 215, 219-24 (1990-91).

176. *See, e.g.*, Leni Marin, *Violence in the Filipino Immigrant Home: A Very Private Pain*, 2 KATIPUNAN Nos. 6-7 (Feb.-Mar. 1989); Diana Marshall, *Family Violence* (Mental Health Association of North Dakota) (on perceptions of family violence in Native American communities); Ginario & Reno, *supra* note 53, AGNES FLAVIA, REBUILDING BROKEN LIVES (Bombay 1988); M. ZAMBRANO, MEJOR SOLA QUE ACOMPANADA: FOR THE LATINA IN AN ABUSIVE RELATIONSHIP (1985).

177. Coker, *supra* note 137.

Policy issues arise frequently, especially as cities and states become more aware of the impact of domestic violence. These issues can become focal points for the class to engage in discussion of differing perspectives within the community. Sensitivity to often ignored issues allows the class an opportunity to raise serious questions about appropriate or desired responses to battering and about current theories of battering, as well as including issues that are of concern to everyone and which other law school classes may not address.[178]

B. *Clinical Programs*

Starting a clinical program involves a multitude of considerations, of which I will focus on two: first, a personal decision based in the philosophical and pedagogical beliefs of the professor; and the other, a decision based on the practical realities of the city and the school in which the clinical program is run.

The first consideration in forming a clinical program is determining the basis on which the program will service its clients. Will the clinic represent battered women who have a specific, identifiable legal problem (e.g., they need a restraining order, custody, or assistance in prosecuting their batterer), or will the program serve women because they are in an abusive relationship, no matter what their legal needs? Choosing between these two alternatives may reflect the philosophy of the instructor on what it means to advocate for battered women.

The latter approach represents an approach to legal services based on clientele, much like a legal services center which serves clients who are homeless. Professor Czapanskiy's practice group at the University of Maryland School of Law and Professor Bryant's Battered Women's Rights Clinic at CUNY both accept clients based on their status as a battered woman, without first screening for identifiable legal problems. The professors of these clinics emphasize that battering is not merely a specific legal problem, but a problem that takes on many different forms, all of which need to be addressed in order to assist a battered woman to find safety.[179]

In contrast, other clinical programs concentrate on obtaining a specific type of legal relief for women who are battered. The general view of professors in these programs is that there is already a specific, identifiable legal need of battered women in the community which is not being filled. The clinical program becomes a way of meeting that need. For example, the Sex Discrimination Clinic at Georgetown University Law Center and the Gender and the Law Clinic at the University of Minnesota Law School will obtain protection orders for battered women;

178. *See, e.g.,* Crenshaw, *supra* note 13.

179. For a discussion on the limits of law, see *supra* notes 85-114 and accompanying text.

and New York University's Criminal Defense Clinic works specifically with battered women who have killed their batterers. Typically, these clinics will intervene or "pick up" clients at a time when the woman has already made the decision to pursue a particular legal remedy, by doing intake at the courts, for example, or when the criminal justice system has initiated action.

A second focus of inquiry before starting a clinical program addresses a more practical issue: determining the needs of battered women in the community.[180] A needs assessment provides a meaningful indicator of the service needs in a community that the clinical program might provide. Are there four local advocacy projects that already help women with civil protection orders but no legal services offices that will take battered women's divorce cases on a priority basis? Is the local prosecutor someone you know and someone who would be interested in partially supervising students to help prosecute misdemeanor assaults? Are there battered women incarcerated for killing their batterer because they are unable, in your state, to enter testimony about their abuse?

Most important in a needs assessment is the voice of the battered women in the community. Non-lawyer community advocacy groups and battered women's shelters are the main sources of information about what the battered women in the community need and want from lawyers. Make time to talk first with the people you will serve.

Talking with battered women in the community also provides a practical view of the state of the law. Perhaps there is little desire on the part of battered women for protection orders because the state's abuse prevention statute offers inadequate remedies. A one semester clinical program might be created as a means to reform the current legislation. If prosecutors' offices are not vigorously prosecuting domestic violence cases because of low priority or a lack of resources, the presence of law students who could help organize facts, interview witnesses, collect evidence and aid in trial preparation may make a difference in a battered woman's experience of the criminal justice system.[181] Similarly, criminal defense lawyers who take on battered women's self-defense cases can benefit from student assistance and also provide supervision for students.

VII. CONCLUSION

As society faces the devastating impact of rising levels of violence and crime on individuals and communities, they increasingly turn to the law

180. For an excellent review of the considerations involved in starting a student advocacy project, which apply equally to beginning a clinical program, see Brown et al., *supra* note 66.

181. For a discussion of Lauren Robel's Indiana Protective Order Project, see *supra* notes 108-109 and accompanying text.

for solutions. Lawyers gain their first understanding of how the legal system works, what their role in that system will be, and how they can effect changes in the world from their legal education. For many students the introduction to the legal world leaves them alienated and unsatisfied, as law schools tend to ignore issues of social justice and fail to provide students with models of legal work which provide meaning, and not just money. Domestic violence courses can offer students an experience that may alter how they view lawyering. These courses also expose them to critical but largely ignored issues about the lives of women and the law's role in dealing with our increasingly violent society. Just as the medical profession is addressing the need to teach its students about violence, the legal profession must do the same. The programs discussed in this paper represent models for how law schools can begin to teach students about their role in a changing society and putting an end to the cycle of violence.

I. APPENDIX A: METHODOLOGY AND LIST OF PROFESSORS INTERVIEWED

A. *Methodology*

A brief description of my methodology will explain the scope of this paper. The research for this paper was conducted over a one year period from spring of 1991 to spring of 1992. It consisted of two interviews with each professor, an initial interview and a follow up interview occurring approximately one year later to check on the program's status as well as any changes that had occurred over the past year and to verify information obtained in the first interview. Prior to the follow up interview, all participants received a sheet summarizing the description of their program that was to be included in the paper so that they could make corrections as necessary.

The names of people to be interviewed were obtained through three sources. First, Elizabeth Schneider, who supervised this project, provided the names of those people she knew were teaching courses in domestic violence. Second, she supplemented this with a list of professors who attended the Women and the Law Project Meeting of the Association of American Law Schools in 1991. Third, during each initial interview I asked the professors to supplement my list of interviewees. Overall, I contacted twenty professors, conducted extensive interviews with fourteen and included their comments in this paper. However, I did not include all of their programs as part of the paper.

There are two ways in which the programs discussed in this paper are narrow enough to be manageable, but broad enough to provide a sense of the courses in this area. First, I discuss only those courses in law school offered for credit, thereby eliminating the wide variety of programs offered as extra-curricular activities.[182] Second, the paper includes only those courses that focus exclusively, or if not predominantly, on domestic violence. This excluded a broad range of courses and clinical programs which incorporate issues of domestic violence into

182. For example, this excluded Lauren Robel's highly regarded Indiana University School of Law Protective Order Project from discussion in the main section of the paper because it is a completely volunteer, no credit program. However, a description of her project is included in the Appendix and her comments from our conversation are still included in the discussion.

This also excluded a number of student-run advocacy projects such as the Yale University Law School Temporary Restraining Order Project and the Harvard University Law School Battered Women's Advocacy Project.

their programs.[183] It is clear that through extra-curricular activities and incorporation of issues of domestic violence into other courses, these issues are being discussed on law school campuses. However, issues of domestic violence provide abundant opportunities and advantages in a single forum class or clinical, and this paper focuses on how this is now being done.

Finally, a comment on the fluid nature of these curricula. Courses in law school that are not considered part of the core curriculum come and go depending on the availability of the professors and the commitment of the school to teaching the course. All of the courses and programs described in this paper focused on domestic violence because of the intense interest of the particular instructors in the subject matter. I discuss all the programs in the present tense, although due to the nature of law school curriculum, they are not all permanent offerings.[184]

B. *List of People Interviewed*

Beverly Balos
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285 Law Center
229 19th Avenue South
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(612) 625-5515

Mary Becker
Univ. of Chicago Law School
1111 E. 60th St.
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183. One such clinical program was Janet Calvo's Immigrants' Rights Clinic and Seminar at CUNY. Comments and examples provided by Janet Calvo are included in the paper, however, the clinic is discussed in relation to CUNY's Battered Women's Rights Clinic, directed by Susan Bryant, with which the Immigrants' Rights Clinic works closely.

184. Specifically, the following two courses were offered for one semester: Professor Martha Mahoney's Battered Women and the Law class at University of Miami School of Law which was taught in the fall of 1992 and Visiting Professor Elizabeth Schneider's Battered Women and the Law seminar at Harvard University Law School which was taught in the spring of 1991. Professor Mahoney has indicated that she will teach her course again but due to scheduling conflicts probably not until the 1993-94 school year.

One very positive development occurred while writing this paper: Lois Kanter's Domestic Violence Clinic, which was being taught for only two of the four academic quarters at Northeastern University Law School in 1991 and 1992, received funding from the Department of Education to be taught in all four quarters in the 1992-93 school year.

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*Naomi Cahn is now an Associate Professor of Law at George Washington National Law Center. Deborah Epstein is an Assistant Director and Visiting Proessor of Law at the Georgetown University Law Center Sex Discrimination Clinic.

II. APPENDIX B: DESCRIPTION OF THE PROGRAMS

A. *Washington College of Law, American University: Women and the Law Clinic*

TAUGHT BY ANN SHALLECK, DIRECTOR OF THE WOMEN AND THE LAW PROJECT AND PROFESSOR OF LAW

The Women and the Law Clinic, founded in 1984, is a year long clinical program in which students provide legal services for the victims of domestic violence, as well as for women seeking child support and women defending against neglect and abuse charges. The clinic was founded in 1984 and is directed by Ann Shalleck.

Students in the clinic receive six credits per semester. Six students work at the Women and the Law Clinic and two are placed in externships. Students spend three seminar hours weekly in class and an average of twenty to twenty-five hours per week in the clinical.

The classroom component is split. Students meet for two hours weekly in a lawyering process class held in conjunction with the Criminal Justice Institute. Here they cover issues such as the role of the lawyer in interviewing and counseling as well as issues of values, ideology, bias and case theory. Students are also involved in simulations and case presentations.

Students in the clinic meet for one hour a week to discuss the particular lawyering issues that arise in their cases. Professor Shalleck conceives of this hour as a "space for students to talk to others about the common problems that arise not only in the cases, but also in the role of woman as lawyer." Issues of gender are often discussed in this hour, both in terms of gender bias in the system towards the women clients and in terms of the students' experience as a woman lawyer. The construction of the role of the lawyer, its openness and its constraints, is another main focus of the class.

All of the students have at least one client who is a battered woman. In these cases, the student will help the client obtain whatever type of relief she needs. Often, this involves obtaining a civil protection order for the woman or working on a contempt complaint arising from an earlier order. Students, though, may also work on a divorce for the woman, defend against an eviction or appeal a denial of benefits. Students handle all aspects of the clinical work, from interviewing, drafting and filing pleadings, to negotiating and trying cases. There are also two externships which Professor Shalleck supervises. These two students work on abuse and neglect cases with local attorneys.

B. *Boalt Hall School of Law, University of California-Berkeley: Domestic Violence Law and Domestic Violence Clinic*

TAUGHT BY NANCY LEMON, LECTURER

The Domestic Violence Law seminar and the Domestic Violence Clinic taught at Boalt Hall are an example of the impact that students can have on their own education. Boalt students wanted a substantive class on domestic violence to be taught by the school, so they conducted their own search and interview process and recommended Nancy Lemon, the former legal programs Director of Battered Women's Alternatives and later Intern and Volunteer Coordinator at the Family Violence Law Center in Berkeley to teach the course. She was hired by the school and has been teaching the seminar at Boalt since the Fall of 1988. She also taught a seminar at Golden Gate Law School in the spring of 1991. This seminar appears to be the first one taught at any law school which concentrates solely on domestic violence.

Professor Lemon both teaches the seminar and supervises a separate clinic which is offered for two to four students each semester. The seminar consistently has an enrollment of eighteen to thirty-two students.

The class is a substantive course on domestic violence. It is divided into four sections. The first section covers a general introduction to the problem of battering, including the psychological and political aspects of domestic violence, historical and cross-cultural issues, lesbian and gay battering and marital rape. The second section covers issues arising in civil representation of battered women including torts and inter-spousal immunity, temporary restraining orders, interstate custody issues and child-snatching, domestic violence as a custody factor and mediation of custody and visitation disputes. The third section covers issues which arise in criminal representation of battered women including police, district attorney and judge's response to domestic violence, evidentiary issues in criminal domestic violence cases and battered women as defendants. The final section covers administrative and federal issues, specifically welfare and immigration law.

The clinic consists of externship placements with one weekly class hour meeting with Professor Lemon. Students are placed at the Family Violence Law Center, the Cooperative Restraining Order Clinic and the Southern Alameda County Domestic Violence Law Center where they all represent battered women in obtaining restraining orders. Clinic students spend an average of eight to ten hours a week in their clinical placements, which is roughly divided as half the time spent interviewing, drafting pleadings and preparing cases and the other half in court for hearings.

C. *City University of New York Law School at Queens College: Battered Women's Rights Clinic*

TAUGHT BY SUSAN BRYANT, DIRECTOR, MARIA ARIAS AND NILDA DE LOS SANTOS. INTERVIEW CONDUCTED WITH SUSAN BRYANT

CUNY Law School's Battered Women's Rights Clinic, which opened in September of 1990, is a newly added unit at the school's Main Street Legal Services. The function of the clinic is to serve the needs of low income victims of domestic violence, therefore, cases are not accepted by case type, but instead, the client is accepted because of her status as a battered woman.

The Battered Women's Rights Clinic is a year long program for which students get eight credits per semester. Twelve students spend four seminar hours weekly in class and an average of twenty to twenty-five hours per week in the clinical.

The classroom component is a mix of doctrine, theory on domestic violence and lawyering skills. The class aims to give students a broad perspective on domestic violence and include the views of both attorneys and non-attorneys. In addition, students cover substantive law in the different areas of their cases as well as learning lawyering skills such as client counseling and interviewing. Students do both simulations and case presentations.

In the clinical component, students handle a caseload of four to five cases and one project. Students will work on whatever relief the client needs. Often, this involves obtaining a civil protection order, pursuing a contempt complaint arising from an earlier order, securing custody and child support for the woman's children or handling a benefits or housing case. Because of student practice limitations in New York, students rarely handle divorces. Students handle all aspects of the clinical work, from interviewing, drafting and filing pleadings, to negotiating and trying cases.

Students are also involved in one law reform or community project each year. The project serves as a means of allowing students to examine the problems of clients as a group as opposed to separate individuals. Some projects the students have completed include training on women's basic legal rights at local shelters and working with the Committee for Hispanic Women and Children to help develop an agenda for their legislative lobbying efforts. In the 1991-92 school year students worked on a manual for clemency cases in New York as well as working with women in prison on their clemency petitions.

Students have also collaborated with other projects at Main Street Legal Services. For example, since the opening of the Battered Women's Rights Clinic, CUNY's Immigrant's Rights Clinic, directed by Janet Calvo,

has taken on several battered women's cases and several larger law reform projects involving issues of immigrant battered women. For example, students researched and drafted legislation on the pre-petitioning process as it applies to battered women. While there is currently a "battered spouse" waiver, it applies only to immigrant women whose spouses have already petitioned for them. The student's project sought to expand the legislation so that it protected women at other times, such as after the spouse had filed the petition but before it had been approved. Students also sought to form a solution to the common occurrence that a batterer often uses the very application itself as a form of abuse and control by not applying for his wife's citizenship.

D. *Columbus School of Law, Catholic University of America: Family Abuse Project*

TAUGHT BY CATHERINE KLEIN,
DIRECTOR OF THE FAMILY ABUSE PROJECT

For the past thirteen years, the Family Abuse Project, directed by Catherine Klein, has focused its energies on aiding women and children who have been abused, mostly through representation of battered women in divorce cases. The Family Abuse Project is part of the Columbus School of Law's Litigation Clinic. The Litigation Clinic has four attorneys who work primarily in three areas, housing, benefits and family law.

The Litigation Clinic is offered as a semester course in which twenty to twenty-five students spend four hours a week in the classroom and approximately sixteen hours a week doing clinical work.

The class is co-taught by the four attorneys at the Litigation Clinic. It is basically a lawyering process class focusing on teaching students lawyering skills, procedure, ethics and professional responsibility. While there is some substantive law taught in the classroom, it is mostly process.

Students in the clinical are not assigned to a specific unit or supervisor, but instead have a mix of cases. All of the students have at least one client who is a battered woman and the clinic as a whole has a caseload of about one third to one half domestic violence cases. In domestic violence cases, the student will help the client obtain whatever type of relief she needs. Often, this involves obtaining a civil protection order for the woman or following through on a contempt complaint arising from an earlier order. Students, though, may also work on a divorce for the woman, custody or child support. Students handle all aspects of the clinical work, from interviewing, drafting and filing pleadings, to negotiating and trying cases.

E. *Georgetown University Law Center: Sex Discrimination Clinic*

TAUGHT BY SUSAN DELLER ROSS, DIRECTOR AND PROFESSOR OF LAW AND DEBORAH EPSTEIN, ASSISTANT DIRECTOR AND VISITING PROFESSOR OF LAW

The Georgetown Sex Discrimination Clinic was founded ten years ago in 1983 to handle sex-discrimination employment law cases. About five years after its inception, the clinic started to take on domestic violence cases, and in 1989-1990 switched to handling only domestic violence cases.

The Sex Discrimination Clinic is actually a class and a clinical, which must be taken together. Twenty two students a year take the course, which is split into four seminar hours per week and an average of twenty to twenty-five clinical hours per week.

The seminar, which is co-taught by Professor Ross and Professor Epstein, consists of the instruction of both substantive law on domestic violence and lawyering process and trial advocacy skills. There are twenty-eight classes, two two-hour seminars each week. The beginning classes focus on the dynamics of domestic violence and substantive law. The aim of the class is to interweave the teaching of substantive law with teaching students about client representation. The students have their first hearing about four weeks into the semester, and by that time the students have covered interviewing, direct and cross-examination, and openings and closings in class. The class also involves moots by the students which are videotaped and critiqued by the class.

The clinical students obtain civil protection orders and contempt orders for victims of domestic violence. The process for obtaining a civil protection order in Washington D.C. requires a full evidentiary hearing, scheduled two to four weeks after an ex-parte hearing, so that students get actual trial practice. Students do client interviews, draft pleadings, negotiate in court, and/or try the case. A hearing typically involves an opening statement, direct examination of the Plaintiff and cross-examination of the Defendant. Students also have some involvement with the criminal side. They talk intensively with the client about the criminal process and whether she wants to pursue relief through the criminal system. If she does, students will often work with police to issue warrants and meet with the U.S. Attorney to discuss a case.

Students in the clinic have also worked on several cases which have set precedent. For example, in the Washington D.C. Abuse Prevention Act child support was not explicitly available, but there was a catch-all provision allowing any other relief necessary to protect the woman from abuse. A case from the clinic, *Powell v. Powell*, established that child support could be awarded by the court through the catch-all provision.

F. *Harvard University Law School: Battered Women and the Law*

TAUGHT BY ELIZABETH SCHNEIDER, VISITING PROFESSOR

Battered Women and the Law was offered as a seminar course with an optional clinical component at Harvard Law School in the spring of 1991. It was taught by Visiting Professor Elizabeth Schneider.

The class was a two hour seminar with forty students. The materials for the seminar were divided into four different areas. The introductory section was designed to situate the problem and included conflicting definitions of battering, the historical and social context of battering (including cross-cultural issues and gay and lesbian battering), and battered women as mothers (including child custody and welfare issues). The second section focused on social and legal reform efforts to assist battered women, including shelter, civil restraining orders, mandatory arrest and prosecution of domestic violence, and torts. A second part of this section covered alternative procedural frameworks including mediation, civil rights and international human rights. Another part of this section focused on legal representation of battered women and on batterer's programs. The third section discussed the criminal defense of battered women who kill their batterers. The final section returned to the relationship between theory and practice by assessing the contributions of and dilemmas posed by different jurisprudential frameworks, including feminist theory, law and society, critical legal studies and critical race theory. This section also examines the implications of the work of the course for public policy and practice.

The seventeen students in the clinical program met for an additional class hour and received two to four credits for ten to twenty hours of clinical work a week at various externships. The weekly clinical class hour was also run by Professor Schneider and included a discussion of how the theories discussed in class that week applied to the students clinical work.

Students were placed in a wide range of programs. A large percentage worked in the family law units of local legal services offices on domestic violence cases. Three students worked with the Harvard Battered Women's Advocacy Project, obtaining restraining orders for women. Three other students worked with a group of battered women at the local prison on their clemency petitions and developed a clemency manual. Another three students worked with an assistant district attorney, helping her prosecute misdemeanor-level assaults by batterers. One student worked with the Massachusetts Gender Bias Commission on a project to establish information centers for battered women at local courts.

G. *Indiana University-Bloomington School of Law: Protective Order Project*

SUPERVISED BY LAUREN ROBEL,
ASSOCIATE DEAN AND PROFESSOR OF LAW

The Protective Order Project at Indiana University-Bloomington School of Law was consistently referred to by other practitioners as a model project in which law students aided victims of domestic violence in obtaining civil protection orders. Lauren Robel started the project in 1988, and currently trains forty-five law student volunteers for the program each semester. Students work on a completely volunteer basis and receive no credit.

Students in the Protective Order Project participate in an intensive ten hour training program which is given over a weekend. The first day is a crash course in domestic violence. It focuses on the psychological, sociological and historical perspectives of domestic violence. The aim of the first day is to have students see themselves as instruments of change. The second day is the nuts and bolts of the abuse prevention statute and the legal work required of the students in the cases.

After the training, students are assigned to do intakes one day of each month. If the program can take the case presented at intake that day, the student contacts a volunteer attorney to supervise him/her on the case. The project currently enlists twenty attorneys who take these cases on a pro-bono basis. They also have students who are working for credit at the school's poverty law clinic supervise students in the project. Students interview the women and any witnesses, collect evidence, draft briefs and prepare clients and witnesses for direct and cross examinations. However, the volunteer attorney actually tries the case.

H. *University of Maryland School of Law, Clinical Law Office: Practice Group*

TAUGHT BY KAREN CZAPANSKIY, ASSOCIATE PROFESSOR

Karen Czapanskiy's practice group at the Clinical Law Office at the University of Maryland School of Law focuses exclusively on representing victims of domestic violence in a variety of settings. It is the only clinic that will do both criminal defense and civil cases, although the focus of the clinical work is on civil cases.

Six to eight students practice in Professor Czapanskiy's group each semester. Students can elect to work at the clinic for the year or just for one semester. If students are taking the class for one semester, they spend 60% of their time at the clinic and receive seven credits. If they are there for the year, they devote 25% of their time to the clinic and receive four credits per semester. Students spend two seminar hours weekly in class and an average of ten to twenty hours per week in the clinic.

The seminar component is taught by Professor Czapanskiy. The aim of the class is to teach lawyering skills by serving battered women and examining the treatment of battered women in the legal system. The first few weeks of the class provide background information to situate the problem and training in the lawyering skills necessary to obtain a civil protection order. The students simulate an interview, hearing and negotiation. The remainder of the semester is spent discussing whatever the cases in the clinic require. A typical class will have a student moot an argument or negotiation (often with the actual client) and then have the class discuss the presentation.

In the clinical component, students handle three to four cases in addition to working on one larger project. The cases vary from protection orders, divorces, custody and child support, abuse and neglect cases to benefits and housing. The clinic occasionally handles a case where a battered woman has been charged with a misdemeanor.

Students also work on a law reform project that involves the larger issues of social policy concerning battered women. One of the most successful projects that Professor Czapanskiy's students started was a clemency drive which eventually led to the commutation by the Governor of Maryland of the sentences of eight battered women incarcerated for killing their batterers. In the 1991-92 school year, students worked on reforming and passing an amendment to the abuse prevention statute in Maryland.

I. *University of Miami School of Law: Battered Women and the Law*

TAUGHT BY MARTHA MAHONEY, ASSISTANT PROFESSOR

The Battered Women and the Law seminar was taught in the fall of 1991 at the University of Miami School of Law. The seminar was a two credit course with twelve students who met for two hours each week. It did not include any clinical component.

The aim of the seminar was to change student consciousness about battered women by having students question their assumptions and stereotypes about battered women.

The course started with theories of battering, historical and cross-cultural understandings of battering, and lesbian battering. The class covered responses to battering, starting with shelters and civil restraining orders. They then moved to arresting, prosecuting and treating batterers. These classes drew on a case study of a pilot program in Dade County, focusing on early intervention and treatment of batterers at the misdemeanor stage. The judge who runs this pilot program was a guest speaker in the class and readings included feminist perspectives on domestic violence and Martha Minow's judicial training materials. The following section, which focused on battered women who kill in self-defense, made use of the videotape A PLEA FOR JUSTICE. The class also covered emotional abuse, sexual abuse and torts, including marital rape. The class discussion on litigating custody and visitation for battered women included a talk by a feminist lawyer who tried a contested custody case. The lawyer brought in materials from the actual case which the students drew on to discuss trial strategy and how to address bias by the actors in the system. The course ended with the presentation of the students' papers.

J. *University of Minnesota Law School: Domestic Abuse Prosecution Clinic*

TAUGHT BY BEVERLY BALOS, CLINICAL PROFESSOR OF LAW

The Domestic Abuse Prosecution Clinic at the University of Minnesota Law School, taught by Beverly Balos, is most likely the only law school clinical program in which students exclusively prosecute misdemeanor level domestic assaults by batterers. The clinic started in 1986.

The Domestic Abuse Prosecution Clinic has a classroom component of two hours per week. The class is structured so as to simultaneously teach students about criminal procedure in misdemeanor cases, political, sociological and historical theories of domestic violence, and lawyering process skills, such as interviewing and trial advocacy. In addition, students spend the first few weeks of class observing how the criminal justice system actually works. They accompany police on ride-alongs and observe arraignments and pre-trials in criminal court. In the classroom they simulate arraignments, pre-trials and trials.

In the clinical component, students have a caseload of four or five misdemeanor charges. They usually are assigned cases right after arraignment or at the pre-trial stage. Students interview the victims and any witnesses, collect evidence, prepare briefs and negotiate or try the cases in court. Supervision is through both Professor Balos and a city prosecutor who is an adjunct at the law school.

K. *University of Minnesota Law School: Gender and the Law Clinic*

TAUGHT BY BEVERLY BALOS, CLINICAL PROFESSOR OF LAW

Beverly Balos and Mary Louise Fellows, Professor of Law, created a Gender and the Law course in 1990. One of the concepts in the formation of the course was a commitment to integrating theory and practice. In furtherance of that concept, the Gender and the Law course is a pre-requisite to the Gender and the Law Clinic. Gender and the Law is a one semester course which covers a full range of political and sociological issues, as well as feminist theory, focusing on violence against women. About thirty students take the course each year. The clinic was structured so as to add a clinical dimension to Gender and the Law and to further the goal of integrating theory and practice.

The Gender and the Law Clinic has a classroom component of two hour per week. In the class, students learn both the substantive law on domestic violence, The Domestic Abuse Act and the applicable criminal statutes, and lawyering process skills, such as interviewing and trial techniques.

In the clinical component, students represent battered women seeking orders of protection from the preliminary intake through the court process. In Minnesota, a TRO is initially scheduled for a fifteen minute hearing in the morning in front of a referee. If no agreement between the parties is reached and contested issues remain, the case is scheduled for an evidentiary hearing the same afternoon in front of a referee who acts as a judge. This process allows students to get trial practice doing openings, direct examinations, cross examinations, and closing arguments.

L. *Northeastern University School of Law Domestic Violence Clinic*

TAUGHT BY LOIS KANTER, DIRECTOR

The Domestic Violence Clinic at Northeastern Law School is part of a larger project aimed at increasing awareness of domestic violence at the school. The Domestic Violence Advocacy Project, overseen by Clare Dalton, Professor of Law, includes three distinct components: a law school-based community awareness program that includes efforts to integrate issues of domestic violence into the curriculum and to educate the larger academic community on these issues; a shelter-based first year volunteer project where students provide legal advice and referrals to callers and accompany shelter clients to court to secure restraining orders; and a legal services-based Domestic Violence Clinic.

The Domestic Violence Clinic is a clinical course with six to eight second and third year students who work in a legal services office on domestic violence cases. It was started in the summer of 1990; in the winter of 1990-91 Lois Kanter was hired as instructor/supervisor. At the time of this writing, the clinic had recently received funding to expand. I will first describe the clinic as it existed in the 1990-91 and 1991-92 school years and then briefly describe plans for the 1992-93 school year.

In the 1990-91 and 1991-92 school years Northeastern offered the Domestic Violence Clinic as a clinical course in the spring and summer quarters. Six to eight students participated in the clinic receiving six credits per quarter. The classroom component was scheduled for three hours per week, but the class hours were front ended in order to allow for intensive training and education in the first few weeks. The students then spent sixteen to twenty hours a week on their clinical activities.

The class focuses on domestic violence, mixing training on substantive law and on lawyering process and trial advocacy skills. The first two weeks the students go through a role play of a reasonably complex restraining order, from interview through the hearing stage. The role play is supplemented by two long classes, one devoted to an introduction to the dynamics of domestic violence and the applicable areas of substantive law, and a second devoted to litigating abuse prevention cases within the District and Probate Courts. In the remaining nine weeks of the course, structured academic classes are alternated with case reviews. Topics of the classes have included an introduction to the criminal justice system, racism and ethnicity issues, lesbian battering, gender roles and their impact on the dynamics of domestic violence and bias against women in the court system.

In the clinic students do a variety of work, but primarily they obtain and enforce restraining orders for battered women. Routine work includes advocating at the initial and ten day hearings to secure the

orders, filing contempt and criminal complaints when orders are violated, assisting the District Attorney's office at arraignments and criminal trials, and representation when issues of child support and/or custody and visitation emerge. The clinic has worked closest with the local shelter that houses Northeastern's first year program and are working with them to focus on improving service delivery within specific courts. (Just this Spring, both programs have joined a court-initiated pilot project to improve abuse prevention services at the Dorchester District Court, one of the city's busiest.)

For the 1992-93 school year Ms. Kanter has received funding to run the clinic year round. The Clinic should expand from its current half-time, half-year status to full-time, full-year operation, including four clinic sessions each year. The intent for the year is to strengthen ties to the local shelter program by moving into shared space. The structure of the clinic will probably remain very similar, although the types of cases on which students work may expand to include more divorce and child support cases.

M. *New York University School of Law Criminal Defense Clinic*

TAUGHT BY HOLLY MAGUIGAN, ASSOCIATE PROFESSOR OF CLINICAL LAW AND STEVEN ZEIDMAN, ASSISTANT PROFESSOR OF CLINICAL LAW. INTERVIEW CONDUCTED WITH HOLLY MAGUIGAN.

The Criminal Defense Clinic at New York University Law School has a nationwide reputation as a premier clinic for representing battered women who are charged with a felony offense, either homicide or assault, against their batterers.

The clinic does not focus exclusively on battered women's cases. Students are assigned a misdemeanor caseload, and one felony case. One half of the felony cases are those where a battered woman has been accused of either homicide or assault.

Students are involved in the clinic for their entire third year and receive six credits per semester for their work. Sixteen students spend four to five seminar hours weekly in class and an average of 15 to 20 hours per week in the clinical.

The seminar component is structured to provide an analysis of the criminal justice system and the lawyering skills that students need to develop to work well in that system. To that end, the class teaches both the substantive and procedural issues of criminal law and lawyering and trial advocacy skills. Students spend the first few weeks of class observing how the criminal justice system actually works. They ride along with police officers, tour the central booking facilities and observe where defendants are held before trial, where the paper work is processed, and sit with both judges and public defenders while watching arraignment procedures. The purpose of these exercises is to have students begin to think about the biases in the system and how the criminal justice system operates in New York City. Another portion of classes focus on dealing with difference in the criminal justice system, within which issues of battered women as defendants are specifically addressed. But issues of domestic violence also come up in a variety of settings, such as when discussing ethical issues and prosecutorial discretion. Simulations are also done in the classroom.

In the clinical component, students handle misdemeanor cases, which they work on individually. The students are also assigned one felony case, which they work on in pairs. The felony case is actually tried by outside counsel and students second seat the trial. However, students do all the necessary work in the case, including interviewing lay witnesses, interviewing and conferring with expert witnesses, gathering evidence, creating a trial strategy, researching and writing memoranda and trial briefs, and preparing witnesses for direct and cross.

N. *George Washington University National Law Center Domestic Violence Advocacy Project*

TAUGHT BY JOAN MEIER, DIRECTOR,
AND ASSOCIATE PROFESSOR OF CLINICAL LAW

The Domestic Violence Advocacy Project, started in 1993, is a clinical program focusing on lawyering for social change with particular focus on the problem of domestic violence. Approximately ten students may take the clinic each semester, for four credits. Students must participate in a two-hour seminar, in addition to devoting sixteen to twenty hours per week to their clinical work.

For the bulk of their clinical work, students represent battered women in court cases seeking and enforcing civil protection orders. These cases, which are expedited by the court, give students superb experience in representing individual clients, including interviewing and counseling, legal problem-solving, and trial skills. In addition, students participate in an ongoing larger project seeking to reform the justice system's response to domestic violence. Through simultaneous work on individual cases and larger system reform issues, students learn sensitivity to the problem of domestic violence on a personal level while examining the interaction of theory and practice, including their ability to both shape the law and work within it, and the need for larger policy goals both to inform individual representation and to be informed by real people's experiences.

In its first year, the clinic's reform project involves a study of the use of the "battered woman's syndrome" for self-defense claims in criminal cases in the D.C. court system. Students will survey homicide cases in which battered women killed their batterers, and will make recommendations to the D.C. Council concerning the appropriateness of existing law concerning admissability of such testimony. In addition, students will assist the defense in an ongoing trial of a battered woman who killed her batterer. Through this combination of civil and criminal work for battered women, students will experience both the prosecutional and defense council roles, and will gain a richer perspective on the legal system's response to domestic violence.

In addition to their clinical work, students participate in a two-hour seminar which focuses on the interaction of theory and practice, including substantive material on domestic violence and the law, trial skills, and system reform lawyering. Classes involve numerous simulations, role-plays, and discussions of the dynamics of domestic violence, the lawyering role, and ethical issues. Classes occasionally utilize socratic dialogue on substantive law. Classes also include"grand rounds," in which students share issues from their cases and jointly strategize and problem-solve. Students may participate in the clinic for one or two

semesters; those who carry over must produce a research paper on an issue of law reform instead of participating in the seminar.

O. *The Illinois Clemency Project for Battered Women: Issues in Domestic Violence Law at Northwestern University School of Law*

TAUGHT BY CYNTHIA GRANT BOWMAN, ASSOCIATE PROFESSOR OF LAW

Domestic Violence Seminar at University of Chicago School of Law

TAUGHT BY MARY BECKER, PROFESSOR OF LAW, KATHLEEN BANER FROM THE MACARTHUR JUSTICE CENTER AND MICHELLE KAPLAN FROM THE MANDEL LEGAL AID CLINIC OF THE UNIVERSITY OF CHICAGO SCHOOL OF LAW

The Illinois Clemency Project for Battered Women was started by a solo practitioner in Chicago, Margaret Byrne. She had represented several women in prison on their clemency petitions and heard from many others who wanted to participate in a mass clemency project similar to ones that have been conducted in California, Maryland, Ohio, and a number of other states. Byrne called a meeting open to lawyers, law professors, community activists, direct service providers, and students. This group and various subgroups meet regularly to organize and strategize the best way of preparing and presenting clemency petitions to the Prisoner Review Board and Governor of Illinois.

The group devised a structure that capitalizes on the connection with law schools and the enormous student interest in doing this work. Thus, a number of law schools in Illinois will be working in some capacity to write clemency petitions. Two schools, Northwestern University and the University of Chicago, have created courses on domestic violence in which students will take on this work. A third school, DePaul University College of Law is structuring an extra-curricular project with assistance from volunteer attorneys.

The clemency petitions will be undertaken on behalf of any woman who has a verifiable pattern of abuse and is serving time for either killing or injuring her abuser. It is estimated that there are over one hundred women in Illinois prisons who fit this description, although it is unclear at the time of this writing how many will request services. During the summer of 1993, student volunteers will conduct intake at the prisons.

To produce the clemency petitions, students will go to the prisons and interview the women. In addition, they will interview family, friends, and witnesses, write affidavits, collect police reports and hospital records, and draft petitions. Each student will also make a fifteen minute presentation of their case to the Prison Review Board.

At Northwestern, Cynthia Grant Bowman taught Issues in Domestic Violence Law in the fall of 1993, a seminar course on domestic violence

combined with actual representation by students of women on their clemency petitions.

Ten students in the seminar attended a two-hour class for three credits. The clemency petition fulfilled the writing requirement of the seminar. The seminar started with the study of domestic violence as a problem, paying particular attention to the responses and inadequacies in the response of the legal system. Students went to court and observed the protection order process and were asked to draft suggestions for how the domestic violence statute might be improved. The majority of the course concentrated on women who kill their abusers, providing a theoretical background for the students' practical work.

At the University of Chicago, Mary Becker, Kathleen Banner, and Michelle Kaplan co-taught the Domestic Violence Seminar, a three credit course in the fall of 1993. Twenty students worked in pairs on clemency petitions.

Becker structured the class to give students exposure to a broad range of theoretical issues, so that they could see that the way in which the legal system responds to battered women who kill is only one manifestation of the multitude of problems facing battered women. Thus, students studied the abuse prevention laws and spent a morning in court watching the process for obtaining a protection order. A panel of service providers in the community addressed the class and discussed the pros and cons of mandatory arrest and no-drop prosecution policies. Students studied lesbian battering and the specific difficulties lesbians face in obtaining protection, and the class examined child abuse and its connection to domestic violence.

In addressing battered women's self-defense, students read the writings on battered women's syndrome and critiques of battered women's syndrome. They then drew up alternative means of explaining a battered woman's situation which could be presented to a jury.

In addition to the clemency petitions, students handled part of an actual divorce case involving a woman who is battered.

P. *Stanford University Law School Domestic Violence Clinic: Social & Legal Analysis of Woman-Battering/ Models of Attorney Intervention*

TAUGHT BY DONNA COKER, ADJUNCT PROFESSOR OF LAW

With ten years of experience as a social work activist in the battered women's community, including acting as coordinator of programs at the Hawaii Family Peace Center, Donna Coker's seminar at Stanford is designed to have students question dominant models of client representation by looking at the role of lawyers and lawyering within a particular community.

Her three unit seminar, offered in the fall of 1993, had, among other things, students examine both well recognized models of intervention in domestic violence, as well as lesser known models of intervention from communities of color. With this information, the class then examined the community of East Palo Alto, a nearby low-income, multi-cultural community experiencing high levels of drug abuse related problems. Coker chose this site because it is the locale of the domestic violence clinic of the East Palo Alto Community Law Project, a Stanford affiliated clinic. In addition, ten of the eighteen students enrolled in the seminar took an additional clinical credit with the course for which they worked in the Community Law Project.

In their examination of different intervention models, students focused on the questions: what model would work best in this particular community? And what is the lawyer's role within this model of intervention? They answered these questions by devising a model of domestic violence intervention that was appropriate for East Palo Alto. Donna Coker hoped that, by having students engage in this exercise, they would learn that the law does not stand alone, but is used by lawyers in a particular way within the particular communities they serve.

The seminar began by studying men who batter. Students read the psychological and sociological information available on men who batter and also looked at the criminal and cultural sanctions that men receive (or fail to receive) for their actions. The seminar continued with the historical perspective on battering. A section on cross-cultural understandings of woman abuse and lesbian and gay battering paid particular attention to the problems of exclusivity in the definition of "battered woman" that has emerged in our culture and which often serves to deny any relief within the legal system to women of color and poor women, among others, who don't fit the stereotypical mold.

Another section examined the use of civil protection orders to protect women, asking whether they work and if lawyers can know when they will work. By introducing the methods used to estimate the lethality of a particular batterer, students can gain a greater grasp of the fact that,

as lawyers seeking to effectively assist clients, they need to look at the particular needs of each client and to have more sophisticated information available to them than simply the law on the books. The class also covered emotional abuse, sexual abuse, and marital rape, and the relationship of drug and alcohol abuse to domestic violence clinic of the Community Law Project. Students also worked in pairs to put together a community education program. One education program was directed at educating teens in local high schools on dating and domestic violence, the second was directed at training the police force. The third option for a pair of students was to create a report and suggestions for how to better serve the needs of the East Palo Alto community. The students compiled information from the files at the student-run domestic violence clinic, as well as interviewed service providers and members of the community. Students also looked at how to connect the local community to extensive resources already available in the region.

Q. *University of Florida College of Law: Domestic Violence Seminar*

TAUGHT BY NANCY DOWD, PROFESSOR OF LAW

In the spring of 1993, Nancy Dowd taught the Domestic Violence Seminar at University of Florida College of Law.

Dowd's goals for the seminar were to provide students with a base of information on domestic violence from which they could then problem solve an issue. To achieve the latter goal, she required student seminar papers to have practical significance in the field and to be of publishable quality. She noted that the paper requirement, while difficult for the students, also excited and motivated them.

The course began by addressing head on students' preconceived notions about domestic violence, focusing on who batters, who is battered, and how abuse occurs within relationships. She returned to this subject throughout the course, inviting three guest speakers to the class, all selected to address the tendency of those learning about domestic violence to deny or minimize the extent of the harm of abuse by casting the women as weak and helpless "others" and the men as mentally imbalanced crazies.

In the first class, students heard about the local impact of domestic violence. Dr. Mary E. Nutter, Executive Director of Sexual and Physical Abuse Resource Center, a local shelter, talked about the women who use her shelter and the partners of these women. This helped students understand that the national statistics included people within their community.

In the next three weeks of class, students read about the historical, cross-cultural, sociological, and psychological aspects of battering. They discussed battering within gay and lesbian communities and communities of color, profile and treatment models for men who batter, and the connection between women abuse and child abuse.

In the class on batterers, Paul Weiler, a psychologist who runs group therapy in a batterers' treatment program, spoke to the class. Weiler first discussed different models of therapy emphasizing how popular models, specifically the family systems model and couples therapy, often serve to replicate the same patterns of abuse a woman is experiencing in her home. He then discussed the model used in his program, the power and control model, which connects the battering behavior to larger societal patterns of domination within male-female relationships.

To illustrate the power and control model he showed several videos that were very effective in demonstrating to students that power and control issues are often present in every relationship. For example, one video shows a couple who drive to a convenience store and the woman goes alone into the store to purchase a pack of cigarettes. While inside,

she talks to the clerk and a male customer. Her partner sees this from the car and invents a story of what is occurring inside the store in his head. He then begins his abusive behavior when she returns to the car. The story continues and clearly shows a dynamic in which the woman is not passive and the man is not a brute, but the dynamics of power and control are readily apparent.

The next five weeks concentrated on the legal system's response to battered women. This section started with an overview of how the legal system and actors within it perceive battered women, which lead into a discussion of battered women's syndrome and self-defense. Civil remedies, including civil protection orders, torts, and civil rights were covered next.

In the next to last week of readings, students examined state and national reform efforts. Sue Peterson-Armstrong, Executive Director of the Florida Coalition Against Domestic Violence shared her experiences about reform efforts in Florida. Proposed federal and civil rights legislation was also discussed.

In the last class, students explored the connection between domestic violence and other issues of violence against women in a broader feminist analysis.

Finally, in addition to their paper requirement, students turned in a weekly journal with their thoughts on the course reading. The journal was a productive way to maintain communication about the difficult issues which students encountered in studying the topic.

R. *Suffolk University Law School: Battered Women's Advocacy Project*

TAUGHT BY CHRISTINE BUTLER: DIRECTOR AND ADJUNCT PROFESSOR

The Suffolk Battered Women's Advocacy Project is yet another example of student initiative in creating domestic violence course. Students from the Suffolk Women's Law Caucus met in the summer of 1985 to determine how they could integrate work with battered women into their law school experience. Christine Butler, a Suffolk alumna, who at the time was working with local battered women's shelters and representing battered women in her private practice, offered support and guidance. The students started a crisis line for battered women and accompanied those women who needed advocacy services into court to obtain restraining orders. Although the students received no funding for the project, they were able, with Butler and another attorney as volunteer supervisors, to acquire some limited independent study credits for their work.

Two years later, the program received funding from the school and became a one semester clinical course for which students received two credits, and eventually three. Students at Suffolk, who may take a maximum of nine clinical credits during law school, have the option of taking the clinical course up to three times. While this is an unusual arrangement, it is possible because the supervisors meet separately with students who "repeat" the course and cover additional advanced material. Up to one half of the students take the course for a second semester during the academic year.

Twenty students have two class hours per week in addition to a one-time, full day training in the beginning of the semester. During training, students learn about stereotypical images as compared with the realities of battered women, batterers and the dynamic of battering. A weekly two-hour class then begins with the substantive law and procedure for obtaining restraining orders and pressing criminal charges as well as strategies for safety planning based on the shelter model. Students are taken on a tour of a courthouse and are walked through a hypothetical case. Later, classes discuss other pertinent areas of law, such as divorce, paternity, and the Uniform Child Custody Jurisdiction Act, as well as involve students in simulations and role-plays to develop practical lawyering skills. The main focus of the class is the political dimensions of the students' work. Time is always open during class and in individual supervision to discuss the emotional aspects of the work and how it effects each student.

Students spend from ten to twenty hours a week on clinical work. Four to six hours a week are spent assisting women on the crisis line. The remainder is spent advocating for women in protection order

hearings, and, when needed, assisting the client in pressing criminal charges. The Project has relationships with several area courts which allow students to "staff" the court for specific hours each week and assist each woman as she comes in seeking a restraining order, if the woman desires the representation. Students thus pick up cases by staffing a court one day each week and by assisting the women who call on the crisis line.

COMMENTS

From Self-Defense to Coercion: *McMaugh v. State* Use of Battered Woman's Syndrome to Defend Wife's Involvement in Third-Party Murder

I. INTRODUCTION

The admissibility of evidence of battered woman's syndrome continues to receive abundant attention, both positive and negative, in public arenas such as courtrooms,[1] books,[2] newspapers,[3] and television

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1. *See generally* Margaret M. Prendergast, *The Admissibility of Expert Testimony on Battered Woman Syndrome Under the Federal Rules of Evidence*, 65 TEMP. L. REV. 341 (Spring 1992); Loraine P. Eber, Note, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895 (1981); *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman's Syndrome and Rape Trauma Syndrome*, 25 COLUM. J.L. AND SOC. PROBS. 277 (1992); Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545 (1988).

2. *See generally* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW (1981); CHARLES PATRICK EWING, BATTERED WOMEN WHO KILL (1987); JENNIFER BAKER FLEMING, STOPPING WIFE ABUSE (1979); CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW (1989); EDWARD W. GONDOLF, BATTERED WOMEN AS SURVIVORS (1988); DEL MARTIN, BATTERED WIVES (1976); AGGRESSION, FAMILY VIOLENCE AND CHEMICAL DEPENDENCY (Ronald T. and Patricia S. Potter-Effron eds., 1990); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984) [hereinafter THE BATTERED WOMAN SYNDROME]; LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1989) [hereinafter TERRIFYING LOVE].

3. A Boston Globe report indicated that "[i]n the first three months of 1992, one Massachusetts woman was murdered every nine days as a result of domestic violence." Anita Diamant, *How the Quincy District Court Protects Battered Women*, BOSTON GLOBE MAGAZINE, Oct. 11, 1992, at 14. *See also* Sally Jacobs, *In Hub and Beyond, HIV Seen as Latest Whip for Batterers*, BOSTON GLOBE, Jan. 24, 1993:

> [I]n women's shelters and emergency rooms and clinics across the country, there is a growing perception that HIV infection may have become the most

programs[4] designed to stage controversial legal topics. Traditionally, a battered woman's defense[5] consists of the admission of sufficient evi-dence of abuse to demonstrate that the victim killed her aggressor, typically her spouse or intimate companion,[6] in self-defense. The Rhode Island Supreme Court recently shifted the dynamic of the doctrine from self-defense to coercion by permitting Ann McMaugh to use battered woman's syndrome to establish the coercive measures implemented by her husband.

This Comment proposes that acceptance of coercion as a viable, alternate standard for admitting evidence of battered woman's syndrome could promote the doctrine's overall acceptance.[7] Because the requisites for proving coercion are less stringent than those of self-defense,[8] the threshold for inculcating battered woman's syndrome into

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> insidious weapon of domestic abuse. . . . [S]ometimes the men refuse [to wear condoms] because the human immuno-deficiency virus, which causes AIDS, is the most powerful weapon of control that they possess.

Id. at 21, 24. *See also* Rebecca Freligh, *Bobbitt Case Spotlighted Domestic Violence*, PLAIN DEALER REPORTER, Jan. 25, 1994, at ID ("In the wake of the not guilty verdict in Lorena Bobbitt's trial, local experts hope the heightened attention it brought to domestic violence resonates beyond the grotesque facts of the Virginia case.").

4. *See generally L.A. Law* (NBC television broadcast); *Law and Order* (NBC television broadcast); *N.Y.P.D. Blues* (ABC television broadcast).

5. For purposes of this paper, the term "battered woman's syndrome" refers to the victim in the feminine form since most individuals seeking admission of evidence of abuse are women. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 21 (1983). In addition, while most claims of battered woman's syndrome depict a woman's husband as her abuser, the scope of the doctrine is in no way limited to such an application. *See, e.g.*, Lynda Gorov, *Battered–By a Woman: Lesbian Slayer of Abusive Lover Seeks Pardon*, BOSTON GLOBE, Jan. 10, 1993 at 21, 27.

6. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.05(b)(1) (1987). *See, e.g.*, State v. Ordway, 619 A.2d 819 (R.I. 1992). The defendant was an abused woman who thought her husband was going to choke her because he had acted similarly in the past. *Id.* at 821-22. The defendant admitted that she "grabbed [a] knife from the television and warned [her husband] to stay away from her." *Id.* at 822. When he continued to approach her, the defendant acknowledged stabbing him in the arm. *Id.* However, she had no recollection of inflicting a second, fatal stab wound which punctured his lung and heart. *Id.*

7. Although the battered woman concept continues to receive significant publicity, the doctrine's status as an absolute "self-defense" has not achieved universal acceptance in this country. *See* cases cited *infra* note 40 and accompanying text.

8. The elements of a self-defense claim are that (1) a person may use against a perpetrator that amount of force which he or she reasonably believes is necessary to prevent (2) imminent death or serious bodily injury if (3) he or she is not the first aggressor. DRESSLER, *supra* note 6, at § 18.01. *See also infra* notes 24-30 and accompanying text. The elements of coercion include (1) a threat to immediately kill or seriously injure another unless he or she commits the offense; (2) the victim's reasonable belief that the threat is real; (3) the victim's reasonable belief that committing the offense is necessary to prevent the perpetrator from fulfilling the

the legal mainstream could become more relaxed and broader in scope. Although the admissibility of evidence of the syndrome is not accepted equally throughout the United States in self-defense cases,[9] permeation of the doctrine at a lower standard could promote its eventual universal acceptance as an absolute self-defense justification for battered women.

This Comment examines the Rhode Island Supreme Court's acceptance of battered woman's syndrome as a means of establishing coercion. Part II discusses background on self-defense, the development of the battered woman concept, and the coercion defense.[10]

Part III establishes the facts upon which *McMaugh v. State*[11] is based, and the holding of the court.[12] Part IV, a detailed analysis of the opinion, explores whether and how other courts apply evidence of battered woman's syndrome in cases other than self-defense.[13] Finally, the potential effects of a shift from self-defense to coercion, especially as they relate to the *mens rea*, or criminal intent element, will be investigated to determine whether recognition at a lower standard would really promote universal acceptance of battered woman's syndrome as an absolutely justifiable self-defense.

II. BACKGROUND

A. *Self-Defense*

The common law distinguishes between two types of self-defense which exonerate individuals who commit homicide. The first, justifiable self-defense, applies to anyone who while faultlessly attacked, slays an aggressor to protect him or herself from death or serious bodily injury.[14] Elemental to this defense is the victim's reasonable and honest belief in the imminent danger of death or grave bodily harm.[15] Therefore, subsequent discovery dispelling the danger's authenticity does not bar invocation of this defense.[16]

The second, excusable self-defense, applies when an individual, confronted with a sudden assault, kills an assailant to save him or herself

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threat; and (4) the lack of fault of the victim for being involved in the coercive situation. DRESSLER, *supra* note 6, at § 23.01. *See also infra* notes 53-60 and accom-panying text.

9. *See* cases cited *infra* note 40 and accompanying text.

10. *See infra* notes 14-60 and accompanying text.

11. 612 A.2d 725 (R.I. 1992).

12. *See infra* notes 61-167 and accompanying text.

13. *See infra* notes 168-220 and accompanying text.

14. IRVING J. SLOAN, THE LAW OF SELF-DEFENSE: LEGAL AND ETHICAL PRINCIPLES 1 (1987).

15. *Id.* at 8. The reasonableness of the actor's conduct constitutes the objective aspect of the test, while her belief, although mistaken, comprises the subjective component. *Id.*

16. *Id.* at 1.

from death or serious bodily harm.[17] Conditions precedent to suc-cessful execution of this defense are that the victim both retreat to safety, if possible, before killing the adversary, and demonstrate later that he or she was not the aggressor.[18] States failing to differentiate between these two forms consolidate both types under the crown of justifiable self-defense.[19]

Statutes generally dictate the amount of force a victim may exercise during the pendency of attack.[20] On its broadest terms, the law allows one attacked to use any force directly proportional to the potency of the aggressor's force.[21] For example, use of lethal force is warranted only upon a showing that the actor reasonably believed that the aggressor immediately intended to inflict death or serious bodily harm.[22]

B. *Battered Woman's*[23] *Syndrome: An Imperfect Self-defense*

The battered woman's syndrome has often been termed an "imperfect" self-defense because testimony of prior attacks serves to mitigate charges, such as reducing first-degree murder to manslaughter,[24] in cases not absolutely applying the doctrine. The law of self-defense has been referred to as a law for men,[25] since women generally do not engage in fist fights, nor do they kill violent strangers to save

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17. *Id.*

18. *Id.*

19. *Id.* at 2.

20. *Id.* at 23; *see also* R.I. GEN. LAWS §11-8-8 (1991); State v. Fetzik, 577 A.2d 990 (R.I. 1990) (holding that a person assailed in his residence by a co-habitant is not entitled to employ deadly force).

21. SLOAN, *supra* note 14, at 25. Both statutes and case law delineate more specific qualifications, such as the use of non-deadly or deadly force. *Id.* at 23-24. *See, e.g.,* State v. Butler, 268 A.2d 433 (R.I. 1970) (holding that a defendant is entitled to have a jury instruction on the issue of self-defense whether or not the judge believes his or her testimony); State v. Carson, 423 A.2d 823 (R.I. 1980) (explaining that when a defendant proves some evidence of self-defense, the burden falls on the state to disprove this defense beyond a reasonable doubt).

22. SLOAN, *supra* note 14, at 25.

23. *See supra* note 5.

24. State v. Ordway, 619 A.2d 819 (R.I. 1992); *see also supra* note 6.

25. GILLESPIE, *supra* note 2, at 4. The author identifies two scenarios out of which the law of self-defense arose: the abrupt assault and the fist fight or brawl. She notes, however, that the assumptions that "the antagonists were men of relatively equal size, strength, and fighting ability . . . [and] were strangers, or perhaps acquaintances, whose confrontation was an isolated incident occurring in a public place from which one or both could withdraw or escape" created the foundation of the self-defense doctrine. *Id.* at 4-5. *See also* Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense,* 15 HARV. C.R.-C.L. L. REV. 623, 624-25 (1980); DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE (Daniel Jay Sonkin, Ph.D., ed., 1987).

their own lives.[26] A women who kills in self-defense usually does so within her abode, and against her husband or intimate companion who has subjected her to years of systematic threats, beatings, and fear.[27] "Because the battered woman's use of deadly force may not have conformed to the traditional definitions [of self-defense], it was often necessary to offer a defense of insanity or diminished capacity in an attempt to explain the woman's actions."[28] This issue was finally addressed in *State v. Wanrow*,[29] in which the Washington Supreme Court decided that a battered woman was entitled to a self-defense jury instruction which embraced her vantage point.[30]

The dynamic of battered woman's syndrome involves the victim's subjection to systematic and almost ritualistic patterns of both physical and psychological abuse.[31] Those who survive these repeated attacks are often further debilitated by feeling helpless and out of control, while perceiving their abusers as both omnipotent and omniscient.[32]

Apprehension toward exonerating individuals who premeditatively murder their intimate partners causes some to disfavor the doctrine.[33]

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26. GILLESPIE, *supra* note 2, at 5. *See also* CHARLES PATRICK EWING, PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION 23 (1987) (quoting FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 8, 169-177 (1985) ("Men are the perpetrators as well as the victims in the vast majority of homicides in the United States. In 1984, for example, of the 13,856 individuals arrested for murder or non-negligent manslaughter, more than 86 percent were men. During the same year, men comprised over 74 percent of murder victims.")).

27. GILLESPIE, *supra* note 2, at 5. *See also* WALKER, THE BATTERED WOMAN SYNDROME, *supra* note 2, at 40-44 (addressing the effects of male violence against women, including low self-esteem, a sense of self-protection against recurring attacks, and the perception of notable changes in the male's behavior signaling his intent and capacity to kill her).

28. SLOAN, *supra* note 14, at 30.

29. 559 P.2d 548 (Wash. 1977). The court permitted the jury to consider the defendant's conduct through her perception of the situation in light of the conditions to which she was subjected. *Id.*

30. *Id.* at 555. "[T]he justification of self-defense is to be evaluated in light of *all* the facts and circumstances known to the defendant, including those known substantially before the killing." *Id.*

31. DRESSLER, *supra* note 6, at §18.05(b)(1). *See also infra* notes 36-43 and accompanying text.

32. DRESSLER, *supra* note 6, at 204.

33. GONDOLF, *supra* note 2, at 11-18. *See, e.g.*, People v. Yaklich, 833 P.2d 758 (Colo. 1991) (holding that a self-defense instruction is not available in a contract-for-hire situation, even though the accused presents credible evidence that she is a victim of battered woman's syndrome). The jury in Commonwealth v. Grimshaw, 590 N.E.2d 681 (Mass. 1992) believed that the defendant suffered from battered woman's syndrome despite the fact that Massachusetts has yet to rule on the admissibility of this evidence. *Id.* at 685. The defendant, however, was convicted of manslaughter for retaining two friends to lure her husband into the woods and bludgeon him to death. *Id.* at 682.

Observance of the diminished state of mind of the battered victim, culminating in an imminent act of self-defense, makes others advocate admission of evidence of abuse.[34] Central to successful implementation of the doctrine is a showing of imminence–that the woman's mental state was so intimately tied to the patterns of abuse that her extreme conduct can be condoned as defensive in a moment of desperation rather than as a premeditated act of murder.[35]

The New Jersey Supreme Court pioneered the on-going debate over the use of expert testimony to explain the battered woman's state of mind and the reasonableness of her belief in the necessity and the amount of force used.[36] The narrow issue of the decision concerned whether the expert testimony was "scientific" enough to justify dependence on authority.[37] In an attempt to define what is meant by the term "battered woman's syndrome,"[38] the court further commented in detail on the plight of the battered woman.[39]

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34. *See, e.g.,* State v. Kelly, 478 A.2d 364 (N.J. 1984), discussed *infra* notes 36-39 and accompanying text.

35. TERRIFYING LOVE, *supra* note 2, at 26 ("The term *imminent* as it is defined in self-defense statutes usually means 'to be on the brink of,' not 'immediate,' as is its more common interpretation.").

36. State v. Kelly, 478 A.2d 364 (N.J. 1984). The defendant, Gladys Kelly, was involved in a "stormy" marriage plagued by her husband's alcohol addiction, violent physical attacks, and threats to her life. *Id.* at 369. Mrs. Kelly, who met her husband at his friend's house to ask for money to buy food for the family, became involved in a public melee with her husband on the way home. *Id.* After strangers separated the two, Mr. Kelly lunged at his wife who, in fear for her life, removed a pair of scissors from her pocketbook and mortally stabbed him. *Id.*

37. *Id.* The state proposed that dependence on expert testimony to assist the jury in evaluating the defendant's perception of her situation was misplaced since lay persons possess the capacity to understand and analyze both situations. *Id.* at 375. Thus, the state claimed that its case would be unfairly prejudiced since the jury would tend to overweigh the expert's testimony because of his or her status. *Id.* at 378. The court opined that the testimony was necessary to identify and refute:

> [A]n area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge.

Id.

38. The court defined the syndrome as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figures in their lives." *Id.* at 371. The court further noted that the physical and emotional abuse, combined with social and economic factors, comprised the core of the syndrome. *Id.*

39. *Id.* at 369-73. The court noted that battered women are subjected to long-term physical and psychological abuse, primarily by the intimate men in their lives. *Id.* at 369-70. Alcohol is often a catalyst to the violence, which occurs most often in the privacy of the home. *Id. See generally* AGGRESSION, FAMILY VIOLENCE AND CHEMICAL DEPENDENCY, *supra* note 2. Moreover, the battered woman is generally

Today, many states, similar to New Jersey, have allowed the use of expert testimony regarding battered woman's syndrome to dispel common myths.[40] Perhaps the most popular fiction is that a battered woman is always free to leave her aggressor, and that her continued presence indicates a better situation than the one to which she admits.[41] Clinical studies have shown this not to be the reality; in fact, a battered woman tends to become incapacitated by extremely low self-esteem, fear of the awesome power of her aggressor, and a feeling of responsibility

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financially dependent on the man. THE BATTERED WOMAN SYNDROME, *supra* note 2, at 27. Dr. Walker's study of 435 battered women revealed that thirty-four percent had no access to checking accounts, fifty-one percent had no access to charge accounts, and twenty-seven percent had no access to cash. *Id.* (*cited in* EWING, *supra* note 2, at 10). This only serves to worsen the situation when children are involved in the equation. *Kelly*, 478 A.2d at 369-70. A battered woman may respond by evincing a low self-esteem, a desire to save the marriage and family based on guilt over its failure, and a fear that she will suffer even greater repercussions from her spouse or intimate companion upon leaving. *Id.* at 372-73. Battered women become trapped and paralyzed by fear, which cripples their ability to improve or alter the situation. *Id.*

40. Today, many, but not all, states have permitted use of the defense. *See Ex parte* Hill, 507 So.2d 558 (Ala. 1987); Thompson v. State, 813 S.W.2d 249 (Ark. 1991); People v. Aris, 215 Cal. App. 3d 1178, 264 Cal. Rptr. 67 (Cal. 1989); Ibn-Tamas v. United States, 455 A.2d 893 (D.C. 1983); Hawthorne v. State, 408 So.2d 801 (Fla. Dist. Ct. App. 1982); Smith v. State, 277 S.E.2d 678 (Ga. 1981); People v. Minnis, 455 N.E.2d 209 (Ill. 1983); State v. Hodges, 716 P.2d 563 (Kan. 1986); Commonwealth v. Rose, 725 S.W.2d 588 (Ky. 1987); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Wilson, 487 N.W.2d 822 (Mich. 1992); State v. Hennum, 441 N.W.2d 793 (Minn. 1989); State v. Briand, 547 A.2d 235 (N.H. 1988); State v. Kelly, 478 A.2d 364 (N.J. 1984); State v. Swavola, 1992 LEXIS 73 (N.M. Ct. App. 1992); People v. Towes, 488 N.Y.S.2d 358 (N.Y. 1985); State v. Norman, 366 S.E.2d 586 (N.C. 1988); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983); State v. Koss, 551 N.E.2d 970 (Ohio 1990); Bechtel v. State, 840 P.2d 1 (Okla. 1992); State v. Moore, 695 P.2d 985 (Or. 1992); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989); McMaugh v. State, 612 A.2d 725 (R.I. 1992); State v. Hill, 339 S.E.2d 121 (S.C. 1986); Fielder v. State, 756 S.W.2d 309 (Tex. Crim. App. 1985); State v. Ciskie, 751 P.2d 1165 (Wash. 1988); State v. Steele, 359 S.E.2d 558 (W. Va. 1987); State v. Landis, 406 N.W.2d 171 (Wis. 1987); Buhrle v. State, 627 P.2d 1374 (Wyo. 1981).

41. *See generally* TERRIFYING LOVE, *supra* note 2. Battered women stay with their abusers for many reasons, including fear of previous threats made by a batterer that he will find and possibly kill her; lack of money; learned helplessness; family expectations; impossibility of a lawsuit; and the inability of law enforcement officers to remedy situations other than battering incidents in process. EWING, *supra* note 2, at 12-21. *See generally* J. HENDRICKS, CRISIS INTERVENTION: CONTEMPORARY ISSUES FOR ON-SITE INTERVENERS 49-51 (1985) (*cited in* EWING, *supra* note 2, at 15); CRIMINAL JUSTICE, POLITICS AND WOMEN: AN AFTERMATH OF LEGALLY MANDATED CHANGE (Claudine Schweber & Clarice Feinman eds., 1985) (addressing the problems with the implementation and effectiveness of restraining orders in the prevention of subsequent abuse).

for the situation.[42] Another misconception is that the battered woman is a liar because she insists her companion loves her; outsiders observing a battering situation find it hard to imagine loving someone who beats you.[43] For these reasons, courts admit documentation on battered woman's syndrome to help the jury target whether the defendant honestly and reasonably believed she was in imminent danger of death or serious bodily harm, and whether or not a reasonable person in her position would have reached a similar conclusion.[44]

Consistent with other defendants claiming self-defense to homicide, a battered woman is accorded a fair trial by being allowed to present evidence of the disparity in size, weight, and strength between her aggressor and herself,[45] the location of the altercation,[46] her rationale for feeling apprehensive,[47] and her intuition for the need to use deadly force to save her own life.[48] Evidence that the defendant was battered can support the reasonableness of her actions.[49]

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42. THE BATTERED WOMAN SYNDROME, *supra* note 2, at 23-33. Many studies of battered wives have revealed consequences even more frightening and graphic than the inability to leave. For example, in Walker's study of 435 battered women, two-thirds of the abusive encounters involved pushing, slapping, and hitting. Punching or throwing the woman occurred in half of these episodes, while approximately "one-third of these women reported being choked or strangled, and almost ten percent said they had been attacked with an automobile." EWING, *supra* note 2, at 8 (citing THE BATTERED WOMAN SYNDROME, *supra* note 2, at 28). The laundry list of injuries included burns, attempted drownings, fractures, lacerations, stab and gunshot wounds, internal bleeding, and concussions. *Id.* Another study examined 420 women who had reported being beaten at least once a week. *Id.* (citing Kuhl, *Community Responses to Battered Women*, 7 VICTIMOLOGY 49, 52 (1982)). In a study of fifty women, twenty-four admitted that their mates physically battered them while they were noticeably pregnant. *Id.* (citing K. HOFELLER, SOCIAL, PSYCHOLOGICAL AND SITUATIONAL FACTORS IN WIFE ABUSE (1982)).

43. THE BATTERED WOMAN'S SYNDROME, *supra* note 2, at 25.

44. GILLESPIE, *supra* note 2, at 67-77.

45. *Id.* at 100.

46. Many battered women who kill their spouses do so in the privacy of their homes. *See supra* note 27 and accompanying text. *See also* EWING, *supra* note 2, at 81 (examining the "castle doctrine" or defense to habitation as applied to a battered woman's self-defense claim).

47. *See supra* note 41-42 and accompanying text.

48. *See* cases cited *supra* note 40 and accompanying text.

49. State v. Kelly, 478 A.2d 364 (N.J. 1984).

C. *Coercion*

Whereas self-defense justifies the commission of a crime, coercion[50] affirmatively excuses[51] allegations of criminal conduct.[52] "In prosecutions of criminal defendants . . . the fundamental issue is the extent to which coercive treatment interferes with the victim's capacity to formulate voluntarily the criminal intent required to uphold a criminal charge."[53] Coercion requires that the defendant has acted voluntarily or intentionally.[54] A presumption of coercion exists when the defendant demonstrates that he or she was in imminent danger, with no opportunity to escape, and had a well-grounded fear of death or serious bodily injury unless he or she complied with the captor's commands.[55] The burden then shifts to the state to prove the lack of coercion, and to establish beyond a reasonable doubt that the actor was not operating under compulsion.[56]

When a battered woman claims coercion as the basis for her conduct,[57] courts have found this idea of "continuous compulsion" difficult, if not impossible, to overcome.[58] Courts generally perceive a battered woman's ability to come and go on her own, to marry, and to control

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50. For purposes of this Comment, the term "coercion" will be used consistently, although courts often interchange coercion with duress. *See, e.g.*, DRESSLER, *supra* note 6, at 259. Notes will indicate whenever the word coercion has been substituted for duress.

51. However, in some jurisdictions coercion or duress is still only an imperfect defense. DRESSLER, *supra* note 6, at 264.

52. *Id.* at 259. In Rhode Island, the test for coercion is "whether the defendant's statements [or conduct] were 'the product of his free will and rational choices' or the result of coercion that had overcome the defendant's will at the time he confessed." State v. Griffith, 612 A.2d 21 (R.I. 1992) (quoting Greenwald v. Wisconsin, 390 U.S. 519 (1968)).

53. Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1, 5 (1978). "Past experience demonstrates that most . . . [coercively persuaded] victims, once removed from the coercive environment, soon lose their inculcated responses and return to their former modes of thinking and acting. . . . Punishment of such individuals does little to promote the rationales of the criminal justice system." *Id.* at 9.

54. United States v. Johnson, 956 F.2d 894, 897 (9th Cir. 1992).

55. United States v. Hearst, 563 F.2d 1331, 1335 (9th Cir. 1977). Statutes such as R.I. GEN. LAWS §§ 11-37-1, 11-37-2, 11-37-4, 11-39-1, and 11-41-5 include implied as well as express threats. *See also* State v. Burke, 522 A.2d 725 (R.I. 1987). How-ever, threats alone are insufficient unless accompanied by a "well-grounded apprehension of death or serious bodily injury if the act is not done." United States v. Gordon, 526 F.2d 406, 407 (9th Cir. 1975) (*cited in* McMaugh v. State, 612 A.2d 725 (R.I. 1992)).

56. *Hearst*, 563 F.2d at 1335.

57. *See infra* notes 168-220 and accompanying text.

58. *See infra* notes 198-213 and accompanying text.

her own finances as evidence that she did not suffer from the coercive pressure throughout the entire period during which she claims to have been coerced.[59] Moreover, courts have difficulty reconciling the two defenses since coercion assumes that the defendant has acted voluntarily, and evidence of battered woman's syndrome is offered to negate the defendant's criminal intent or free will. In attempting to resolve this apparent conflict, one court has determined the relevant test to be "whether, given the experience and psychological makeup of this defendant, she feared to leave her criminal ways and obeyed from fear the criminal who directed her conduct."[60]

III. MCMAUGH V. STATE

While some courts[61] have labored over the use of expert testimony in determining the defendant's state of mind,[62] others are now encountering claims of battered woman's syndrome to excuse crimes not committed in self-defense.[63] *McMaugh II* illustrates the use of the battered woman's syndrome to establish a coercion defense to a charge of murdering a third party.[64]

A. *Facts*

In 1985, Mr. Bernard and Mrs. Ann McMaugh were convicted by the Superior Court jury of murder, conspiracy, and carrying a pistol without a license.[65] Bernard McMaugh was also convicted of assault with a deadly weapon.[66]

An indictment was issued against the couple based on the following facts. On the night of August 15, 1980, Bernard and Ann McMaugh

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59. *See* United States v. Gregory, No. 88 CR 295, 1988 U.S. Dist. LEXIS 10060 (Dist. Ill. Sept. 2, 1988), discussed *infra* notes 207-12 and accompanying text.

60. United States v. Johnson, 956 F.2d 894, 900 (9th Cir. 1992). In this case, the defendants claimed that they were under coercion (actually pleaded as duress) prior to distributing drugs, for which they were later convicted. *Id.* at 897. While the defendants had not proven coercion as an affirmative defense, they were entitled to raise the claim of incomplete coercion for the purpose of sentencing. *Id.* at 899. Moreover, the court noted that the sentencing court could consider testimony on battered woman's syndrome in determining whether the defendants were particularly vulnerable to the fear that eventually gave rise to the coercion defense. *Id.* at 900.

61. *See, e.g.*, State v. Kelley, 478 A.2d 364 (N.J. 1984) and *supra* notes 36-39 and accompanying text.

62. *See* cases cited *supra* note 40 and accompanying test.

63. *See infra* notes 168-220 and accompanying text.

64. McMaugh v. State, 612 A.2d 725, 726 (R.I. 1992) [hereinafter *McMaugh II*]. *See infra* notes 127-64 and accompanying text.

65. State v. McMaugh, 512 A.2d 824, 826 (R.I. 1986) [hereinafter *McMaugh I*]. *McMaugh I* contains a detailed account of the facts and procedural claims made by the defendants on their first appeal to the Rhode Island Supreme Court.

66. *Id.*

visited the Causeway Lounge in Smithfield, Rhode Island.[67] At some point that evening, Bernard McMaugh returned from the bathroom and found the victim, Gregory J. Dube, approaching his wife.[68] The two men began to argue outside the lounge.[69] After collecting his wife from inside, the two proceeded home, where he procured two guns.[70] The McMaughs then returned to the Causeway at approximately two a.m.[71]

The victim's friend, Robert T. Croft Jr., as a witness testified that the dispute between the two men had commenced a few days earlier when Mr. McMaugh believed that Dube was trying "to score his wife."[72] The subsequent encounter at the Causeway Lounge revived the tension and induced Bernard to return to the bar, bringing Ann with him.[73] When the McMaughs arrived, Bernard saw Dube in the parking lot, and parked his car.[74] Dube then approached the McMaugh vehicle, and an alter-cation ensued.[75] At some point, two shots were fired, Dube fell to the ground, and the defendants fled the scene.[76]

The defendants presented a less incriminating version of these events. Notably, they contended that Dube issued threats at Bernard McMaugh, who fired one shot in the air to frighten Dube.[77] They also asserted that Dube reached into the driver's window to grab Bernard McMaugh. At this point the defendants claimed that Ann McMaugh snatched the .22 caliber pistol and threw it to the back seat to keep it away from Dube, when the gun accidentally discharged, killing Dube.[78]

B. *Trial Court's Decision: State v. McMaugh*

The defendants were sentenced to life imprisonment.[79] They appealed on the grounds that: (1) they were denied their constitutional

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67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* The guns were a .41 caliber magnum revolver and a .22 caliber semiautomatic pistol. *Id.*
71. *Id.* Bernard McMaugh testified that he returned to the lounge to visit a friend, and that he secured the weapons as a precautionary measure because he feared the victim. *Id.*
72. *McMaugh I*, 512 A.2d at 826.
73. *Id.*
74. *Id.*
75. *Id.* This was supported by the testimony of witness Jeffrey Mansi. *See* Witness Statement of Jeffrey David Mansi.
76. *McMaugh I*, 512 A.2d at 826.
77. *Id.*
78. *Id.* at 826-27.
79. *Id.* at 827. The court determined that "[o]verall, one could readily conclude from the totality of the evidence presented at trial that this was a premeditated killing perpetrated with malice aforethought." *Id.* at 830.

right to a speedy trial; (2) the trial justice erred in not severing the cases *sua sponte*; (3) the trial justice erred in denying defendants' motions for judgments of acquittal and for a new trial; and (4) Bernard McMaugh was improperly indicted and convicted as a principal.[80]

The court held that Ann McMaugh was responsible for some of the delay in the trial process since she changed counsel on two occasions and requested a continuance once.[81] Next, the court examined Ann McMaugh's claim that, although she chose to forego severance of her case from her husband's, the court should have ordered a severance *sua sponte*.[82] The court declared that, although unwise, this was her cou-nsel's decision and, as such, did not amount to reversible error.[83]

The defendants next argued for acquittals or, alternatively, a new trial, because the evidence was insufficient to sustain verdicts of first-degree murder.[84] The court concluded that circumstantial evidence of premeditation could have been inferred from the course of the defendants' conduct, and that Ann McMaugh's version of the story was contradicted by firearms and ballistics experts.[85]

C. *Ann McMaugh's Petition for Post-conviction Relief*

When her Rhode Island Supreme Court appeal was denied,[86] Ann McMaugh [hereinafter McMaugh] filed a petition for post-conviction relief[87] in which she claimed that she was a victim of battered woman's syndrome.[88] In the petition, McMaugh claimed that her husband subjected her to harsh physical and mental abuse and coerced her into giving a version of the transpiring events that was favorable to him but prejudicial to her own best interests.[89] McMaugh contended that the

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80. *Id.* at 826.
81. *Id.* at 828.
82. *Id.*
83. *Id.* at 828-29.
84. *Id.* at 829.
85. *Id.* at 829-30. A "dead weight" test was performed on the .22 caliber pistol which revealed that the "trigger had a pull that required 2.5 to 3 pounds of pressure in order to fire." *Id.* An additional test showed that the gun could not fire unless the trigger was pulled manually. *Id.* at 827. *See also* Deposition of Mr. Schrecker, ballistic expert, at 401.
86. Providence County Miscellaneous Petition II 86-2956 (post-conviction relief) (1987) [hereinafter Pet. II].
87. McMaugh originally filed an application for post-conviction relief on July 11, 1986, which was amended on August 27, 1987, when new counsel entered for the petitioner. *Id.* at 5.
88. *Id.* at 5. *See also supra* notes 23-49. The court found that both guns had been fired and wiped clean of fingerprints, and that Ann McMaugh did not deny firing the fatal bullet. Pet. II, *supra* note 86, at 5. McMaugh alleged, however, that her long history of abuse psychologically incapacitated her from sharing the relevant facts of the murder with the police, the court, or her defense counsel. *Id.* at 5-6.
89. *Id.*

abuse (1) rendered her unable to assist her trial counsel;[90] (2) forced her to make statements prior to trial that were involuntary and coerced;[91] and (3) constituted newly discovered evidence endorsing the granting of a new trial.[92]

On the grounds that an evidentiary hearing was required, the trial justice originally denied the state's motion to dismiss.[93] During the hearing, which lasted for the first five months of 1990, McMaugh submitted several experts' testimony on battered woman's syndrome.[94] One of the experts, Dr. Angela Browne, concluded that the abuse McMaugh suffered incapacitated her from rationally evaluating her station in, or methods of ameliorating, the relationship.[95] Browne concluded that McMaugh became so depressed that she attempted suicide just prior to trial.[96]

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90. *Id.* at 5-6.

91. *Id.* at 7. McMaugh asserted that her husband forced her to testify that the gun accidentally fired as she was throwing it to the back seat, and that the legal effect of such a statement was to preclude her counsel from requesting instructions concerning the law to be applied. *Id.* at 4. Because McMaugh had decided to go forward with the accident story, her attorney could not protect her interests by filing motions to sever her case from her husband's, and to suppress her statements to the police and the grand jury. *Id.*

92. *Id.* at 6. The justice stated that:

> Implicit in her pleadings, memoranda and evidence presented at her hearing is the suggestion that Bernard, not she, fired the fatal shot, and that Bernard during the period between shooting and trial, concocted a story he coerced her into presenting to the grand jury and at her trial in order to exonerate him. Her fallback position is that if she did indeed fire the fatal shot, she was unable, by virtue of her status as a "battered woman," to present facts which might have militated against the existence of premeditation.

Id. at 6-7. McMaugh also asserted that she returned to the bar with Bernard because he had a heart condition, and that she was leery of letting him go anywhere by himself. *Id.* at 2.

93. Providence County Miscellaneous Petition I 86-2956 (citing State v. Fontaine, 559 A.2d 622 (R.I. 1989)).

94. *See supra* notes 23-49 and accompanying text.

95. Pet. II, *supra* note 86, at 10.

96. *Id.* In denying the petition for post-conviction relief, Justice Grande stated that:

> Remarkably, Dr. Browne arrived at this conclusion without having attended the trial, without having read the grand jury transcript of Ann McMaugh's testimony, without having read a trial transcript of Ann McMaugh's testimony, and, most startling of all, without having interviewed her trial attorney, William Dimitri.

Id. at 10-11. *See also McMaugh II*, 612 A.2d 725 (R.I. 1992) (McMaugh so desired to end the "campaign of terror" her husband inflicted upon her before trial that she ingested approximately twenty-five Ativan pills. *Id.* at 728-29 n.2. Although the hospital record indicates that she was receiving treatment for emotional problems caused by her husband, she was released in his care. *Id. See also* Hospital/Discharge

Doctors Sadovnikoff,[97] Kaiser,[98] and Bauermeister[99] concurred with Dr. Browne's determinations and analysis that the ramifications of abuse would not necessarily be apparent to others, including her counsel.[100] The trial justice opined, however, that the determinations of Dr. Kaiser and Dr. Browne were flawed.[101] The justice concluded that the "[t]estimony at the post-conviction hearing fell lamentably short of presenting any facts sufficient to raise the defense of coercion or duress or any fact relevant to the absence of malice."[102]

Three attorneys also testified at the hearing, particularly on the issue of newly discovered evidence.[103] Attorney Cicilline, who represented McMaugh immediately following the shooting, noted that only when her husband was held pending bail did he meet alone with McMaugh.[104] Attorney Cicilline stated that Bernard McMaugh demanded to attend all conferences scheduled between Cicilline and McMaugh, and would refuse to leave the room when asked.[105] Additionally, Bernard, talking for his wife, argued with Cicilline over his desire yhat his wife exculpate him with the accident story.[106] McMaugh said little other than to agree

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Report of Ann McMaugh from The Memorial Hospital, Pawtucket, Rhode Island, 3-12 to 3-13-1983.

97. Dr. Vsevolod Sadovnikoff, a board-certified psychiatrist providing therapy to the emotionally distraught McMaugh after her institutionalization, formed his opinion that she was a battered woman who would have been unable to inform her attorney at trial about the abuse she had suffered by her husband, before learning that McMaugh's attorney had filed for post-conviction relief. *McMaugh II*, 612 A.2d 725, 729 (R.I. 1992). *See generally* Deposition of Vsevolod Sadovnikoff, M.D., June 20, 1989.

98. Dr. Deborah B. Kaiser, a New York clinical psychiatrist widely lauded as an expert on the subject of battered women and hired by the State, commented that McMaugh lacked the capacity to assist her counsel in her own defense because the abuse, after the shooting, had the effect of forcing her to testify that the gun had fired accidentally. *McMaugh II*, 725 A.2d at 729. *See also* Dr. Kaiser's Report of Examination of Ann McMaugh at 11. The trial justice considered Dr. Kaiser's evaluation of McMaugh "flawed." Pet. II, *supra* note 86, at 11-12.

99. Dr. Martin Bauermeister, Ph.D., M.D., prepared a psychiatric evaluation of McMaugh, which was admitted into evidence in accord with the State. He suggested that McMaugh "'experienced a dissociative reaction right after the shooting with psychogenic amnesia.'" The court found this information defective because it was based on the selective memory of McMaugh. *Id.* at 11 (quoting the Psychiatric Evaluation of Mrs. Ann McMaugh at 29).

100. *McMaugh II*, 612 A.2d 725, 729 (R.I. 1992).

101. Pet. II, *supra* note 86, at 11. *See generally* Dr. Angela Browne's Report to the Court Re: Ann Marie McMaugh.

102. Pet. II, *supra* note 86, at 15.

103. *Id.* at 17-20. *See generally* Transcript of Testimony given by John F. Cicilline.

104. Pet. II, *supra* note 86, at 18.

105. *Id.* at 18.

106. *Id.* At this point, only Mr. McMaugh had been charged with murder. *Id.* It was not until Bernard McMaugh convinced his wife to tell the "accident story" to the grand jury that she was indicted for the murder with her husband. *Id. See supra*

with her husband.[107] Cicilline, who advised McMaugh not to go forward with the accident story, planned to protect her interests by filing motions to sever the two cases and to suppress her statements to the police and the grand jury.[108] Because Mr. McMaugh vehemently objected to this approach, Cicilline was replaced by attorney William A. Dimitri, Jr.[109]

Attorney Dimitri testified that Bernard McMaugh accompanied her to each of the six or seven appointments arranged prior to trial.[110] Again, McMaugh blended into the scenery while her husband captained the discussion.[111] Dimitri, unaware of the abuse to which McMaugh was being subjected, testified that he would have filed motions to suppress and sever, as well as asserted a defense based on coercion, had he known.[112]

Upon McMaugh's conviction and sentencing to life imprisonment, attorney Summer Stone represented McMaugh's interest in the custody of her daughter, while attorney Ira Schreiber prosecuted her appeal and petition for post-conviction relief.[113] After meeting independently with McMaugh several times, both attorneys concluded that she was frigh-tened of her husband and would not act in any way adverse to his case.[114] Stone avouched that McMaugh "had the irrational belief that her husband was omniscient and all-powerful, capable of hearing anything she said and capable of inflicting abuse upon her even though she was locked up in the women's prison and he was locked up in the men's prison."[115] Moreover, Stone compared Bernard McMaugh with Charles Manson and Svengali in his display of absolute control over his wife.[116]

McMaugh asserted on appeal that either duress or self-defense could have been presented at trial had she been capable of expressing to her attorney the abuse she had suffered.[117] The trial justice decided, however, that the opinions of the experts were "not worthy of any weight" and that the reasons offered "in the report of their opinions were not sound and were heavily outweighed by other evidence in their

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note 91 and accompanying text.

107. Pet. II, *supra* note 86, at 18.
108. *Id.* at 19.
109. *Id.* at 23.
110. *Id. See generally* Deposition Testimony of William A. Dimitri.
111. Pet. II, *supra* note 86, at 19.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id. See generally* Transcript of Testimony given by Summer Stone, Esq.
116. Pet. II, *supra* note 86, at 16.
117. *Id.* at 7.

own testimony."[118] In response to McMaugh's claim that she was a battered woman, the court concluded that she exhibited no evidence of being irrational, emotional, or confused. Rather, she was lucid, articulate, well-oriented, and skillful; in essence, McMaugh's behavior "contradict[ed] the portrait of a battered woman."[119] The court determined that McMaugh had not been abused,[120] and that she was not socially or economically dependent on or isolated by her husband.[121] The court concluded that the "[p]etitioner's status as a battered woman in the circumstances presented . . . [was] as much happenstance as [was] her height or the color of her hair and [was] totally irrelevant to the charge that she murdered not her husband batterer, but . . . a person she barely knew."[122]

The trial justice held that the evidence presented at the evidentiary hearing demonstrated that McMaugh was competent to stand trial, and "did not support McMaugh's contention that she was subjected to duress that could operate as a defense to the crime charged."[123] The trial justice based this conclusion on the several occasions that McMaugh

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118. *Id.* at 9-10.

119. *Id.* at 10-17. The trial justice reached this conclusion despite the fact that: (1) all of the medical experts concurred in the conclusion that McMaugh was a battered woman who was coerced by her husband through repeated episodes of abuse and intimidation to present a false account of what had happened (*see supra* note 91); (2) all the experts agreed that the consequences of such abuse might not be apparent to others (*id.*); (3) the McMaughs' daughter attested that her father beat both her mother and her routinely, sometimes with his bare hands, and other times with instruments such as a wooden spoon or a leather whip (Deposition of Sheila McMaugh at 6-7); (4) McMaugh had communicated to her daughter by phone that she lied out of force and fear of her husband (*id.*); and (5) Dr. Bauermeister detailed, in his psychiatric evaluation, which was admitted into evidence, the extent of abuse to which Bernard McMaugh subjected his wife. This abuse included choking McMaugh until she was elevated to a standing from a sitting position; forcing her to engage in sex with other men (adding that she would do it if she loved him) and later to admit that she had enjoyed it; pulling out clumps of her hair; hitting her on the head so as not to leave visible bruises; arousing himself with adult videos and pornographic magazines, and then relieving himself in her; and threatening to kill her if she ever tried to leave him: "that if he couldn't have her, nobody would, that he would find her and do whatever he had to do. Ann took this threat seriously." (Dr. Martin Bauermeister's Psychiatric Evaluation of Mrs. Ann McMaugh at 3-14, 23).

120. Pet. II, *supra* note 86, at 17-19.

> If Bernard was a batterer, he was an extremely ineffectual one as he tried over a period of nearly two years to persuade Ann to testify before the grand jury. . . . It is hardly logical for a[n abusing] husband to use his attorney speaking to his wife's attorney to get her to do his bidding. Abusing husbands are not known to use interlocutors.

Id. at 17.

121. *Id.* at 20.

122. *Id.* at 27.

123. *Id.* at 12.

displayed "assertive behavior" during trial.[124] The justice also refused to adopt McMaugh's claim that the evidence of battering was newly discovered.[125] From these holdings,[126] McMaugh again appealed.[127]

D. *The Rhode Island Supreme Court Decision: McMaugh v. State*[128]

Writing for the court,[129] Justice Shea first examined the general nature of the battered woman's syndrome.[130] The court observed that a woman is beaten approximately every eighteen seconds, and that millions of women each year endure violence in their intimate relationships.[131] The court then adopted the dicta found in *State v. Kelly*[132] defining the battered woman's syndrome, the abuse cycle described by Lenore E. Walker,[133] and the "learned helplessness" concept as articulated in *People v. Aris*.[134] The court interpreted the *Aris* reasoning

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124. *Id.*

125. *Id.*

126. *See supra* notes 93-123 and accompanying text.

127. *McMaugh II*, 612 A.2d 725 (R.I. 1992). McMaugh contended on appeal that the trial justice erred in disregarding the "uncontradicted evidence that [her] husband's domination . . . prevented her from assisting her trial counsel and presenting a reasonable defense." Pet. II, *supra* note 86, at 12.

128. *See supra* note 127 and accompanying text.

129. This was a unanimous decision.

130. *McMaugh II*, 612 A.2d at 731. *See supra* notes 23-49 and accompanying text.

131. *McMaugh II*, 612 A.2d at 731. The court borrowed this data from *Report of the Gender Bias Study of the Supreme Judicial Court*, 23 SUFFOLK U. L. REV. 575, 584 (1989) [hereinafter *Gender Bias Study*] (citing U.S. BUREAU OF JUSTICE STATISTICS, 1986). The *Gender Bias Study* explains that violence against women is not the same as violence against men, specifically because it often involves nonstrangers or acquaintances, psychological trauma, and a feeling of betrayal. *Id.* The author postulated that such ramifications, distinctive of battered women, require special attention by the courts, and should not warrant the "long-held presumption that such matters are best left to the private sector and are outside the realm of the courts." *Id.*

132. *McMaugh II*, 612 A.2d at 731 (citing *Kelly*, 478 A.2d 364 (N.J. 1984)). *See supra* notes 36-39 and accompanying text.

133. *McMaugh II*, 612 A.2d at 731 (citing *Kelly*, 478 A.2d at 371 (quoting LENORE E. WALKER, THE BATTERED WOMAN XV (1979))). Dr. Walker commented that for a woman to be identified as a battered woman, she must undergo the battering cycle at least twice. *Id.* This cycle is composed of three stages: the tension-building (male batters woman in minor physical and verbal ways, while woman tries to placate and pacify because she is afraid), the acute battering incident (tension evolves into serious violence, culminating a triggering event which precipitates this phase), and the loving phase of the male (male promises to seek professional help, stop drinking, and refrain from additional violence, while offering his forgiveness and love for the woman). *Id.* Dr. Walker notes that "[a]ny woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman." *Id.*

134. *McMaugh II*, 612 A.2d at 731 (citing People v. Aris, 215 Cal. App.3d 1178, 1195, 264 Cal. Rptr. 167, 172 (1989)). The *Aris* court recognized that:

to mean that a woman who discovers she is helpless does not have the ability to escape the batterer's control on her own.[135]

The court next addressed McMaugh's application for post-conviction relief, which is governed by the same standard which is used for awarding a new trial.[136] The test consists of both threshold and credibility elements.[137] To meet the threshold, the justice must find that (1) the newly discovered evidence is actually newly discovered or available only since trial; (2) the petitioner was diligent in attempting to discover the evidence for use in the original trial; (3) the evidence is not merely cumulative or impeaching, but is also material to the issue; and (4) the evidence is of a kind that would probably change the verdict at a new trial.[138] Once this threshold test is met, the credibility test, of "whether the evidence presented is credible enough to warrant relief,"[139] is applied. The opinion stated that the trial justice must balance the evidence and appraise the credibility of the witnesses presented at the hearing.[140] On appeal, deference must be accorded to the trial justice's determinations[141] unless clear error is found, or the moving party demonstrates that relevant and material evidence was overlooked or misconceived.[142]

Applying these standards to the facts of this case, the court held that the threshold test was met.[143] In support of the first requirement, the court noted that McMaugh *was not able* to "reveal that she was the victim

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> The battered woman often does not know why she is beaten on any particular occasion. The violence is perceived by the woman as 'random and aversive stimulation.' Because of its randomness, she believes she is incapable of doing anything to prevent the abuse and, as a result, feels helpless. Women who attempt to defend themselves usually succeed only in eliciting laughter from the batterer and/or provoking more abuse, accentuating the feeling of helplessness.

Aris, 215 Cal. App.3d at 1195, 264 Cal. Rptr. at 172.

135. *McMaugh II*, 612 A.2d at 731.

136. *Id.* *See also* State v. Lanoue, 366 A.2d 1158, 1160 (1976) (denying a motion for new trial where newly discovered evidence was merely impeaching and cumulative, and there was no showing of due diligence in procuring this evidence for an earlier hearing).

137. *McMaugh II*, 612 A.2d at 731-32 (citing Fontaine v. State, 602 A.2d 521, 524 (R.I. 1992)).

138. *Id.*

139. *Id.* at 732 (citing *Fontaine*, 602 A.2d at 524). The trial justice exercises independent judgment in accepting or rejecting conflicting testimony. *Id.*

140. *Id.* (citing *Fontaine*, 602 A.2d at 524-25).

141. *Id.* (citing *Fontaine*, 602 A.2d at 525).

142. *Id.* *See* State v. Henshaw, 557 A.2d 1204, 1207 (R.I. 1989) (explaining that a polygraph test administered after a defendant has been found guilty does not come within the definition of newly discovered evidence); State v. Estrada, 537 A.2d 983, 986 (R.I. 1988) (holding that the admissibility of evidence, when opposed by an objection of irrelevancy, is a discretionary matter for the trial justice to resolve).

143. *McMaugh II*, 612 A.2d at 732-33.

of an extremely focused campaign of abuse and domination that prevented her from assisting her own trial attorney and presenting a credible defense."[144] Moreover, the court declared that uncontradicted evidence showed that the abuse prevented McMaugh from offering exculpatory evidence at her original trial.[145] Only after the passage of one year, after the trial had ended and McMaugh had been secluded from her husband by separate incarceration, did Attorney Stone and Dr. Sadovnikoff discover that McMaugh had been battered.[146] For these reasons, the court was compelled to classify the evidence that McMaugh was a battered woman as newly-discovered.[147]

The second part of the threshold test, compelling diligence in gathering this evidence for the original trial, was "inappropriate," the court held, as applied to this case.[148] This decision was based on uncontradicted evidence that McMaugh could not freely communicate her thoughts to others or emancipate herself from her batterer's influence, and therefore "could not have fully assessed the reality that she was a battered woman, . . . until prison confinement physically, and eventually mentally, separated her from her abusive husband."[149] Thus, the court elected to waive this element of the test.[150]

The court determined that the third condition, dictating that the evidence be material to the case, was met because McMaugh's capacity to help prepare a trial defense in her best interests was central to this claim.[151] The court found that the record overwhelmingly embraced the conclusion that her husband's command forced McMaugh to recount his fabricated "accident" story, which resulted in her being indicted for murder, along with her husband, by the grand jury.[152] The court pointed out that until that point, McMaugh was not charged, that her husband's domination prevented her from acquiring a separate trial, and that she feared her husband so much that she could not disclose to her attorney that she returned to the parking lot that night only out of fear for her own safety.[153]

In assessing the final element of the test, the court concluded that "evidence of battered woman's syndrome could change the verdict of first-degree murder at a new trial if the evidence was believed by the

144. *Id.* at 732.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*

factfinder."[154] If a jury believed this evidence, the presumption that McMaugh premeditatively murdered Dube would be rebutted. Since premeditation is an essential element of the crime of first-degree murder, this evidence had the potential to completely "exonerate McMaugh because . . . it could establish that she did not commit the crime at all."[155]

In deciding that the trial justice ignored uncontradicted evidence that was credible enough to warrant relief, the court observed several factors.[156] The first was that the experts were unanimous in concluding that McMaugh was severely battered for many years prior to the shooting. Moreover, these professionals agreed that following the shooting, Bernard McMaugh launched a strategy of physical and mental abuse aimed at forcing McMaugh to verify his fabricated version of the events.[157] The court fouthat the accord between these experts was compelling evidence that the abuse rendered McMaugh incapable of evaluating her part in the relationship, determining ways to improve the situation, and assisting her counsel in the preparation of her own defense.[158]

Second, the court factored into this analysis the opinions of the lawyers, who had the opportunity to observe McMaugh closely. The court took exception to Mr. McMaugh's refusal to leave when asked, his domination over McMaugh during all conversations, his demand to keep the cases unsevered,[159] and the arguments he engaged in with the attorneys.[160] Additionally, the court considered McMaugh's passive conduct throughout the entire process compelling evidence of coercion.[161]

In its conclusion, the court held that the trial justice overlooked uncontradicted evidence in deciding that McMaugh did not look or act like a battered woman.[162] The court acknowledged that the battered woman's syndrome has legal consequences, and declared that the

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154. *Id.* at 733.

155. *Id.* However, McMaugh still could have been convicted of either second-degree murder or manslaughter. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* Dimitri testified about one occasion when Bernard McMaugh became "furious" when the attorney tried to have a private conversation with Ann McMaugh outside the courtroom during a break in the trial. *Id. See* text accompanying *supra* notes 110-115.

162. *McMaugh II*, 612 A.2d at 733. "[This] overlooks the testimony of the experts that the effects of the abuse would not necessarily have been apparent to other persons involved with the trial." *Id.*

syndrome can be raised as a defense in a criminal trial.[163] The court further held that the state will not be required to disprove the defense beyond a reasonable doubt, but rather the defendant has the burden of proving its existence by a fair preponderance of the evidence.[164] In sum, the court, believing McMaugh met her burden, sustained her appeal, granted her application for post-conviction relief, and vacated the convictions for first-degree murder, conspiracy, and carrying a pistol without a license. The case was remanded to the Superior Court for a new trial.[165]

E. *The Plea Agreement*

Instead of a retrial, McMaugh entered into a plea agreement with the attorney general's office in which she pled no contest to a reduced charge of involuntary manslaughter and conspiracy. Judge John F. Sheehan assigned McMaugh a twenty-year probationary period, and ordered her to receive counseling. This non-conviction construction of involuntary manslaughter cleared McMaugh's criminal record.[166] In all, Ann McMaugh served seven-and-one-half years in prison.[167]

IV. ANALYSIS

A. *Reasoning of the Rhode Island Supreme Court*

The successful prosecution of crimes that require specific criminal intent require proof that the offender possessed a particular mental state, intent, or knowledge in performing the offense.[168] The crime of first-degree murder, with which McMaugh was charged, necessitates a showing of both premeditation and the specific intent to kill.[169] *McMaugh II* established that evidence that the defendant suffered from

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163. *Id.*

164. *Id.* at 733-34. The court stated that the defendant's assertions would be exposed to the "most exacting scrutiny to determine [their] legitimacy in each factual circumstance in which it is presented." *Id.* at 733.

165. *Id.* at 734.

166. Tracy Breton, *Woman Goes Free in Landmark Case on Battered Wives*, THE PROVIDENCE SUNDAY JOURNAL, Dec. 20, 1992, at A20. "'It's ironic that the only reason she was indicted was because she spoke to police and the grand jury, and the only reason she was convicted was because it was proven that those statements were false,' prosecutor David Morowitz said after court . . . ." *Id.* The author reported that McMaugh has both divorced her husband and returned to using her maiden name, Ann Marie Morgan. *Id.*

167. *Id.*

168. DRESSLER, *supra* note 6, at 109.

169. *Id.* at 455-57. Traditionally, states that grade murder by degrees treat a "'wilful, premeditated, and deliberate' killing as murder in the first degree." *Id.* at 457.

battered woman's syndrome was admissible to negate her criminal intent.[170]

Even though McMaugh's mental state was critical to determine the extent of her involvement in the events that had transpired, until her appeal, the defendant was denied both the use of such evidence and the invocation of a special instruction for the jury to adequately consider her state of mind.[171] Without the expert testimony on battered woman's syndrome, the state's case for first-degree murder was overwhelming; with it, the jury could have concluded that she was coerced into firing or that she did not fire the fatal shot. Thus, the trial justice's decision precluded McMaugh from having the chance to receive either an acquittal or a judgment of involuntary manslaughter.[172]

Absent the expert testimony, the jury would and did have difficulty understanding why McMaugh "would get in a car with a drunk, violent, and heavily armed man . . . [and] did not either resist him, or refuse to go–and why she sat passively, waiting for events to unfold."[173] Such conduct, unsupported by expert testimony, was susceptible to the conclusion that McMaugh "connived" with her husband to kill Dube.[174] By showing the defendant's state of mind through expert testimony, McMaugh could and did demonstrate that she possessed neither the intent nor the premeditation to harm Dube. As her counsel argued, McMaugh could have instinctively obeyed her husband to avoid the abuse her resistance necessarily would evoke.[175]

B. *Other Jurisdictions*

Rhode Island was not the first jurisdiction to allow use of battered woman's syndrome for other than self-defense claims.[176] Several courts

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170. *See supra* notes 127-65 and accompanying text.

171. *See supra* note 107 and accompanying text.

172. Brief-in-Chief for the Petitioner-Appellant at 59, McMaugh v. State, 612 A.2d 725 (R.I. 1992) (No. 91-307). However, because the existence of the syndrome is a question of fact, the jury could have chosen not to find that McMaugh suffered from battered woman's syndrome. In that case, McMaugh still would have been convicted for murder in the first degree.

173. *Id.*

174. *Id.*

175. *Id.*

176. The Ninth Circuit was confronted with a coercion-based battered woman's defense in United States v. Homick, 964 F.2d 899 (9th Cir. 1992). Delores Homick was indicted for conspiracy to commit wire fraud in connection with her husband's involvement in a robbery and several murders. *Id.* at 901. Through a police-installed wiretap, calls were intercepted incriminating Homick. *Id.* at 902. The court excluded evidence that Homick was a battered woman because she informed her defense counsel of her status in the midst of trial, without giving written notice regarding her intent to use expert testimony to the attorney for the government. *Id.* at 905.

recognize that where criminal intent is an essential element to the crime charged, evidence of battered woman's syndrome can assist the jury in properly evaluating why the defendant acted the way she did.[177] However, even though courts allow evidence of prior acts of abuse in self-defense claims, the law is not as well-defined when a battered woman claims to have been coerced.[178]

Three factors have emerged from the case law throughout the country which appear to condition whether the invocation of a coercion defense based on evidence of battered woman's syndrome will be successful. First, the defendant must establish coercion by a voluntary act. Second, the defendant must prove she was continuously under compulsion in a "course of conduct" crime. Third, the defendant need not raise self-defense to invoke battered woman's syndrome.

1. The defendant must establish coercion by a "voluntary" act.

United States v. Sebresos[179] exemplifies the requirements of the first factor. In *Sebresos*, the defendant, who worked unpaid for her husband for five years, embezzled money from his union apparently to establish financial independence.[180] Sebresos claimed that subjection to many years of physical and mental abuse forced her to act under compulsion, thereby negating her intent to commit the crime.[181] The Ninth Circuit held that while testimony of battered woman's syndrome is not *per se* inadmissible to support a coercion defense, the coercion defense itself must first be established.[182]

Coercion would have excused Sebresos' conduct if she demonstrated that (1) her husband threatened to immediately kill or seriously injure her or a family member if she did not embezzle the money; (2) she reasonably believed that the threat was real; (3) she voluntarily embezzled the money because she reasonably believed that it was the only way to

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In State v. Lambert, 312 S.E.2d 31 (W. Va. 1984), the Supreme Court of Appeals of West Virginia granted a new trial to a woman who was convicted of welfare fraud when her husband procured employment in violation of a Welfare Department policy. *Id.* at 32. The defendant contended that she could not have intended the crime because she acted out of fear of what her husband would do to her if she failed to comply with his commands. *Id.* at 33-34. The court remanded the case because the instruction to the jury erroneously omitted the elements of "imminence, reasonableness, continuousness, and the inability to escape." *Id.* at 34 n.2.

177. *See supra* notes 25-49 and accompanying text.

178. *See supra* notes 57-60 and *infra* notes 179-220 and accompanying text.

179. United States v. Sebresos, No. 91-10193, 1992 U.S. App. LEXIS 17757 (9th Cir. July 22, 1992).

180. *Id.* at *1. At the second sentencing hearing, the defendant tried to introduce evidence that her husband was actually the beneficiary of the embezzled funds. *Id.* at *2.

181. *Id.* at *2. The defense was presented as duress and not as coercion.

182. *Id.* at *3.

prevent her husband from following through on the threat; and (4) she had no opportunity to escape the coercive environment.[183] To introduce evidence of battered woman's syndrome, Sebresos would have had to show that (1) she was abused by her husband,[184] which caused her to have low self-esteem and to suffer from "learned helplessness;"[185] (2) she committed the crime not with free will, but because she reasonably believed her husband would kill or seriously injure her if she did not;[186] and (3) an attempt to escape was futile.[187]

The *Sebresos* court had difficulty reconciling the "voluntary/involuntary act" distinction between a defense based on coercion and one based on evidence of battered woman's syndrome. The court felt that Sebresos could not use battered woman's syndrome to support her coercion defense because coercion requires the defendant to act voluntarily,[188] and Sebresos contended that she acted involuntarily because of the patterns of abuse to which she was subjected.[189]

Because of unenlightened thinking, such as that found in *Sebresos*, battered women who raise a coercion defense must face a paradoxical requirement. Invocation of a successful coercion defense requires that an abused woman voluntarily assist in or commit a criminal act.[190] Often, however, the abusive situation to which a battered woman is subjected virtually eliminates her free will or choice to act other than criminally.[191] Because a battered woman's coerced conduct does not conform to the traditional application of a coercion defense, the danger exists that this class of defendants will be denied a defense.[192]

Like Sebresos, McMaugh had been subjected to years of physical and emotional abuse which she claimed virtually eliminated her ability to act according to her own choices and desires. While Sebresos contended

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183. DRESSLER, *supra* note 6, at 259.

184. *Id.* at 204. The abuse generally occurs in phases, typically identified as the "battering cycle." *Id.* *See supra* note 133 and accompanying text.

185. *See supra* note 134 and accompanying text.

186. *See supra* notes 41-42 and accompanying text.

187. *See supra* note 41 and accompanying text.

188. United States v. Sebresos, No. 91-10193, 1992 U.S. App. LEXIS 17757, at *6-8 (9th Cir. July 22, 1992). The court felt that Sebresos had not met the burden of proving a coercion defense since the defense "assumes that the defendant has voluntarily performed the criminal act; his or her will has not been so overcome that another choice was impossible." *Id.* at *6 (quoting United States v. Johnson, 956 F.2d 894, 897 (9th Cir. 1992)).

189. *Id.* at *5.

190. *See supra* note 54 and accompanying text.

191. *See supra* notes 186-89 and accompanying text. A showing that such coercion does not consume the woman's freedom operates to stultify this defense, and will foster a more focused scrutiny of her conduct according to the elements of imminence, reasonableness, continuousness, and the inability to escape. *See supra* note 182 and accompanying text.

192. Delgado, *supra* note 53, at 7.

the abuse negated her intent to embezzle, McMaugh claimed the abuse forced her to admit guilt for a crime she never committed. In both cases, the defendants' status as battered women was inextricably interwoven with the coercion claim they presented. The *Sebresos* court could not, however, reconcile the "voluntary act" requirement of a coercion claim with the lack of free will under which Sebresos, like many battered women, acted.

The Rhode Island Supreme Court overcame this contradiction by redefining the conventional definition of coercion to embrace a battered woman's unique characteristics—one of which is that her acts are controlled by fear of her abuser's retribution rather than by her free will.[193] By allowing McMaugh to admit evidence of battered woman's syndrome to support her coercion defense, the court examined the voluntariness of her actions in light of the situation to which she was subjected.[194] Because the Rhode Island Supreme Court, unlike the *Sebresos* court, did not simply dismiss McMaugh's claim because of a technicality, the decision stands as an example of how battered women can claim coercion, and still receive a defense, a fair trial, and due process of the law.

This reasoning is in accord with the development of admitting evidence of battered woman's syndrome in self-defense cases.[195] The earliest cases which confronted that issue required the defendant to plead insanity or diminished capacity to explain her actions.[196] Today, the law of self-defense allows a battered woman to introduce evidence of abuse so that the jury can properly evaluate the reasonableness of her belief that she was in imminent danger of harm, and the reasonableness of her use of force to protect herself.[197] The decision of the Rhode Island Supreme Court will now allow a battered woman to introduce evidence of abuse to demonstrate that she acted criminally under the belief that she was in imminent danger and had no opportunity to escape, even though the act was not done voluntarily.

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193. *See supra* note 191 and accompanying text.

194. *See supra* notes 130-65 and accompanying text.

195. *See supra* notes 29-49 and accompanying text.

196. *See supra* note 28 and accompanying text. *See also* United States v. Johnson, 956 F.2d 894, 898 (9th Cir. 1992) ("[I]n the duress case before us . . . as elsewhere in the criminal law, there is 'an unwillingness to vary legal norms with the individual's capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable.'").

197. *See supra* notes 34-35 and accompanying text.

2. The defendant must prove she was continuously under compulsion in a "course of conduct"[198] crime.

Dunn v. Roberts[199] highlights the second factor. In *Dunn*, the petitioner was charged as an intentional active participant in aiding and abetting her abusive companion in the commission of several felonies.[200] A jury convicted Dunn according to an instruction which found an individual guilty of intentionally aiding and abetting another by mere presence, regardless of the extent of participation in the commission of the crime.[201] The Supreme Court of Kansas affirmed Dunn's conviction and found that she was not entitled to raise the defense of compulsion because there was no showing that she was either continuously under compulsion or had no opportunity to escape without committing the crimes.[202] The Tenth Circuit overturned this decision based on Dunn's right to rebut the inference of intent.[203]

As with many battered women, Dunn's continued presence with her abuser generated both mystery and skepticism regarding her involvement in the crimes.[204] Where the criminal conduct extends over a considerable period of time, a traditional application of a coercion defense will require the defendant to show that she was in imminent danger, had a reasonable fear of death or bodily injury, and had no opportunity to escape throughout the entire duration of her coercive custody.[205] However, by allowing evidence of abuse through expert testimony, a battered woman who is coerced into acting criminally is afforded the opportunity to explain and dispel the myth that she was "free" to leave the relationship at any time.[206]

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198. A "course of conduct" crime is one in which the agent acts criminally over a protracted period of time. United States v. Gregory, No. 88 CR 295, 1988 U.S. Dist. LEXIS 10060, *3-5 (Dist. Ill. Sept 2, 1988).

199. 963 F.2d 308 (10th Cir. 1992).

200. *Id.* at 309-10. Dunn was charged with felony murder, aggravated kidnapping, aggravated robbery, and aggravated battery. *Id.*

201. *Id.* at 311. Although no witness identified Dunn as having a weapon or as engaging in any violence, the state's presentation of four witnesses, attesting that someone with the petitioner's hair color was driving the truck, was sufficient to convict Dunn according to this statute. Dunn was then sentenced to four consecutive terms of fifteen years to life, which were later modified to be served concurrently. *Id.*

202. State v. Dunn, 758 P.2d 718 (Kan. 1988).

203. Dunn v. Roberts, 963 F.2d 308 (10th Cir. 1992).

204. *Id.* at 312.

205. *See supra* note 8 and accompanying text.

206. *Id.* at 892.

In *United States v. Gregory*,[207] defendant Lisa Gregory asserted that she lacked the free will necessary to commit the charged act of fraudulent mailing because of her boyfriend's physical abuse and threats.[208] Gregory asserted "that for a period of some thirty-four months, she was virtually a prisoner of Larry Austin, living in the constant and uninterrupted fear of death or bodily harm, with absolutely no opportunity to leave his presence long enough to seek assistance from law enforcement authorities."[209]

In rejecting Gregory's argument, the court noted that an "exceptional" defense such as the one Gregory claimed is more appropriate in a "one-time" "explosive" situation than in a "course-of-conduct crime."[210] The court noted that the defendant did not meet the burden she alleged in her affirmative defense because she was free to come and go as she pleased, maintained employment, communicated with friends, received welfare funds, and married.[211]

As the District Court of Illinois articulated, a woman's claim of battered woman's syndrome, while certainly admissible to establish lack of intent, will probably be more successful in a "one-time" reactionary-type of crime than in a "course-of-conduct" transgression where proving continuous coercion and inability to escape could be virtually impossible.[212] *McMaugh II* represents such a "one-time" offense, and it may have been this feature that appealed to the Rhode Island Supreme Court. By offering proof of prior abuse and fear of her husband, McMaugh was allowed to establish that she was in imminent danger of death or serious bodily injury if she did not obey her husband's instructions.[213] Moreover, this testimony demonstrated the seriousness of the situation with which McMaugh was confronted, the reasonableness of her actions, and her inability to escape.

3. The defendant need not raise self-defense to invoke battered woman's syndrome.

The third factor which has emerged from case law appears in *State v. Baker*.[214] In *Baker*, the defendant appealed a first-degree aggravated drug trafficking conviction because she was denied the opportunity to introduce evidence of abuse based on a statute constricting the

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207. United States v. Gregory, No. 88 CR 295, 1988 U.S. Dist. LEXIS 10060 (Dist. Ill. Sept. 2, 1988).

208. *Id.* It was alleged that the defendant submitted approximately 175 fraudulent income tax returns/refunds over an almost three-year period. *Id.*

209. *Id.* at *3.

210. *Id.* at *3-5.

211. *Id.* at *3.

212. *Id.* at *5. *See supra* notes 187-91 and accompanying text.

213. *See supra* note 119 and accompanying text.

214. 1992 LEXIS 3745 (Ohio App. July 16, 1992).

testimony's relevancy to claims of self-defense.[215] The court would not consider her argument since she did not make any type of self-defense claim.[216] By requiring Baker to claim self-defense before she could introduce evidence of battered woman's syndrome, the Ohio Appellate Court adopted the position that evidence of the doctrine cannot apply to a coercion defense. This analysis, which was espoused by the trial justice who heard McMaugh's petition for postconviction relief, was refuted in *McMaugh II*.

The Rhode Island Supreme Court was correct in holding that evidence of battered woman's syndrome is also admissible in cases other than self-defense.[217] Implicit in the trial justice's reasoning in *McMaugh I* and the court in *Baker*, is that evidence of battered woman's syndrome does not apply to claims other than self-defense.[218] This reasoning is erroneous because the doctrine's purpose is to help the jury decide whether the defendant possessed the requisite intent that would make her conduct criminal. Although many defendants who try to offer evidence of battered woman's syndrome invoke a self-defense justification, the doctrine's scope is in no way limited to such an application.[219] Thus, expert evidence of prior acts of abuse should be admissible whenever it will assist the jury in understanding the defendant's state of mind.[220]

V. CONCLUSION

In crimes requiring a specific intent, where the actor's intention is an essential element of the offense, evidence of battered woman's syndrome should be admitted to help the jury decide whether the defendant's conduct is justifiable or excusable. This affords the defendant a fair trial, whether she is attempting to justify her conduct based on self-defense or excuse it based on coercion. Although the law is not uniform in those

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215. *Id.* at *5.

216. *Id.* at *18.

217. This decision is unconventional because it recognizes the admissibility of evidence of the syndrome based on a coercion instead of a self-defense claim.

218. Brief-in-Chief of the Petitioner-Appellant at 59 n.12, *McMaugh II*, 612 A.2d 725 (R.I. 1992) (No. 91-307).

219. *See generally Lambert*, *supra* note 175 (holding that a criminal defendant is entitled to present evidence of battered woman's syndrome to demonstrate coercion, thereby negating intent, to rebut a charge of welfare fraud). *See also* Brief of Amici Curiae in Support of Appellant-Petitioner [McMaugh] on Behalf of Five Organizations Which Provide Direct Services and Advocacy to Victims of Domestic Abuse at 16-19, *McMaugh II*, 612 A.2d 725 (R.I. 1992) (No. 91-307) [hereinafter Brief of Amici Curiae] (outlining "the relevancy and admissibility of battered woman's syndrome evidence to augment existing legal defenses to crimes other than murdering one's batterer, crimes which were not directed *against* the batterer but rather were directed or choreographed *by* the batterer.").

220. Brief of Amici Curiae, *supra* note 219, at 34-35.

courts which have confronted a battered woman's claim of coercion, the Rhode Island Supreme Court's reasoning stands as an example of how to apply the doctrine. By following the *McMaugh II* decision, other courts can provide a defense to a battered woman whose criminal conduct resulted from intimidation, and not from free will.

Monique M. Gousie[*]

* This Comment is dedicated to my family for their constant love and support, and with very special thanks to Norbara L. Octeau for her insight and friendship.

In re Valerie D.: Prenatal Conduct an Insufficient Basis for Termination of Parental Rights

I. INTRODUCTION

A unanimous Connecticut Supreme Court decided that a mother's prenatal conduct, by itself, does not empower the state to terminate parental rights.[1] By so doing, the Connecticut Supreme Court prevented the state from enacting the harshest termination statute in the country.[2] The implications of this case are far reaching: civil rights, the rights of women, public health matters, and drug treatment agendas were all touched by *In re Valerie D.*[3] This case was viewed as having such importance that it mobilized twenty-three attorneys and "an unprecedented seventy amici curiae"[4] presenting their positions to the Connecticut Supreme Court. The court, in turn, carefully decided the case on narrow statutory grounds, avoiding the difficult and controversial issues.[5]

This Comment examines the court's statutory analysis in deciding *In re Valerie D.*, and discusses the ramifications of that analysis. Part II presents the constitutional framework under which the Connecticut Supreme Court was bound.[6] Part III examines the pertinent Connecticut statutes,[7] and discusses cocaine, its physiological effects on the baby,[8] and its psychological effects on family dynamics.[9] Part IV addresses pertinent case law in other jurisdictions.[10] Part V relates the

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1. *In re* Valerie D., 613 A.2d 748, 752 (Conn. 1992). The case concerned the termination of parental rights of a mother who injected cocaine intravenously nine hours before the birth of her baby.

2. Thomas Scheffey, *Prenatal Conduct Alone Can't Cut Parental Rights*, CONN. L. TRIB., Aug. 24, 1992, at 2. *See infra* note 143 and accompanying text.

3. Scheffey, *supra* note 2, at 2.

4. *Id.*

5. *Id.*

6. *See infra* text accompanying notes 15-26.

7. *See infra* text accompanying notes 27-49.

8. *See infra* text accompanying notes 50-69.

9. *See infra* text accompanying notes 70-83.

10. *See infra* text accompanying notes 84-100.

facts of the case[11] and its procedural history,[12] and Part VI discusses the Connecticut Supreme Court decision.[13] Part VII presents an analysis of *In re Valerie D.* and suggests why this decision was judicially correct beyond the statutory tact taken by this court.[14]

II. CONSTITUTIONAL FRAMEWORK

Prior to discussing *In re Valerie D.*, it is necessary to examine the rights afforded to parents by the courts. Family integrity, the right to establish and maintain a family, and "the right of the family to remain together without coercive interference of the awesome power of the state,"[15] have long received constitutional protection.[16] The United States Supreme Court has held firm to its assertion that it is the parents' primary function to have custody of their children, to care for, and to nurture them.[17] Because of this recognized constitutional right, terminating parental rights has not been taken lightly by the Court.

Terminating parental rights ultimately severs all ties between the child and its parent.[18] It is a "most serious and sensitive judicial action."[19] Accordingly, "the United States Supreme Court has repeatedly held that the interest of parents in their children is a fundamental constitutional right that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[20]

States, however, do have a legitimate interest in the welfare of their citizens.[21] This concern is the basis for the state's power to intervene in essential family matters.[22] "The interest of the state and its power to intervene in family matters are generally justified as a facet of the

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11. *See infra* text accompanying notes 101-30.
12. *See infra* text accompanying notes 131-50.
13. *See infra* text accompanying notes 151-205.
14. *See infra* text accompanying notes 206-309.
15. Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).
16. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). "The rights to conceive and to raise one's children have been deemed 'essential' [and one of the] 'basic civil rights.'" *Meyer*, 262 U.S. at 399.
17. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). *See also Stanley*, 405 U.S. at 651.
18. Anonymous v. Norton, 362 A.2d 532, 535 (Conn. 1975), *cert. denied*, 423 U.S. 935 (1975).
19. *Id.* at 537.
20. *In re* Jessica M., 586 A.2d 597, 600 (Conn. 1991) (quoting *Stanley*, 405 U.S. at 651).
21. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
22. *See* Cheryl M. Browning & Michael L. Weiner, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 214 n.12 (1979).

state's *parens patriae* power."[23] The *parens patriae* power is that power invoked by the state to act in place of the parent in protecting children.[24] States regularly use this inherent power to justify their interest in removing neglected children from parents' homes and in terminating parental rights.[25] It is clear, however, that whenever a state seeks to remove children from the custody of their parents, there is a conflict between the parents' constitutional rights and the interest of the state in protecting children.[26]

III. BACKGROUND

A. *The Connecticut Neglect and Termination Statutes*

In creating neglect and termination statutes, the Connecticut Legislature declared its goal to be one of protecting children who may be injured or neglected. The Legislature pledged to accomplish this by making the home safe for children. It attempted to carry out this purpose by taking measures necessary to "'enhanc[e] the parental capacity for good child care.'"[27] The Legislature also acknowledged the existence of certain situations where protecting the child may require temporary or permanent removal of the child from the parents.[28] For this reason, legislation to allow for the termination of parental rights in certain cases was enacted.[29]

The termination of parental rights is defined as "the complete severence by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent . . . ."[30] The Connecticut legislation[31] provides for the termination of parental rights

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23. *Id.* at 216. *Parens patriae* refers "traditionally to [the] role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

24. *The parens patriae* power has been inherited from the English courts and, as it was adopted in the United States, state intervention was invoked primarily in the case of poor families. Browning & Weiner, *supra* note 22, at 216. As the *parens patriae* power expanded, it was invoked in the cases of "immoral or physically abusive" parents. *Id.* Upon further expansion, it was used "to protect children from emotional harm." *Id.* This power is now used by states as justification for removal of neglected children from their parents and for the termination of parental rights. *Id.*

25. *Id.*

26. *In re* Juvenile Appeal (83-CD), 455 A.2d 1313, 1319 (Conn. 1983).

27. *Id.* at 1318; *see* CONN. GEN. STAT. § 17a-101 (1990).

28. *Juvenile Appeal*, 455 A.2d at 1318.

29. CONN. GEN. STAT. § 45a-717 (1990).

30. *In re* Juvenile Appeal (84-BC), 479 A.2d 1204, 1207 n.9 (Conn. 1984).

31. CONN. GEN. STAT. § 45a-717(f) (1990). Section 45 replaced CONN. GEN. STAT. § 45-61(f), the statutory rule in effect when the trial court was hearing *In re Valerie D.* A court may terminate the parent-child relationship if:

based on abandonment, acts of parental commission or omission, or the absence of an ongoing parental relationship.[32] In addition, a nonaccidental or inadequatedly explained serious injury produces prima facie evidence for the termination of parental rights.[33]

Commitment to the temporary custody of the Department of Children and Youth Services (DCYS) and/or termination of parental rights can also be based on neglect findings.[34] Grounds for a neglect determination include abandonment of the child, denying the child proper care and attention, allowing the child to live under injurious conditions, circumstances, or associations, and abuse.[35] When petitions for both temporary commitment to the DCYS[36] and for termination of parental rights are filed together, a procedure, authorized by Conn. Gen. Stat. section 17a-112(e), allows the court to terminate parental rights pursuant to Conn. Gen. Stat. section 45a-717.[37]

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(2) the child has been denied, by reason of an act or acts of parental commission or omission, the care, guidance or control necessary for his physical, educational, moral or emotional well-being. Nonaccidental or inadequately explained serious injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficent for the termination of parental rights; (3) there is no ongoing parent child relationship which is defined as the relationship that ordinarily develops as a result of a parent having met on a continuing day-to-day basis the physical, emotional, moral, and educational needs of the child, and to allow further time for the establishment or reestablishment of the parent child relationship would be detrimental to the best interest of the child.

Id.

32. *Id.* The termination of parental rights based on abandonment was not at issue in *In re Valerie D.*

33. *Id.*

34. *See* CONN. GEN. STAT. §§ 45a-717, 46b-129 (1990).

35. CONN. GEN. STAT. § 46b-120 (1990). A neglected child is defined as one who "(i) has been abandoned or (ii) is being denied proper care and attention, physically, educationally, emotionally or morally or (iii) is being permitted to live under conditions, circumstances or associations injurious to his well-being, or (iv) has been abused." *Id.*

36. The petition for an order of temporary care and custody of a child is governed by CONN. GEN. STAT. § 46b-129(a). This petition can be filed by:

any selectman, town manager, or town, city, or borough welfare department, any probation officer, the Connecticut Humane Society, or the commissioner of human resources, the commissioner of children and youth services or any child-caring institution or agency approved by the commissioner of children and youth services, a child or his representative or attorney or a foster parent of a child . . . .

Id.

37. CONN. GEN. STAT. § 17a-112(e) (1990) provides:

Any petition brought by the commissioner of children and youth services to the superior court, pursuant to subsection (a) of section 46b-129, may be accompanied by a petition for termination of parental rights filed in accordance with this section with respect to such child, notwithstanding that

The Connecticut courts, however, consider custody and termination under these statutes as two separate issues.[38] "[Q]uestions concerning the ultimate custodial placement of the child may not be intermingled with the issues of termination."[39] Therefore, parental conduct which would justify removal of the child from the parent's custody would not necessarily justify termination of parental rights.[40]

The termination statute ties all of its requirements to the "best interest of the child" standard.[41] This standard, however, has no precise meaning.[42] Because of the individual nature of the cases, it is impossible to have precision in making decisions.[43] "Standards of mathematical precision are neither possible nor desirable in this field; much must be left to the trial judge's experience and judgment." [44] Therefore, the boundaries of the standard are defined by case law.

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such child has not been committed to the commissioner of children and youth services. Notice of the hearing on such petitions shall be given in accordance with sections 45a-716 and 45a-717. The superior court, after hearing, in accordance with the provisions of subsection (b) of this section, may, in lieu of granting the petition filed pursuant to section 46b-129, grant the petition for termination of parental rights as provided in section 45a-717.

Id. The provisions governing the termination of parental rights are identical in CONN. GEN. STAT. § 45a-717 and CONN. GEN. STAT. § 17a-112(e). The Connecticut Supreme Court considered termination of a mother's parental rights under § 45a-717 in *In re* Valerie D., 613 A.2d 748 (Conn. 1991).

38. *In re* Jessica M., 586 A.2d 597, 601 (Conn. 1991).

39. *Id.*

40. *Valerie D.*, 613 A.2d at 759.

41. State v. Anonymous, 425 A.2d 939, 945 (Conn. 1979). Consideration of the best interest of the child, however, still necessitates that all the statutory requirements for the termination of parental rights be complied with. *In re* Barbara J., 574 A.2d 203, 210 (Conn. 1990); *In re* Luis C., 554 A.2d 722, 726 (Conn. 1989); *In re* Juvenile Appeal v. Comm'r of Children & Youth Servs., 420 A.2d 875, 886 (Conn. 1979); *see also Jessica M.*, 586 A.2d at 600; Orman W. Ketcham & Richard F. Babcock Jr., *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUTGERS L. REV. 530, 539 (1976).

> General Statute § 45a-717(f) expressly requires the court to find, in addition to the existance of an enumerated statutory ground for termination, that such termination is in the best interest of the child. This statutory element was added to § 45a-717(f) by 1983 Conn. Acts 83-478 § 2. Both its plain language and its available legislative history indicate that the legislature intended this provision to serve as an additional, not an alternative, requirement for the termination of parental rights.

Valerie D., 613 A.2d at 758 n.15 (citing *In re* Jessica M., 586 A.2d 597, 600 n.5 (Conn. 1991)).

42. *Anonymous*, 425 A.2d at 945.

43. *Id.* (citing Pet. of the New Eng. Home for Little Wanderers, 328 N.E. 2d 854, 863 (Mass. 1975)).

44. *Id.*

Before a parent's rights can be terminated, Connecticut courts require strict compliance with statutory criteria.[45] These criteria "enhance the child's best interest by promoting autonomous families and by reducing the dangers of arbitrary and biased decisions amounting to state intrusions disguised under the rubric of the child's 'best interest.'"[46] For an action as final as the termination of a parent's rights, Connecticut courts require clear and convincing evidence,[47] as well as the strictest level of judicial scrutiny.[48] In summary, the strict standards that have been established by the Connecticut courts provide procedural safeguards for the vague "in the best interest of the child standard."[49]

The standard, when applied to *Valerie D.*, is particularly ambiguous because the definition of "child" may or may not include the unborn, and the effects of cocaine on the unborn child are not yet fully understood.

B. *Physiological Effect of Cocaine on the Baby*

While there are four available forms of cocaine,[50] most of the cocaine available in the United States is sold as hydrochloride powder, colloquially known as street cocaine,[51] which can be snorted or injected intravenously.[52] Substantial research is available on the *prenatal* effects of exposure to all forms of cocaine.[53]

Infants born to cocaine users have a variety of symptoms, including low gestational age, low birth weight,[54] and below average length and head circumference.[55] They can be lethargic or catatonic when born.[56] It has also been established that pregnant women who use

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45. *In re* Juvenile Appeal v. Commissioner of Children & Youth Servs., 420 A.2d 875, 886 (Conn. 1979).

46. *Id.*

47. *In re* Migdalia M., 504 A.2d 533, 540 (Conn. 1986).

48. *In re* Juvenile Appeal (84-BC), 479 A.2d 1204, 1207 (Conn. 1984).

49. CONN. GEN. STAT. § 45a-717 (1990); *see supra* note 41 and accompanying text.

50. Hydrochloride powder is only one of the four types of cocaine available. Coca leaf, coca paste, and crack are the other forms of cocaine. Institute of Medicine, TREATING DRUG PROBLEMS 67-68 (1990).

51. ARNOLD WASHTON, COCAINE ADDICTION 10-11 (1989).

52. *Id.*

53. *See infra* notes 55-67 and accompanying text.

54. Ira J. Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 THE PED. CLINIC OF N. AM. 1403, 1406 (1988); see also, Scott N. MacGregor et al., *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, 74 OB. & GYN. 882, 884 (1989); Barry Zuckerman et al., *Effects of Maternal Marijuana and Cocaine Use on Fetal Growth*, 320 NEW ENG. J. MED. 762, 766 (1989).

55. Chasnoff, *supra* note 54, at 1406. *See also* Zuckerman, *supra* note 54, at 766.

56. Sam S. Balisy, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1217 (1987); *see also* Linda C. Mayes, *Prenatal Cocaine Exposure and Young Children's Development*, 521 ANNALS AM. ACAD. POL. & SOC. SCI. 11, 16 (1992).

cocaine are predisposed to certain complications in labor and delivery, including premature delivery and abruptio placentae.[57] Fetuses have been known to experience strokes, not unlike those in adult cocaine users, when the pregnant mother uses cocaine in the days prior to delivery.[58]

In addition, infants born to drug-using mothers show symptoms of withdrawal, specifically irritability and tremulousness.[59] When these babies are suffering withdrawal symptoms, "'their emotions are right on the edge' . . . . They may be screaming and inconsolable one moment and then fall asleep the next."[60] They also show motor control impairment,[61] which can continue for at least four months.[62] These children do, however, exhibit normal growth patterns by the age of two.[63]

Babies exposed to cocaine in utero also have difficulty relating to their environment.[64] As these babies may be less responsive to human voice and touch, it is more difficult to be comforting and nurturing to

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57. Chasnoff, *supra* note 54, at 1406. *See also* MacGregor, *supra* note 54, at 884. Abruptio placentae is defined as a "premature detachment of a normally situated placenta." STEDMAN'S MEDICAL DICTIONARY 4 (5th ed. 1982). This situation can put the baby at risk. *But see* Mayes, *supra* note 56, at 14. Findings of premature delivery are inconsistent.

58. Chasnoff, *supra* note 54, at 1406.

59. James M. Wilton, *Compelled Hospitalization and Treatment During Pregnancy: Mental Health Statutes as Models for Legislation to Protect Children from Prenatal Drug and Alcohol Exposure*, FAM. L. Q. 153 (Summer 1991). *See generally* Ira J. Chasnoff, *Newborn Infants with Drug Withdrawal Symptoms*, 9 PED. IN REV. 273, 274 (1988) [hereinafter *Newborn Infants*]. Fetuses also suffer in utero side effects substantially the same as the side effects of the drug using mother because the liver of the fetus is unable to metabolize the quantities of accumulated substances. Susan E. Rippey, *Criminalizing Substance Abuse During Pregnancy*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 69, 73 (1991). *But see infra* text accompanying notes 68, 262-80.

60. Bill Barol et al., *Cocaine Babies: Hooked at Birth*, NEWSWEEK, July 28, 1989, at 56 (quoting Dr. Ira Chasnoff).

61. Chasnoff, *supra* note 54, at 1406. Cocaine-exposed infants exhibit impairment in muscle tone, restricted volitional movement patterns, and retention of primitive reflexes. Tremors in the newborns' arms and legs are also common. *Id. See generally* J.W. Schneider & Ira J. Chasnoff, *Cocaine Abuse During Pregnancy: Its Effects on Infant Motor Development–A Clinical Perspective*, 2 TOPICS IN ACUTE CARE AND TRAUMA REHAB. 59, 61 (1979).

62. Chasnoff, *supra* note 54, at 1406. *See generally* Ira J. Chasnoff, *Motor Assessment of Cocaine/Polydrug Exposed Infants at Age Four Months*, 14 NEUROTOXICOLOGY & TERATOLOGY 97 (1992).

63. Ira J. Chasnoff et al., *Cocaine/Polydrug Use In Pregnancy: Two Year Follow Up*, 89 PED. 284, 289 (1992).

64. Ira J. Chasnoff, *Perinatal Effects of Cocaine*, CONTEMP. OB/GYN, May 1987, at 171, 176.

them.[65] Therefore psychological difficulties associated with withdrawal also exist.[66]

Alternatively, recent research[67] suggests that in utero effects of drug use by a pregnant mother are inconclusive and that other sociological factors may be responsible for the injurious effects.[68] Since cocaine addicted newborns are a new phenomena, one can only speculate what the long term effects on these babies may be.[69]

C. *Psychological Effects of Cocaine on Family Dynamics*

Research is inconclusive as to the effect of drug use on a mother or father's motivation to be a good parent.[70] Some studies suggest that drug addiction adversely affects parental motivation,[71] but others conclude that drug-addicted parents remain highly motivated to parent their children, in spite of their addiction.[72]

One obvious effect of drug addiction on parental abilities is that normal activites and interests are often changed by a constant need to procure drugs and/or money to purchase them.[73] This is especially true for those persons addicted to drugs that have a short half-life such as crack.[74] Since the half-life or high of the drug is short, the user has a greater immediate need for more.[75] This behavior can "detract from the user's normal and prior interests and activities."[76] This change in the parents behavior has been shown to result in anxiety and stress in the children.[77] In addition, the children also exhibit increased anti-social behavior and decreased academic performance.[78] Therefore, even if a parent is motivated, it is likely that their addiction, unless controlled or overcome, will prevent effective or positive parenting.

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65. *Id.*

66. *Id.* It is unclear, however, whether this is a permanent condition. Balisy, *supra* note 56, at 1217.

67. *See infra* text accompanying notes 266-79.

68. *See infra* text accompanying notes 254-56.

69. Barol, *supra* note 60, at 57.

70. Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse,* 56 BROOK. L. REV. 1213, 1225 (1991).

71. Bonnie I. Robin-Vergeer, *The Problem of the Drug Exposed Newborn: A Return to Principled Intervention,* 42 STAN. L. REV. 745, 766 (1990).

72. Jack N. Car, *Drug Patterns Among Drug-Addicted Mothers: Incidence Variance in Use & Effects on Children,* 4 PEDIATRIC ANALYSIS 65, 75 (1975).

73. Dolgin, *supra* note 70 at 1225.

74. "Half-life" indicates that a crack high lasts only minutes. Because of this effect, the user has a more immediate need for more drugs. Dolgin, *supra* note 70, at 1224 n.51.

75. *Id.*

76. *Id.* at 1226 n.61 (quoting a telephone interview with Dr. Janet Mitchell, Chief of Department of H. Hospital (July 11, 1990)).

77. *Id.* at 1225.

78. *Id.*

There is also substantial controversy over the effects of drug use on parental neglect.[79] Research has found that parental drug use does not per se result in child neglect, but rather neglect is more related to the presence of certain other risk factors,[80] including "the sex of the addicted parent, the extent of violence between spouses, poverty, and the absence of financial and social assistance."[81] While parents may use drugs and not necessarily neglect their child,[82] there is evidence to suggest that parents, in their complusive need to obtain drugs, may neglect their children physically and emotionally.[83] The question remains whether that alone makes one an unfit parent.

IV. PRENATAL CONDUCT CASE LAW IN OTHER JURISDICTIONS

While cases in Connecticut involving termination of parental rights have, until now, involved the post-natal conduct of the parent,[84] there is case law in other jurisdictions involving prenatal drug use and temporary commitment[85] and/or the termination of parental rights.[86]

The effect of prenatal drug use on a mother's parenting skills after birth has been used as the basis for neglect findings in the State of Michigan.[87] The Michigan Court of Appeals, in *In re Baby X*,[88] opined that "since a child has a legal right to begin life with a sound mind and body . . . it is within his best interest to examine all prenatal conduct bearing on that right."[89] The court held "that a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child within the

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79. Robin-Vergeer, *supra* note 71, at 766.

80. Rebecca Black & Joseph Mayer, *Parents with Special Problems: Alcoholism and Opiate Addiction*, 4 CHILD ABUSE & NEGLECT 45, 47 (1980).

81. Doglin, *supra* note 70, at 1225 (citing Black & Mayer, *supra* note 81, at 51).

82. Respondent–Appellant's Brief at 8, *In re* Valerie D., 613 A.2d 748 (Conn. 1992) (No. 14420).

83. Doglin, *supra* note 70, at 1226.

84. *See, e.g.*, *In re* Alexander V., 613 A.2d 780 (Conn. 1992); *In re* Jessica M., 586 A.2d 597 (Conn. 1991); *In re* Juvenile Appeal (84-BC), 479 A.2d 1204 (Conn. 1984); *In re* Juvenile Appeal (83-CD), 455 A.2d 1313 (Conn. 1982); *In re* Juvenile Appeal (Anonymous), 436 A.2d 290 (Conn. 1980).

85. *In re* Troy, 263 Cal. Rptr. 869 (Cal. Ct. App. 1989); *In re* Nash, 419 N.W.2d 1 (Mich. Ct. App. 1987); *In re* Baby X, 293 N.W.2d 736 (Mich. Ct. App. 1980); *In re* Stefanel Tyesha, 556 N.Y.S.2d 280 (N.Y. App. Div. 1990).

86. *In re* Solomon L., 236 Cal. Rptr. 2 (Cal. Ct. App. 1987). *See also In re* A.W., 569 A.2d 168, 169 (D.C. 1990) (suggesting a mother's parental rights were terminated because her drug use affected her ability to "plan for and provide care for the child"). *In re* R.T.L.P., 777 P.2d 892 (Mont. 1989) (suggesting the child was considered abused because her mother was a drug user).

87. Dolgin, *supra* note 70, at 1247.

88. *Baby X*, 293 N.W.2d at 736.

89. *Id.* at 739 (citing Womack v. Buchhorn, 187 N.W.2d 218, 222 (Mich. 1971)).

jurisdiction of the probate court."[90] The court then argued that a "fetus is like a sibling to the baby that it becomes."[91] If a mother, by using drugs, neglects the fetus, she is likely to neglect the child when born.[92] The Michigan court ordered state intervention, not on the basis that the infant's needs could not be met, but because it determined that the mother's drug use was per se indicative that she would neglect the child in the future.[93]

In *In re Solomon L.*,[94] the California Court of Appeals made a neglect determination based on a mother's drug use while she was pregnant,[95] the withdrawal symptoms exhibited by the baby, and the subsequent neglect after the baby was born.[96] Relying on the neglect finding, the court was able to terminate the mother's rights to her baby.[97] The court focused on what would be in the best interest of the child,[98] "not solely on the efforts or fitness of the parent."[99] The court's standard for termination decisions, however, relied heavily on the availability of less drastic alternatives to termination, as they related to the welfare of the child.[100]

V. *IN RE VALERIE D.*: BACKGROUND AND PROCEEDINGS

A. *Factual History*

Jean Doe[101] began using drugs when she was eleven years old.[102] At age sixteen, she moved in with a man whom she had known for one year.[103] They both used cocaine by intervenous injection.[104] Jean

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90. *Id.* Even though the drug which affected Baby X was heroin, the theory upon which the court relied applies equally to babies exposed to cocaine in utereo. Dolgin, *supra* note 70, at 1248 n.143.

91. Dolgin, *supra* note 70, at 1248. This analogy implies that the fetus is a child, but not the same child as the baby itself. *Id.* at 1247 n.144.

92. *Baby X*, 293 N.W.2d at 739.

93. *Id.*

94. 236 Cal. Rptr. 2 (Cal. Ct. App. 1987).

95. *Id.* at 3. The mother told her doctor that she had taken drugs before she went to the hospital to deliver her baby. *Id.*

96. *Id.* at 3-4.

97. *Id.* at 4.

98. *Id.* at 5.

99. *Id.*

100. *Id.* The court was weighing adoption as an alternative, if parental rights were terminated, against long-term guardianship, if they were not. *Id.* The court decided that a permanent adoptive placement was in the best interest of the child and terminated the parental rights to accomplish that placement. *Id.*

101. Doe was used as a pseudonym in the Respondent–Appellant's Brief at 1 n.1., *In re* Valerie D., 613 A.2d 748 (1992) (No.14420). However, the mother's actual first name was used. *Id.*

102. *Valerie D.*, 613 A.2d at 756.

103. *Id.*

Doe became pregnant with her first child and gave birth on May 12, 1988. While pregnant, she followed the advice of her physician and discontinued her drug use almost completely.[105] Her first child was born without the symptoms usually associated with prenatal cocaine use.[106] Within three months, she resumed smoking and injecting cocaine two to three times a week.[107] Five months later, in October, 1988, Jean Doe became pregnant with Valerie.[108] She did not seek medical attention until March, 1989, when she was again warned about the dangers of drug use to her unborn baby.[109] By this time she was addicted and unable to refrain from using drugs.[110] Although she was eligible to receive prenatal services at a hospital clinic, she failed to do so until June, 1989.[111]

Jean Doe and the father of the unborn baby were arrested on June 19, 1989, after marijuana and drug paraphernalia were found in their home.[112] They refused voluntary placement in foster care for their older child, who was taken to a local hospital.[113] They also refused treatment for their admitted cocaine addiction, in spite of additional warnings regarding the dangers of continued cocaine use.[114] A neglect petition for temporary custody was filed to remove the oldest child from the hospital and to place her in foster care.[115]

The parents were scheduled to attend a hearing on the continued neglect proceeding of their oldest child when they called the court to report that the mother's water had broken and that they were on the way to the hospital.[116] The parents, however, did not go directly to the hospital.[117] Instead, at approximately 1:00 p.m., the mother injected a quarter gram of cocaine intravenously.[118] She did not arrive at the

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104. *Id.*
105. *Id.*
106. *Id. See supra* text accompanying notes 54-68.
107. *Valerie D.*, 613 A.2d at 756.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* The court duly noted that pregnant women have monthly routine visits for the first twenty-eight weeks, and a high-risk pregnancy resulting from drug use by the mother would require more frequent visits. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id. See supra* notes 32-33 and accompanying text.
116. *Valerie D.*, 613 A.2d at 756.
117. *Id.*
118. *Id.*

hospital until 9:00 p.m., and the baby, Valerie D., was born one hour later.[119]

While the baby was still in the hospital, DCYS immediately filed three petitions with the Connecticut Superior Court.[120] The first, an order for temporary care and custody under Conn. Gen. Stat. section 46b-129(b),[121] was based on an affidavit from the child's pediatrician that the mother's injection of cocaine just prior to the beginning of labor created the risk of life-threatening complications to Valerie D. that amounted to "intentional and severe neglect."[122] The second petition was for commitment of custody to DCYS under section 46b-129(a)[123] on the basis that the child was neglected, uncared for, and abused.[124] The final petition was filed for termination of the mother's parental rights under section 17a-112(e).[125] This petition alleged that, because of her mother's drug use, the child had been denied the "care, guidance, or control necessary for [her] physical, educational, moral or emotional well being."[126] It further alleged that the baby had suffered a "nonaccidental or inadequately explained serious injury."[127] The three petitions were filed, and the petition for temporary custody was granted *ex parte* by the trial court on the very same day.[128] The trial court ordered service on the mother of the three petitions and set hearing

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119. *Id.*

120. *Id.* at 753-55. DCYS took an "unprecedented step by filing immediately for both separation [of the newborn] from her mother and termination of all parental rights." *See* Thomas Scheffey, *Trailing 66 Amici, Valerie D. Case Heads for High Court*, CONN. L. TRIB., May 4, 1992, at 2 [hereinafter TRAILING].

121. *Valerie D.*, 613 A.2d at 753-55. CONN. GEN. STAT. § 46b-129(b) reads in pertinent part:

> (b) If it appears from the allegations of the petition and other verified affirmations of fact accompanying the petition, or subsequent thereto, that there is reasonable cause to find that the child's or youth's condition or the circumstances surrounding his care require that his custody be immediately assumed to safeguard his welfare, the court shall either (1) issue an order to the parents or other person having responsibility for the care of the child or youth to show cause at such time as the court may designate why the court shall not vest in some suitable agency or person the child's or youth's temporary care and custody pending a hearing on the petition, or (2) vest in some suitable agency or person the child's or youth's temporary care and custody pending a hearing upon the petition which shall be held within ten days from the issuance of such order on the need for such temporary care and custody.

Id.

122. *Valerie D.*, 613 A.2d at 755.

123. *See supra* note 34 and accompanying text.

124. *See supra* note 35 and accompanying text.

125. *See supra* note 38 and accompanying text.

126. *Valerie D.*, 613 A.2d at 755. *See supra* note 32 and accompanying text.

127. *Id.* (quoting petitioner's order).

128. *Id.*

dates for argument.[129] At the hearing, Ms. Doe agreed that there was a continuing need for Valerie D. to remain in the temporary custody of DCYS.[130]

B. *Trial Court Proceedings*

The trial court agreed with the allegations of the DCYS and found that both "severe parental neglect," and "nonaccidental or inadequately explained serious physical injury" to the child were present.[131] They concluded that as a result of the mother's injection of cocaine while her amniotic fluid was leaking, the baby had passed and aspirated meconium while being born.[132] The court noted that "[s]tress from cocaine use at this stage precipitated the birth resulting in the baby's aspiration of meconium which only drastic and aggressive suctioning during the birth process prevented from fatality."[133]

Based on these findings, the trial court held that the child "'suffered serious, life-threatening, physical injury at the instant of her birth because of her mother's intravenous injection of cocaine after beginning labor.'"[134] The trial court further concluded that the "child had been denied 'by acts of parental commission or omission the care, guidance or control necessary for physical, educational and emotional well-being.'"[135] For these reasons, the court ordered the permanent termination of the parental rights of Valerie D.'s mother and father.[136] The court reasoned that this result would clearly applied "'to parents who, an instant *after* birth, injected cocaine into the bloodstream of a newborn. The injection of the drug into the bloodstream of a baby about to be born should have no different consequences.'"[137] Whether this conclusion was valid was the primary basis for the mother's appeal.[138]

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129. *Valerie D.*, 613 A.2d at 755 n.8.

130. *Id.*

131. *Id.* at 755. *See* CONN. GEN. STAT. § 45a-717(f)(2)(1990) ("Non-accidental or inadequately explained serious . . . injury [is a] prima facie [ground for] termination.").

132. *Valerie D.*, 613 A.2d at 757 n.14. Meconium is an unborn child's stool.

133. *Id.*

134. *Id.* at 758 ("The trial court specifically found that there had been '[n]onaccidental . . . serious physical injury to [the] child . . . constitut[ing] . . . acts of parental commission or omission sufficient for termination of parental rights.'"). *See* CONN. GEN. STAT. § 45a-717(f)(2) (1990).

135. *Valerie D.*, 613 A.2d at 758 (quoting *In re* Valerie D., 1991 WL 319983 (Conn. Super. Ct.)).

136. *Id.* Valerie D.'s father did not participate in the appeal of the termination of his parental rights. *Id.*

137. *Id.*

138. This appeal was also based on CONN. GEN. STAT. § 45a-717 (g) (1990) (termination of parental rights). The alternative ground for termination is the

B. *Appellate Court Proceedings*

The Connecticut Appellate Court, noting that this was a case of first impression,[139] affirmed the trial court's decision.[140] The expansive language of the holding "that a petition for neglect *or* termination of parental rights can be based solely on a mother's prenatal conduct"[141] placed Connecticut as the only state in the nation which based the termination of parental rights, at birth, on a pre-birth injury.[142]

The appellate court based its decision primarily on the state's interest in protecting fetal life.[143] The court relied on Connecticut's compelling interest in protecting Valerie D., as well as its *parens patriae* interest in children generally.[144] This compelling interest was not simply negated because the mother's conduct occurred prior to Valerie D.'s birth.[145] The court analogized the situation to criminal and tort law where infants suffering prebirth injuries do in fact have a cause of action in negligence.[146]

The appellate court failed to distinguish a neglect finding that would allow temporary separation[147] from the permanent termination of

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absence of an ongoing relationship. The Connecticut Supreme Court decided that the mother's rights could not be terminated on this ground because the state's intervention was the reason for the absence of such a relationship. This ground was added at the appellate level. *See infra* text and accompanying notes 141-51. The court also declined to determine this ground for appeal on any constitutional issues, including violation of the Due Process and Equal Protection clauses, and based its decision on statutory interpretation. *Valerie D.*, 613 A.2d at 753.

139. *In re* Valerie D., 595 A.2d 922 (Conn. App. Ct. 1991), *rev'd*, 613 A.2d 748 (Conn. 1992). No other appellate court in Connecticut had "as yet determined whether a petition for neglect or termination of parental rights can be predicated solely on a mother's prenatal conduct." *Id.* at 924.

140. *Id.* at 923. The court also affirmed the trial court's judgment that "there was no ongoing parent-child relationship" between the child and the respondent-mother, and that it would not be in the child's best interest to allow time for the parent-child relationship to develop. *Id.* at 926.

141. *Id.* at 924 (emphasis added). The appellate court made no distinction between a determination of neglect and a termination of parental rights.

142. Scheffey, *supra* note 2, at 2 (indicating that Connecticut would be alone among the 50 states in basing the termination of parental rights, at birth, solely on a pre-birth injury); *see also Trailing*, *supra* note 120, at 2.

143. *Valerie D.*, 595 A.2d. at 925 (citing Roe v. Wade, 410 U.S. 113 (1973)).

144. *Id.*

145. *Id.*

146. *Id.* at 924 (citing Simon v. Mullin, 380 A.2d 1353 (Conn. Super. Ct. 1977)). *See also* Thomas Scheffey, *Groups Push for Rehearing of Prenatal Conduct Case*, CONN. L TRIB., Sept. 30, 1991, at 2 [hereinafter *Rehearing*].

147. Other states have used prenatal conduct to take temporary custody of a child. *See, e.g., In re* Stefanel Tyesha C., 556 N.Y.S.2d 280 (N.Y. 1990); In re Troy, 263 Cal. Rptr. 869 (1989); *In re* Nash, 419 N.W.2d 1 (Mich. App. 1987); *In re* Baby X, 293 N.W.2d 736 (Mich. App. 1980).

parental rights.[148] Valerie D.'s mother appealed the termination of her parental rights to the Connecticut Supreme Court.[149] The main issue in the certification to appeal was whether, under the facts of this case, "General Statutes [section] 46b-120 and [sections] 45a-717(f)(2) and (3) permit a termination of parental rights based upon the prenatal conduct of the respondent mother?"[150]

VI. THE CONNECTICUT SUPREME COURT DECISION

The Connecticut Supreme Court reversed the appellate court's decision.[151] The court reviewed the factual findings and turned to statutory language and legislative intent in determining that a mother's prenatal conduct is an insufficient basis for the termination of parental rights.[152]

The Connecticut Supreme Court found that the trial court's findings were flawed.[153] The supreme court noted that the cocaine injection did not actually occur after labor began; rather, the record indicated that it was injected after the amniotic fluid began to leak but several hours

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148. *Trailing, supra* note 120, at 2. The parents' fundamental right in the child "does not evaporate simply because they have not been model parents or have lost temporary custory of their child, to the State." Santosky v. Kramer, 455 U.S. 745, 753 (1982).

149. *Valerie D.*, 595 A.2d at 923. The mother's appeal was limited to the termination action. She did not challenge the petition for temporary commitment of the child to the custody of DCYS. *In re* Valerie D., 613 A.2d 748, 755 n.8 (1992).

150. *Valerie D.*, 613 A.2d at 752 n.3. The complete appeal is as follows:

> '1. Under the facts of this case do General Statute §§ 46b-120 and [§45a-717(f)(2) and (3)] permit a termination of parental rights based upon the prenatal conduct of the respondent mother?
>
> '2. If the answer to question 1 is yes, did such a termination: '(a) violate the mother's right to due process of law under the federal or state constitution; or '(b) constitute impermissible discrimination on the basis of sex, in violation of the equal protection clause of the federal or state constitution?
>
> '3. Under the facts of this case, was the termination of parental rights, on the ground that there was no ongoing parent child relationship, unconstitutional on the basis that the state was responsible for the lack of such relationship?
>
> '4. Did the Appellate Court properly conclude that the record supports the trial court's finding that there was no ongoing parent-child relationship?
>
> '5. Under the facts of this case, did the trial court's determination to waive the one-year waiting period under the General Statutes §§ 45a-717(g) violate the respondent mother's constitutional right to due process under the federal or state constitution?'

Id.

151. *Valerie D.*, 613 A.2d at 748.

152. *Id.* at 753.

153. *Id.* at 757 n.14. *See supra* notes 131-38 and accompanying text.

before labor began.[154] The court further noted that there was also clear evidence that the child had not actually aspirated meconium.[155] The Connecticut Supreme Court concluded that "there was, therefore, no evidence from which the trial court could have inferred that the baby aspirated 'meconium which only drastic and aggressive suctioning during the birth process prevented from fatality,' or that the child 'almost died as a direct result of the mother's injection of cocaine after labor had begun.'"[156] The Supreme Court noted that the trial court had relied on the pediatrician's testimony that, if the meconium passed prior to the baby's delivery, there was a risk of aspiration and if that situation occurred, life-threatening respiratory problems would result.[157] In summary, the trial court's conclusion that the child had received a serious, life-threatening injury was unsupported by the evidence.[158]

The Connecticut Supreme Court's statutory analysis focused on the proper interpretation of the grounds for termination presented in section 45a-717.[159] Specifically the court focused on whether the legislature intended the statutory "language to contemplate termination of parental rights based upon prenatal conduct—even prenatal conduct committed shortly before the onset of labor—that results in harm to the child upon its birth."[160]

In beginning its analysis, the court noted that "the [termination] statute rests on 'two distinct and often contradictory interests [of the child]. The first is a basic interest in safety; the second is the important interest . . . in having a stable family environment.'"[161] The court opined that the scope of the statute was clearly ambiguous when applied to the facts of *In re Valerie D.*[162] because the statute did not address when the acts of parental commission or omission must occur.[163] Therefore, the court found it necessary to consider the constitutional protection given to family integrity,[164] the statute's language and

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154. *Valerie D.*, 613 A.2d at 757 n.14.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* The court also noted that it was unnecessary to decide whether the evidence supported the trial court's second finding, that the baby suffered serious injury within the meaning of CONN. GEN. STAT. § 45a-717(f)(2)(1990). The court assumed that the finding would be supported if the prenatal conduct occurred after the delivery. *Id.* at 758. In fact, the baby only suffered mild withdrawal symptoms. Brief for the Appellant at 11, *In re Valerie D.*, 613 A.2d 748 (1992) (No. 14420).
159. *Valerie D.*, 613 A.2d at 759.
160. *Id.* The court acknowleged harm to the child. *Id.*
161. *In re* Juvenile Appeal (83-CD), 455 A.2d 1313, 1319 (Conn. 1983).
162. *Valerie D.*, 613 A.2d at 759.
163. *Id.*
164. *See supra* notes 15-26, *infra* notes 169-73, and accompanying text. The court considered constitutional protection for the family and the limitations it placed on

construction,[165] and the legislative intent of section 45a-717(f)(2) to make this determination.[166]

Because of the constitutional deference given to the family,[167] the court construed section 45a-717 as preferring non-intrusion by the state.[168] Although "it is both a fundamental right and the policy of this state to maintain the integrity of the family,"[169] the court noted that preference should be given to the statutory construction, which minimizes state action, because termination of parental rights encompasses the "'delicate realm of parent-child relationships,'"[170] and is a final, judicial action.[171] Traditionally, the courts have insisted on strict compliance with statutory criteria to terminate a parent's right to his or her child.[172] This court, however, held that a strict and narrow construction[173] was required because of the statute's ambiguous scope.[174]

The court next considered whether the termination statute was intended to apply to prenatal conduct at all.[175] In defining "parent" and "child" for the purposes of section 45a-717, the court noted that "'parent' means a natural or adoptive parent"[176] and "'child' means any person under sixteen years of age."[177] They reasoned that a parent, as it applies to the female, is "'one [who] brings forth offspring,'"[178] and

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state intervention, but it never reached the other constitutional issues raised on appeal, including violations of the Due Process and Equal Protection clauses under the Constitution. Nor did the court consider whether the fetus was a child under the Consitution.

165. *See infra* notes 177-90 and accompanying text.

166. *See infra* notes 192-204 and accompanying text.

167. *See supra* text accompanying notes 15-26.

168. *Valerie D.*, 613 A.2d 760 (citing *In re* Juvenile Appeal v. Commissioner of Children & Youth Serv., 177 Conn. 648, 662 (1979)).

169. *Id.* at 759 (citing *In re* Juvenile Appeal, 455 A.2d 1313 (Conn. 1983).

170. *Id.* at 760 (quoting *In re* Juvenile Appeal v. Comm'r of Children & Youth Serv., 420 A.2d 875, 882 (Conn. 1979)).

171. *Id.* at 759.

172. *In re* Jessica M., 586 A.2d 596, 600 (Conn. 1991). The court adheres to the principle of strict construction of the termination statute although CONN. GEN. STAT. § 45a-706 states that "[t]he provisions of sections . . . 45a-715 - 45a-718, inclusive . . . shall be liberally construed in the best interests of any child for whom a petition had been filed under said sections." *Valerie D.*, 613 A.2d at 760 n.16. *See supra* text accompanying notes 44-46.

173. *Valerie D.*, 613 A.2d at 760. *See also In re* Jessica, 586 A.2d 597 (Conn. 1991); *In re* Juvenile Appeal (Anonymous) v. Commissioner of Children & Youth Serv., 420 A.2d 875 (Conn. 1979).

174. *Valerie D.*, 613 A.2d at 760.

175. *Id.*

176. *Id.* (citing CONN. GEN. STAT. § 45a-707(e) (1990)).

177. *Id.* (citing CONN. GEN. STAT. § 46b-120 (1990)).

178. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1641 (1971)).

until the child is born, or "brought forth," the act can not be considered parental conduct.[179] They further reasoned that the definition of child, limited to one under sixteen years of age, also suggests that one must be born, since determination of age begins with one's birth.[180] The court concluded that "until the moment of birth, Valerie was not a 'child' within the meaning of [section] 45a-717(f)(2) and, therefore, 'the act . . . of parental commission' that took place before that moment cannot be considered to be parental conduct that 'denied [her] . . . the care . . . necessary for [her] physical . . . well-being.'"[181] While it is possible to semantically be considered a parent if the child is not yet born,[182] and the term "child" then, would include unborn children, the court was compelled to choose the narrower interpretation.[183] To further support their conclusion, the court reasoned that, as a general principle, the same words in a statute are read to have the same meanings.[184] It pointed out that the "terms 'parent' and 'child,' as used throughout the other parts of section 45a-717(f), clearly contemplate a child who has been born to his or her parents, and do not contemplate prenatal conduct by a pregnant woman with respect to her fetus."[185]

In addition, the court also reasoned that conduct resulting in a termination petition must continue "over an extended period of time which . . . shall not be less than one year,"[186] unless the court approves a waiver.[187] The court held that under the statute, the one year requirement applies equally to the three possible grounds for termination under section 45a-717.[188] It concluded, therefore, that the legislature could not have intended to apply this requirement to termination based on prenatal conduct.[189]

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179. *Id.*

180. *Id.*

181. *Id.* (quoting CONN. GEN. STAT. § 45a - 717 (f)(2) (1990)). Bruns v. Alaca, 420 U.S. 575 (1975) (statutory words are to be given ordinary meaning unless there are persuasive reasons otherwise.). Child, then, means someone who is already born. *See In re* Valerie D., 613 A.2d at 760-61.

182. *Valerie D.*, 613 A.2d at 761. *But see* Crook v. Academy Drywall Co., 591 A.2d 429 (Conn. 1991) (holding that a child conceived before the date of the employee's injury but born after that date entitled the employee to a dependency allowance). The court distinguished the *Crook* case because of the remedial nature of workers' compensation law; its provisions are liberally construed. *Valerie D.*, 613 A.2d at 761.

183. *Valerie D.*, 613 A.2d at 761.

184. *Id.* (citing AirKaman v. Grappo, 607 A.2d 410, 414 (Conn. 1992)).

185. *Id.*

186. *Id.*

187. *Id.* The waiver is pursuant to CONN. GEN. STAT. § 45a-717(g) (1990).

188. *Id.* The three grounds for termination include abandonment by the parent, act or acts of parental commission or omission, and no ongoing parent child relationship. *See supra* note 28 and accompanying text.

189. *Valerie D.*, 613 A.2d at 761.

Finally, the court examined the intent of the legislature when it enacted certain other statutes.[190] The court considered how the legislature had dealt with the problem of pregnant women who use drugs. Substitute Senate Bill No. 197, the legislation adopted in Connecticut prior to this case,[191] evidenced an intent to deal with the issue of drug-using pregnant women by "treatment and support."[192] It emphasized outreach services, treatment programs, and other support for pregnant, substance-abusing women and their families.[193] The court concurred with the legislature that this state policy would "eschew giving . . . the authority to seek termination of parental rights based upon prenatal drug use."[194]

A previously introduced and rejected bill, House Bill No. 5205, would have required pregnant women to have mandatory drug testing and have those tests results reported.[195] This would be coupled with mandatory investigations by the DCYS to allow the agency "explicit authority to petition for termination of parental rights based upon the prenatal drug abuse by the mother."[196]

These approaches dichotomized the need for mandatory testing and reporting as a means of identifying children and mothers in need of state services,[197] and, on the other hand, the fear that drug-using pregnant women would not seek medical care and would avoid delivering their babies in hospitals.[198] In *In re Valerie D.*, the Connecticut Supreme Court concluded that such policy arguments persuaded the

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190. *Id.* CONN. GEN. STAT. § 17a-644 (1990); *see infra* note 193 and accompanying text.

191. *Valerie D.*, 613 A.2d at 761. Substitute Senate Bill No. 197 was codified as CONN. GEN. STAT. § 17a-644 (1990). *Id.* at 764. It provides for education and prevention programs, outreach services for early identification, hospital care coupled with substance abuse treatment, pediatric care, child care for other children in the family, training in parenting skills, and other support services including home visitation, vocational training, and transporation. *Id.* at 762 n.21.

192. *Id.* at 762.

193. *Id.*

194. *Id.*

195. *Id.* at 762 n.20. House Bill No. 5205 § 7 mandated health providers having "reasonable cause to believe" that a pregnant woman was using drugs to refer her to the department of health services so that she could get treatment. The statute also required toxicology tests on infants if the doctor had "reason to believe" that the pregnant woman had used drugs. Positive test results were to be reported to DCYS and "notwithstanding a negative result . . . 'if other persuasive medical evidence of prenatal exposure to a controlled substance is present.' House Bill No. 5205 §9(b)." DCYS was required by § 8(a) to "investigate . . . and authorized . . . to seek custody of such infant or termination of the parent's rights regarding such infants." *Id.* at 762 n.20.

196. *Valerie D.*, 613 A.2d at 762.

197. *Id.* at 762-63.

198. *Id.* at 763.

legislature that Substitute Senate Bill No. 197, which did not require mandatory testing and reporting, would be the most socially beneficial.[199] The court agreed that pregnant, drug-using women would "avoid prenatal care and substance abuse treatment"[200] due to the risk of being reported and the loss of their child to DCYS. The court reasoned that it would ultimately be better for the babies to not require mandatory testing and reporting[201] of their mothers because more babies would then be born "either without adequate prenatal care or damaged by prenatal drug abuse, or both."[202] The legislature believed that, absent an already existing law, a new law was required to give the DCYS, the appropriate administrative body, the authority to terminate parental rights based on the mother's drug use while pregnant.[203] Therefore, the court determined that the legislature intended the policy to be preventative and supportive with regard to pregnant drug users.

Finally, the court summarily dismissed any analogous cases from any analogous pervasive authority.[204] It concluded that those decisions were not based on thorough reasoning, and the courts did not closely examine the language, constitutional background, and available legislative history of the statute upon which a petition for termination of parental right could be based.[205]

VII. ANALYSIS

In deciding *In re Valerie D.*, the Connecticut Supreme Court narrowed its analysis to statutory language and legislative intent. By so doing, the court accomplished several goals. First and foremost, the court overturned the lower court decisions and restored parental rights to the mother. Second, it avoided the potentially difficult issues surrounding the case.[206] Third, the court could defend its judgment against any accusations that it imposed judicial values on the decision.[207]

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199. *Id.* at 764.
200. *Id.*
201. *Id.*
202. *Id.* The Connecticut Supreme Court stated that it neither rejected nor accepted the policy arguments, only that it felt it necessary to interpret General Statutes § 45a-717(f)(2) (1990) consistently with legislative intent. *Id.* at 764 n.25.
203. *Id.* at 764. Rep. Farr speaking on the Substitute Bill No. 197 said "[a]s far as I'm concerned, we ought to change our laws and we ought to make it abuse for a mother to consume drugs while she is pregnant. That's what should be done. . . ." *Id.* (quoting 33 H.R. Proc., Pt. 26, 1990 Sess. pp. 9408-09 (1990)).
204. *See supra* notes 85-100 and accompanying text.
205. *Valerie D.*, 613 A.2d at 766.
206. *See supra* text accompanying notes 5.
207. *See infra* text accompanying notes 210-36.

The court, as this Comment will argue, made a judicially correct decision. By utilizing a strict and narrow statutory analysis, the Connecticut Supreme Court reached an objective, unbaised result. Social policy, cost concerns, and medical research not actually considered by the court support this conclusion.

A. *Imposition of Judicial Values*

The Connecticut Supreme Court was acutely aware of the possibility that judicial values could intercede in the process of deciding neglect and termination petitions based on prenatal drug use.[208] This bias results from neglect statutes which focus on parental misconduct, rather than actual or future harm to the child.[209] When judges focus on the conduct of a parent, they are often influenced by their own values.[210] Courts should not approach these decisions in a manner where the judges' values become more important than the parents' values and the child's welfare.[211] "[N]eglect, therefore, should be defined in terms of specific harms to the child, rather than broad, vague statutes that now justify intervention."[212] Theoretically, state intervention, then, should not be based on the misconduct of the parent, whatever that conduct might be, unless there is actual or imminent harm to the child,[213] thereby limiting intervention where it is unwarranted and discriminatory.[214]

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208. Brief for Respondent at 3-4 n.6, *In re* Valerie D., 613 A.2d 748 (Conn. 1992) (No. 14420).

209. Robin-Vergeer, *supra* note 71, at 759-60. The direction of family law is changing to require courts to focus on the child. *Id.*

210. *Id.* at 760.

211. *Id.* Because of the court's misguidance, proceedings "resemble criminal proceedings . . . ." State v. Johnson, E89-890-CFA, (Cir. Ct., Seminoe Cty.) (1989). The *Johnson* Court opined: "This verdict gives further notice that pregnant addicts have a responsibility to seek treatment for their addiction prior to giving birth. Otherwise, the state may very well use criminal prosecution to force future compliance with the law, or in appropriate cases, to punish those who violate it." *Id.* At least 50 women have been prosecuted for using drugs while pregnant. *Don't Punish the Troubled Mothers*, LEGAL TIMES, May 21, 1990, at 20.

212. Michael Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 628 (1975) [hereinafter *State Intervention*]. "Neglect statutes should abandon concepts of parental fault and . . . focus on the child if we wish to limit the intervention to cases where it will likely do more good than harm." These statutes should allow intervention only upon a showing that the child has actually suffered or is likely to suffer harm.
Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1001 (1975) [hereinafter *Search*].

213. *Search*, *supra* note 212, at 1001.

214. *State Intervention*, *supra* note 212, at 642.

By focusing on maternal behavior, the government appears to be concerned with helping babies without having to spend any money, change any priorities, or challenge any vested interests.[215] While judges may not have the kind of power necessary to effect that kind of change, legislators do.[216] Although these decisions necessarily have to be left to the trial judges' experience and judgment,[217] it is essential that, in making them, they focus on the harm to the child.

Just a month prior to hearing *In re Valerie D.*, the trial judge, Federica Brenneman, a veteran in the juvenile court system,[218] delivered a speech on the topic of chemically addicted parents. She argued that the current legal responses to the issue were inadequate and should "'compel us to question some basic assumptions underlying current child neglect laws. . . .'"[219] Judge Brenneman focused on those babies born with symptoms usually associated with illegal drug use.[220] She argued that the presumption of parental fitness in the usual forms of child neglect should not be applicable in these cases.[221] She then advocated a change in the laws, recommending that "'the law should be clarified to spell out explicitly with the definition of 'neglect' the characteristics of babies in the target population to permit their removal on both an emergency basis . . . and then adjudication as neglected children.'"[222] Judge Brenneman wanted to define birth deficiencies that were the result of the pregant mother's drug use as prima facie grounds for the termination of parental rights.[223] In a later speech, Judge Brenneman

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215. Katha Pollit, *A New Assault on Feminism*, THE NATION, Mar. 26, 1990, at 410-11. "Judges order pregnant [women who use drugs] to jail, but they don't order drug treatment programs to accept them, or Medicaid . . . to cover crack addiction . . . ." *Id.*

216. Dolgin, *supra* note 70, at 1226. The Connecticut Supreme Court, in *In re Valerie D.*, intimates that it is up to the legislators, not the judiciary, to change the law. *Id. See generally State Intervention*, *supra* note 213, at 640 (arguing that the legislature should draft state intervention laws specifically defining those harms in which intervention would be justified); *see also* Scheffey, *supra* note 2, at 2 (quoting Conn. Att. Gen. Blumenthal: "The court almost invited some sort of statutory change in its language referring to public policy makers perhaps wanting the type of statutory system to sustain the appellate court ruling.").

217. State v. Anonymous, 425 A.2d 939, 945 (1979); *see also State Intervention*, *supra* note 212, at 640. Many judges lack training in psychology or behavioral sciences and in deciding relevant intervention determinations. *Id.*

218. Scheffey, *supra* note 2. *See infra* notes 146-48 and accompanying text.

219. Brief for Appellant at 2, *In re Valerie D.* (No. 14420) (quoting Judge Fredrica S. Brenneman).

220. *Id. See supra* notes 53-69 and accompanying text.

221. Brief for the Appellant at 2, *In re Valerie D.* (No. 14420).

222. *Id.* at 3 (quoting Judge Fredrica S. Brenneman).

223. *Id.* The only prima facie evidence for termination of parental rights is "non-accidental or inadequately explained serious physical injury to the child." *See* CONN. GEN. STAT. § 45a-717(f)(2).

advocated laws to hasten the process of termination of parental rights based on drug use.[224] She argued that by focusing on early termination the "long-term economic and social cost of prenatal damage from drugs would be prevented."[225] A short time later, faced with termination proceedings for Valerie D., Judge Brenneman found, in an oral decision, that the statutory basis for termination was satisfied by the use of cocaine prior to giving birth.[226] Sensing that a legal precedent was in the making, Judge Brenneman issued a written articulation of the decision, providing a record for appeal.[227]

When the appellate court affirmed the decision, a petition for rehearing was filed.[228] The court, however, responded with a supplemental page adding an alternative, independent ground to support the original decision that there was no ongoing parent-child relationship.[229] It is suggested that when the appellate court realized the political and legal controversy that had been raised in its affirmation of *In re Valerie D.*, the alternative ground was added to provide "another layer of armor against appeal."[230] This addition contained a "fact-packed backup rationale for permanently severing the mother's rights to

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224. Deborah J. Krauss, *Regulating Women's Bodies: The Adverse Effect of Fetal Rights Theory on Childbirth Decisions and Women of Color*, 26 HARV. C.R.-C.L. L. REV. 523, 532 (1991) (citing remarks of Judge Frederica Brenneman, Superior Court, Hartford, Conn., address at Casualities of the War on Drugs: Civil Rights, Civil Liberties, and Drug Policy in America, Harvard Law School (Mar. 2, 1991)). *See also* Thomas Scheffey, *The Needle and The Damage Done*, CONN. L. TRIB., May 11, 1992, at 1 [hereinafter *Damage*] (remarks of Kathryn Emmett, lawyer for the mother of Valerie D., suggesting that Judge Brenneman had an agenda and was attempting "to make a groundbreaking legal point . . . this case represents the trial court attempting to solve a social problem."). *But see* Scheffey, *supra* note 2 at 2 (quoting Judge Brenneman: "People accused me of generalizing and saying all babies born to cocaine-addiction mothers should be removed permanently, but I never said that." She emphasized that the decision was fact specific to the case.).

225. Krauss, *supra* note 224, at 532.

226. While the trial court found actual harm to the child, the Connecticut Supreme Court held that this decision was based on flawed findings. *See supra* notes 153-60 and accompanying text. In fact, the trial court took judicial notice, not evidence, of unspecified studies of the effects of in utero cocaine exposure. The Connecticut Supreme Court, however, did assume that this evidence would constitute serious physical injury. *In re* Valerie D., 613 A.2d 748, 757 n.14 (Conn. 1992).

227. Scheffey, *supra* note 2, at 1.

228. *Id.*

229. *Judicial Shenanigans in Amending Valerie D. Decision*, CONN. L. TRIB., March 16, 1992, at 17. The editorial suggests that the new ground for termination was not even raised by the petition for rehearing, nor did it change the original opinion of the appellate court. *Id.* This ground for termination shifted the focus to the mother's post-birth conduct.

230. Thomas Scheffey, *Appellate Court Modifies Valerie D.; But Rights Groups Still Challenge Ruling on Prenatal Conduct*, CONN. L. TRIB., Nov. 11, 1991, at 2 [hereinafter *Appellate Court*].

keep the baby."[231] The appellate decision is criticized as a "broad and dull-edged holding, unrefined by precise analysis or reined in by qualification."[232] Moreover, the trial court judge publicly made statements in support of the appellate decision. The propriety of these and other public remarks were questioned because of the confidentiality necessary in such cases.[233] It was within the context of these judicial, political, and social controversies that the Connecticut Supreme Court decided *In re Valerie D.*

The Connecticut Supreme Court relied heavily on the Connecticut legislative history on the issue of pregnant drug users and the inference created by the dichotomy of views and subsequent legislation enacted.[234] By narrowly defining the issue,[235] the court did not have to consider the possibility of future harm to Valerie D., or discuss the range of moral, emotional, and social issues surrounding the case. The Court also avoided the possibility of imposing judicial values into the process.[236]

Substitute Senate Bill No. 197 excluded the demands for testing and reporting and the provisions for the termination of parental rights[237] because of the strong probability that pregnant, drug addicted women would not seek prenatal care and might even deliver their babies at home.[238] These disincentives would also create a situation of increased harm to the infants. "[C]reat[ing] an adversarial relationship between a pregnant woman and her health care providers drives pregnant women out of the health care system."[239] A pregnant addict who is going to be penalized for her drug use will be discouraged from seeking treatment and will be effectively ensuring her addiction at the time of

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231. *Id.*

232. Scheffey, *supra* note 2, at 1. Because of the lack of qualifications, coupled with the scarcity of case law, it was opined that the *Valerie D.* case might be given applicability for a broader legal principle than the facts would require. *Id.*

233. Brief for the Appellant at 3-4 n.6, *In re* Valerie D., 613 A.2d 748 (Conn. 1992) (No. 14420).

234. *Valerie D.*, 613 A.2d at 762 n.19. *See supra* notes 194-206 and accompanying text.

235. *See supra* text accompanying notes 161-63.

236. *See supra* text accompanying notes 208-17.

237. *Valerie D.*, 613 A.2d at 762.

238. *See supra* notes 201-02 and accompanying text. As Kathryn Salisbury, executive director of the Connecticut Commission on Children remarked: "The word on the street is that if you use cocaine, your babies will be smaller and easier to deliver. The same grapevine warns women who want to keep their babies, to conceal their drug use at all costs, even if it means foregoing prenatal care, or delivering their child at home." She emphasized that the message must be treatment, not punishment. *Valerie D.*, 613 A.2d at 763 n.23.

239. Krauss, *supra* note 224, at 536.

the baby's birth.[240] "'They're scared–they think you'll lock them up, they think you'll take their kids away, so they get no medical treatment at all.'"[241] Previous legal actions, criminal prosecutions of pregnant women who use drugs, the use of neglect and abuse proceedings to deprive parents of their children, and incarceration to prevent addicted pregnant women from obtaining drugs, had been the initial response to the problem.[242] Rather than utilize a punitive approach, the Connecticut Legislature adopted a preventive one.[243]

This approach is in the "best interest of the child." Infants whose mothers receive prenatal care and drug treatment during pregnancy experience improved results in spite of the in utero drug exposure.[244] Certainly, an infant exposed in utero to drugs has a better chance if the pregnant mother receives prenatal care.[245] The incentive for pregnant women to get treatment for their addiction is high. "Pregnancy is a 'window of opportunity' for treating substance abuse"[246] and significant voluntary declines of drug use for pregnant addicts have been documented.[247] On the other hand, there are insufficient treatment programs for pregnant addicts.[248] Funding and liability are impediments in providing adequate treatment programs.[249]

A preventative approach is also more cost efficient.[250] Care for a newborn drug addicted baby costs approximately $28,000 a year;

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240. Susan E. Rippey, *Criminalizing Substance Abuse During Pregnancy*, 17 NEW ENG. J. of CRIM. & CIV. CONFINEMENT 1, 89 (1991).

241. *Appellate Court*, *supra* note 230, at 26 (quoting Dr. Wilfred Reguero, Chairman of the Obstetrics and Gynological Department at the Hospital of St. Raphael in New Haven, Connecticut).

242. Brief of Amicus Curiae at 3 n.1, *In re* Valerie D. 613 A.2d 748 (Conn. 1992) (No. 14420).

243. *In re* Valerie D., 613 A.2d at 764.

244. MacGregor, *supra* note 54, at 885. *See also* Frederic Suffet & Richard Brotman, *A Comprehensive Care Program for Pregnant Addicts: Obstetrical, Neonatal, and Child Development Outcomes*, 19 INT'L J. ADDICTIONS, 199 (1984); Ira J. Chasnoff, et al., *Temporal Patterns of Cocaine Use in Pregnancy, Perinatal Outcome*, 261 JAMA 1741, 1741 (1989); Ira J. Chasnoff, *Drugs, Alcohol, and the Neonate, Pay Now or Pay Later*, 266 JAMA 1567, 1568 (1991) [hereinafter *Pay Now*]. When prenatal care is available, the complications usually associated with in utero exposure to drugs (prematurity, low birth weight, small head circumference) can be significantly affected. *Id.*

245. *See Pay Now*, *supra* note 244, at 1568.

246. Wendy Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, 226 JAMA 1556, 1560 (1991).

247. Brief for Amici Curiae at 3, *In re* Valerie D., 613 A.2d 748 (Conn. 1992) (No. 14420).

248. *Id.* at 4. There are only two residential facilities in Connecticut that have children's facilities. *Id.* There are now 73 women with 161 children on waiting lists for treament centers. *Id.* Many of those treatment centers have limited beds for pregnant women. *Id.*

249. *Id.*

250. Krauss, *supra* note 224, at 536.

educational expenses for remediation can cost $220,000 a year.[251] Therefore, it seems reasonable to fund programs that include "prenatal care and treatment programs on demand."[252]

When the child is committed to the custody of the state, there are not only the additional costs of social intervention, but more importantly the child may become a victim of the shortcomings of the child welfare system.[253] The foster care system has many deficiencies.[254] While the objective of foster care is purported to be short-term care for children whose parents can't take care of them, the placements are frequently long-term and involve more than one location.[255] Children placed in foster care often suffer from neglect and emotional traumas.[256] "[T]he disadvantages of coercive intervention, including the likelihood that the child will spend a lifetime in multiple foster placements, and will never be allowed to develop stable ties to parent figures, pale beside the danger to the child of remaining in the parent's home."[257]

Since neglect proceedings in cocaine cases are generally initiated based on a toxicology testing at birth to determine whether there are drugs in the baby's system,[258] grounds for state intervention can be based on the single fact of prenatal drug use.[259] This is so even though information provided from these tests about the extent of drug exposure to the fetus and the extent of harm is limited.[260] This assumes that the drug use on the part of the mother will be harmful to the child,[261] and

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251. *Id.*

252. *Id.* at 537. *See generally Pay Now*, *supra* note 244.

253. Krauss, *supra* note 224, at 537. *See generally State Intervention*, *supra* note 212, at 644-46.

254. Dolgin, *supra* note 70, at 1256. *See also State Intervention*, *supra* note 212, at 644-46.

255. Dolgin, *supra* note 70, at 1256.

256. *Id.*

257. *Id.* at 1214.

258. This type of screening is performed on urine samples allowing for a highly reliable detection of which drugs are present in the baby's body. This test is capable of determining the presence of cocaine that the mother took prenatally up to four days before birth. Dolgin, *supra* note 70, at 1246 n.134. *But see* David J. Greenblatt, *Urine Drug Testing*, 23 NEW ENG. L. REV. 651, 660 (1990); Robin-Vergeer, *supra* note 71, at 750 n.16. Toxicology screening is not an absolutely reliable method to detect in utero drug exposure because the drugs may have been metabolized before the toxicology test was given. *Id.*

259. Dolgin, *supra* note 70, at 1246.

260. Robin-Vergeer, *supra* note 71, at 750 n.16. A positive toxicology test will only indicate that a drug was taken within the previous forty-eight hours. "To presume that a positive drug test means the child will suffer serious developmental harm is a mistake." *Id.*

261. *See generally* Dolgin, *supra* note 70; *see infra* text accompanying notes 247-55.

that the drug using mother will be an unfit parent.[262] Although these issues were not addressed by the court directly, there is research to disprove these assumptions and to further support the court's decision.

B. *In Utero Drug Use Is Not Necessarily Harmful To The Baby*

It cannot be assumed that in utero exposure to cocaine has "necessarily dire consequences."[263] "[A]vailable evidence from the newborn period is far too slim and fragmented to allow any clear predictions about the effects of intrauterine exposure to cocaine."[264] In addition, available studies do not generally consider other factors influencing the health of the newborn such as "lack of prenatal care, inadequate nutrition, infections, and exposure to other substances . . . ."[265] These factors may exert more influence on newborn disability than the use of drugs by a pregnant women.[266] Automatic acceptance of the in utero effects of drug using mothers allows society to ignore other intervening social factors,[267] and place blame solely on the mothers.[268]

Medical research now suggests that babies exposed to cocaine in utero do not suffer withdrawal symptoms.[269] "Tremors, agitation, hyperactivity, hypertonicity, and gastrointestinal problems, and other classic signs of withdrawal were conspicuous by their absence."[270]

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262. *See supra* notes 70-83 and accompanying text.

263. *Id.* at 5.

264. *Id.*

265. *Id.* at 6. Scientific studies which report the negative effects of cocaine use in utero have a better chance to be published than studies in which no negative effects were found. *Id.* This was "even though the 'negative studies [were] superior in almost every variable studied' to the positive studies." *Id. See also* Beatrix Lutiger et al., *Relationship Between Gestational Cocaine Use and Pregnancy Outcome: A Meta-Analysis* 44 TERATOLOGY, 405 (1991) ("A homogenous pattern of fetal effects has not been established and there is little consensus on the adverse effects of the drug.").

266. Krauss, *supra* note 224, at 533. "[T]he amount and quality of prenatal care they receive[], the quality of their prenatal nutrition . . . all serve to reduce greatly the number of risk factors beyond drug exposure to which these children have been exposed." Chasnoff, *supra* note 64, at 289. *See generally* MacGregor, *supra* note 54, at 885. *See also* Mayes, *supra* note 56, at 27. "Even among infants exposed to narcotics prenatally, the home environment and not the amount of narcotics seems to be the more important predictor of developmental outcome." *Id.*

267. Brief of Amici Curiae at 6, *In re Valerie D.* (No. 14420) (citing Linda C. Mayes, M.D. and Richard H. Granger, M.D.). These factors include poverty, community violence, inadequate education, and diminishing employment opportunties. *Id. See supra* note 80-81 and accompanying text.

268. Brief of Amici Curiae at 6, *In re Valerie D.* (No. 14420) (citing Linda C. Mayes, M.D. and Richard H. Granger, M.D.).

269. Mayes, *supra* note 56, at 16.

270. Brief of Amici Curiae at 7, *In re Valerie D.* (No. 14420) (quoting Claire Coles, Ph.D.).

Although these babies exhibit congential abnormalities, there is no clear causal connection between abnormalities found in babies exposed to cocaine in utero and cocaine use by the mother.[271]

It has not been proven that babies exposed in utero to other legal substances, such as alcohol, have suffered any less harm than those babies exposed to illegal substances.[272] In fact, "prenatal exposure to alcohol is considered to be the most common cause of mental retardation in the United States."[273] The effects of alcohol on the infant can be as severe as those of cocaine.[274] Both physical and mental growth can be adversely effected, including the crainiofacial area, the limbs, and the cardiovascular system.[275]

If the termination of parental rights is based on "serious physical injury" and if cocaine use by the pregnant mother constitutes that injury, then alcohol use by that pregnant mother could also be deemed a "serious physical injury"[276] and could be grounds for termination of parental rights. As the Connecticut Supreme Court points out in *In re Valerie D.*, there is no way to confine the language of the statute to encompass only illegal prenatal conduct, i.e., drug use, as opposed to legal conduct, such as alcohol consumption, however harmful to the baby it might be.[277] "Construing 'serious physical injury' to include exposure to possible harmful substances in utero is contrary to the intent of the Connecticut child abuse statutory scheme."[278]

C. *A Drug Using Mother Is Not Necessarily An Unfit Parent*

There are "two fundamental principles that govern child welfare practices with respect to substance abusing parents: First, substance use and abuse affect parenting ability in varying degrees; second, so long as parenting does not fall below minimal standards of fitness, it is in a child's paramount interest to remain within the family."[279] The extent of substance use, abuse, and dependency is indicative of a "progressive range of involvement with . . . drugs."[280] "Each stage entails the risk

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271. Dolgin, *supra* note 70, at 1215; *See also* Mayes, *supra* note 270, at 15.

272. Wilton, *supra* note 59, at 149. "FAS (Fetal Alcohol Syndrome) is the leading cause of mental retardation known." *Id.*

273. *Id.*

274. *Id.* at 153-54. *See also Newborn Infants, supra* note 59, at 273.

275. E. SANDBERG, SYNOPSIS OF OBSTETRICS 124 (10th ed. 1978).

276. *Id.*

277. *In re* Valerie D., 613 A.2d 748, 765 (Conn. 1992).

278. Brief of Amici Curiae at 7, *In re Valerie D.* (No. 14420); *see* CONN. GEN. STAT. §§ 17-112, 46b-129 (1990) (specifically protecting the "child").

279. Brief of Amici Curiae at 7, *In re Valerie D.* (No. 14420); *see infra* notes 284-90 and accompanying text.

280. INSTITUTE OF MEDICINE, TREATING DRUG PROBLEMS 61 (1990).

of further progression, but progression of drug use is not inevitable.[281] A minority of experimental drug users reach the state of abuse, but fewer reach the stage of dependence."[282]

The extent to which a parent is a user effects his or her ability to function as a parent.[283] There is no evidence supporting the theory that automatic or widespread removal of children from parents addicted to cocaine benefits the children's development.[284] Because a parent is addicted to drugs does not necessarily constitute either abuse or neglect of that child.[285] When parental responsibilites can no longer be assumed and the child is then harmed, the "failures of parental duty provide the basis for substantiating a finding of abuse or neglect."[286] Drug use by a parent is certainly harmful to the child; however, "it often does not cause the sort of harm that warrants coercive state intervention, and even less often does it cause the sort of harm that warrants removal of the child or the termination of parental rights."[287] Therefore, neglect proceedings, in prenatal drug use cases, should not necessarily result in termination of parental rights.[288] The ultimate question should be whether the particular mother involved is capable of caring for a particular child.[289]

D. *In The Best Interest Of The Child*

The removal of a newborn from a drug-using mother is often a moral decision made by the courts.[290] This kind of determination focuses on punishing the mother,[291] rather than on actual or future harm to the child.[292] The punishment becomes more important than the consideration of what is in the best interest of the child.[293] The fact that a pregnant woman would use drugs and "consciously harm her own fetus

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281. Brief of Amici Curiae at 7, *In re Valerie D.* (No. 14420).

282. *Id.*

283. *Id.* at 7-8. The ability of a drug addicted mother to parent should be examined on an individual case basis, focusing on the parenting relationship. *Id.*

284. *Id.*

285. *Id.* at 8.

286. *Id.* at 8. "[P]resuming *every* mother who has used drugs during her pregnancy to be unfit, regardless of the type, quantity, or frequency of consumption, is nothing short of ludicrous." Robin-Vergeer, *supra* note 71, at 749.

287. Dolgin, *supra* note 70, at 1267. "Intervention is appropriate only when the likelihood of future harm to the child is great–that is, only when past parental conduct correlates strongly with future conduct that is likely to cause a specific harm to the child." Robin-Vergeer, *supra* note 71, at 760.

288. *In re* Jessica, 586 A.2d 597, 600 (Conn. 1991).

289. Robin-Vergeer, *supra* note 71, at 778.

290. Dolgin, *supra* note 70, at 1254. *See supra* text accompanying notes 218-25.

291. *Id. See supra* notes 208-43 and accompanying text.

292. *Id.*

293. Dolgin, *supra* note 70, at 1253.

can seem so horrible"[294] that what is best for the child is lost in a moral and emotional dilemma.[295] It is, however, usually in the best interest of the child to remain within the family.[296]

"An uninterupted home life 'comports . . . with each child's biological and psychological need for unthreatened and unbroken continuity of care by his parents.'"[297] The separation of children from their parents, even when it is a "bad" home, has negative effects.[298] Since most children have strong attachments to their parents, "interference with [parental] tie[s], whether to a 'fit' or 'unfit' psychological parent, [are] extremely painful."[299]

The best interest of the mother is also served when the baby is born drug-free.[300] "[C]ourts often lose sight of the mutually cognizable and interrelated interests of parents and children in cases involving parents who misuse . . . drugs."[301] If the baby is drug-free, then so too is the mother. This is obviously in the best interest of the child.

Following the Connecticut Supreme Court's decision, Jean Doe and her daughter Valerie, almost 3 years old, were in the process of being reunited.[302] At the time of the appeal, Jean Doe already had made good progress in improving her life.[303] She had been drug-free for approximately one year, and was working as a manager in her family's moderate-sized business.[304] Today, she lives alone and participates regularly in individually counselling to remain drug-free.[305] In summary, she has "substantially revamped her life."[306]

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294. *Id.* The Connecticut Supreme Court acknowledged this point in *In re* Valerie D., 613 A.2d 748, 759, 765 (Conn. 1992).

295. Dolgin, *supra* note 70, at 1253.

296. *Id.*; *see* Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy,* 86 YALE L.J. 645, 649 (1977).

297. *In re* Juvenile Appeal (83-CD), 455 A.2d 1313, 1319 n.11 (Conn. 1983) (quoting Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J., 645, 649 (1977)).

298. ANNA FREUD, INFANTS WITHOUT FAMILIES (1973).

299. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 20 (1979).

300. Martha A. Field, *Controlling the Woman to Protect the Fetus*, 17 LAW MED. & HEALTH CARE 114, 121 (1989). It is evidence of the mother's abstinence from drugs when the baby is born without drugs in its system. *Id.*; *but see* Robin-Vergeer, *supra* note 71 and accompanying text.

301. Dolgin, *supra* note 70, at 1228.

302. Scheffey, *supra* note 2, at 2.

303. Appellant's Reply Brief at 2, *In re* Valerie D., 613 A.2d 748 (Conn. 1992) (No. 14420).

304. *Id.*

305. *Id.*

306. *Id.*

VIII. CONCLUSION

In a case of first impression, the Connecticut Supreme Court held that a mother's drug use during pregnancy does not by itself empower the state to terminate parental rights.[307] Balancing family integrity against the state power of *parens patriae*,[308] the court narrowed the inquiry to statutory construction and legislative intent.[309] By so doing, an opinion was rendered that not only avoided the moral, emotional, and social dilemmas involved with prenatal drug use, but also the appearance of excessive judicial discretion and the imposition of personal values. The decision is supported by social policy and medical research, despite the fact that such factors were not addressed by the court. Parental rights were correctly restored to Jean Doe [310] and this decision clearly was in the best interest of both this mother and this child.

Hinda K. Kimmel[*]

307. *In re* Valerie D., 613 A.2d 748 (Conn. 1992).
308. *See supra* notes 15-26 and accompanying text.
309. *Valerie D.*, 613 A.2d at 759.
310. *Id.* at 753.

* This article is dedicated to my husband Elliot and to my children, Seth and Simeon, for their support and understanding during my law school endeavors.

Adoption of Carlos: Blood Thicker than Law in Massachusetts

I. INTRODUCTION

The irrevocable termination of parental rights by a State affects a fundamental liberty interest of constitutional dimensions.[1] It is also a personal tragedy for the individuals involved, going directly to the heart of "due process,"[2] and to the heart of every parent who has ever loved a child.

Family law is laden with prickly policy issues, and in the sensitive area of dispensing with parental consent to adoption courts have relied heavily upon prevailing societal attitudes.[3] For this reason, the Massachusetts Supreme Judicial Court's recent ruling in *Adoption of Carlos*[4] can be fully understood only through the lens of current sociological thought, and its modification of the legal test applicable to these situations must be analyzed in historical context.

Section II of this comment briefly recounts the history of the child welfare system in this country, and the development of Massachusetts law in the specific area of termination of parents' rights in their children.[5]

Section III synthesizes the Massachusetts SJC's development of the legal test–from "best interest of the child," to "current parental unfitness," to the most recent development in *Carlos*[6]: "future parental fitness."[7] This section also synthesizes the standard of proof required to satisfy constitutional due process–from "persuasive," to "clear and

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1. Santosky v. Kramer, 455 U.S. 745, 753 (1982). The Court has historically recognized "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Id.* For a brief discussion of *Santosky*, see *infra* notes 89-97 and accompanying text.

2. "[N]o State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

3. *See infra* notes 13-35 and accompanying text.

4. 413 Mass. 339, 596 N.E.2d 1383 (1992).

5. *See infra* notes 13-45 and accompanying text.

6. 413 Mass. at 339, 596 N.E.2d at 1383.

7. *See infra* notes 46-85 and accompanying text.

convincing," to the additional "reasonable likelihood" standard put forth in *Carlos*.[8]

Section IV examines *Carlos*[9]; the facts, the procedure, and the extension of the legal test.[10] Two important schools of sociological thought in this area are explained, and the court's reasoning examined in light of them.[11] The potential ramifications of this decision on children, parents, and foster parents is discussed, and the court's possible motivations considered.

Finally, Section V considers, based on the trend of the court's decisions, how the court might rule on these sensitive cases in the future.[12]

II. THE FORMATION OF A CHILD WELFARE SYSTEM

A. *General Background*

In most of colonial America, child welfare assistance was available only to the destitute and, like the English system it mirrored, provided only apprenticeship as relief.[13] Children could be taken from their impoverished parents without consent, leaving the parents with neither legal custody nor any right to the child's return.[14] Abused or neglected children, however, were generally not entitled to state intervention.[15] Colonial Massachusetts, between 1640 and 1680, stood alone in enacting the first child abuse laws "anywhere in the world."[16]

Nationally, child abuse and neglect continued to be ignored until the 1870s, when these conditions became more widely recognized as social problems and child welfare authorities began to address them.[17] Charitable organizations, called societies for the prevention of cruelty to

8. 413 Mass. at 339, 596 N.E.2d at 1383; *see infra* notes 86-102 and accompanying text.

9. 413 Mass. at 339, 596 N.E.2d at 1383.

10. *See infra* note 104 and accompanying text.

11. *See infra* notes 156-225 and accompanying text.

12. *See infra* note 226 and accompanying text.

13. Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1750 (1987).

14. *Id.*

15. *Id.*

16. Laura Oren, *The State's Failure to Protect Children and Substantive Due Process: DeShaney in Context*, 68 N.C. L. REV. 659, 665 (1990).

17. *Id.* at 666.

children, were formed.[18] Massachusetts, again, was in the forefront of the movement.[19]

The initial influence of these societies waned after little more than a decade, but the turn of the century and the dawn of the Progressive Era brought a resurgence of public interest.[20] The new movement's philosophy was rehabilitation of the family rather than permanent placement of the child.[21] State and federal welfare programs for needy children, coupled with individualized treatment by trained workers, promised solutions to these age old problems.

But these goals never reached fruition.[22] By the mid-1900s it became apparent that placing children in temporary care while the family was rehabilitated, rather than placing the children permanently, was a costly option which frequently led to a loss of contact between parent and child and an unstable existence for the child.[23] The program served primarily poor families, indicating that financial relief was inadequate,[24] and the rehabilitative services parents were supposed to receive seldom materialized.[25]

Child abuse again became a prominent issue during the 1960s.[26] Mandatory reporting laws were enacted, with a subsequent rise in the number of children put into foster care.[27] Since then, the emphasis has been not on criminal prosecution,[28] but rather on establishing a minimum intervention approach to the family.[29] The family, including the abuser, is treated under the supervision of social service agencies.[30]

For better or worse, this approach distinguishes children who are at risk of harm from their parents' behavior from other citizens in need of protection.[31] Parents are presumed to have the "natural and legal right

18. Child protection was an offshoot of the women's reform movement, and was shaped by "the nineteenth century feminist interpretation of social ills." Oren, *supra* note 16, at 666. While the anticruelty societies at first took to the streets, aggressively seeking abuses among their largely working class clientele, as their work became known they responded almost exclusively to complaints. *Id.*

19. *Id.* at 665-66. The Boston anticruelty society was "one of the earliest and most influential of the anticruelty societies." *Id.*

20. *Id.* at 666.

21. Garrison, *supra* note 13, at 1751.

22. *Id.* at 1752.

23. *Id.* at 1753-54.

24. *Id.* at 1752.

25. *Id.* at 1753.

26. Oren, *supra* note 16, at 666.

27. *Id.* at 667-68.

28. *Id.* at 668.

29. Garrison, *supra* note 13, at 1758.

30. Oren, *supra* note 16, at 668.

31. *Id.*

to the custody, care, and control of their minor children,"[32] a philosophy which recognizes the uniqueness of the family unit within our society.[33] The United States Supreme Court has sanctioned family autonomy, holding that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."[34]

In Massachusetts, however, this right is not absolute, and where serious physical or emotional harm is inflicted on a child, the state may intrude, even to the extent of permanently and completely severing the parent-child tie.[35]

B. *Massachusetts Law*

The Commonwealth's rule that adoption required the consent of any living parents was without exception until 1853, when a statute was passed dispensing with the need for consent where the parent was insane.[36] The exception was expanded in 1859 to include situations of willful desertion and neglect of the child by the parent for a year.[37] This provision was eventually codified as part of Massachusetts General Laws chapter 210, section 3.[38]

In 1953, the use of an independent proceeding to determine the need for parental consent to adoption was authorized,[39] but it was not

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32. 67A C.J.S. *Parent & Child* § 16 (1978). The modern view is that:

> As a general rule, at common law and under statutes declaratory thereof, parents have the natural and legal right to custody, care, and control of their minor children or, as otherwise expressed, a natural right to the custody, companionship, and bringing up of their children. Accordingly, if the parents are fit and proper persons . . . they ordinarily have a primary, prior, or paramount right to the care and custody of their minor children. This right grows out of the parents' obligation to maintain and educate their children, and public policy demands that such right be held inviolate, and not easily controlled by other considerations. Moreover, under some statutes, a parent's right of custody continues unless one of the methods provided by the statute for depriving the parent of such custody has been pursued.

Id. (citations omitted).

33. Oren, *supra* note 16, at 668-69.

34. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

35. Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 587-88, 421 N.E.2d 28, 36 (1981).

36. Petition of the New Eng. Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631, 637, 328 N.E.2d 854, 858 (1975) [hereinafter *Little Wanderers*]. For a thorough history of statutory evolution of the adoption laws in the Commonwealth, see *id.* at 637-39, 328 N.E.2d at 858-59.

37. *Id.* at 637.

38. *Id.*

39. *Id.* This proceeding is independent of the actual adoption proceeding, its function being to determine whether the child may be put up for adoption without

until 1964 that a standard was promulgated by which such decisions were to be made: the court must find that the best interests of the child would be served by placement for adoption.[40] In weighing these cases, the court could consider parental unsuitability in light of the parent's capabilities.[41] In 1972, section 3 was revised so that "ability, capacity and fitness" of the parents, combined with "readiness . . . to assume parental responsibility," composed the standard in any petition to dispense with consent to adoption.[42] And in 1993, the legislature again enacted revisions to section 3, adding to it a lengthy list of factors which a court must consider when determining parental fitness in non-consensual adoption cases.[43]

The courts had not been idle through the period of statutory development. On their own initiative, the courts had been crafting a "best interests" approach,[44] interpreting the legislature's stated policy to strengthen and encourage family life.[45]

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parental consent. *Id.* The authorizing statute (since codified as MASS. GEN. L. ch. 210, § 3A) allowed the proceeding to be initiated by the Department of Public Welfare (now the Department of Social Services) or by a child care agency with custody of the child. *Id.* When a petition dispensing with a parent's consent to his or her child's adoption is granted, the parent has no power to prevent the termination of his or her rights and duties to the child. Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 391 Mass. 113, 119, 461 N.E.2d 186, 190 (1984).

40. *Little Wanderers*, 367 Mass. at 638, 328 N.E.2d at 859. Prior to the legislature's enunciation of the test to be applied, for want of any guidance, the courts had applied the standards used in direct adoption cases. *Id.* at 637-38, 328 N.E.2d at 858.

41. *Id.* at 638, 328 N.E.2d at 858.

42. This standard now applies whether the petition is brought by a person having care and custody of a child, or by a Department of Social Services or licensed child care agency. MASS. GEN. L. ch. 210, § 3 (1972); see app. for text of § 3.

43. *See* App. (containing text of MASS. GEN. L. ch. 210, § 3(c)(ixiii)(1993).

44. *Little Wanderers*, 367 Mass. at 638, 328 N.E.2d at 859 (1975). For a comprehensive analysis of the court's development of the "best interests" test, see *infra* notes 53-85 and accompanying text.

45. See *Little Wanderers*, 367 Mass. at 645, 328 N.E.2d at 863. *See also* MASS. GEN. L. ch. 119, § 1 (1972), entitled "Policy of Commonwealth Defined":

> It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.
>
> The purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from parent . . . substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to

III. EVOLUTION OF THE LEGAL TEST AND THE STANDARD OF PROOF

A. *The Legal Test: Best Interests or Parental Unfitness*

Early concepts of parental rights were derived from a property relationship between a parent and child.[46] Today, however, the generally accepted view is that the parent's interest is not one of property,[47] but rather of liberty,[48] and is more in the nature of a trust.[49] Should the parent violate that trust, the state may intervene[50]

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provide care and protection for their children.

Id.

46. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 434 (1983) [hereinafter *Parental Rights*]. There is some argument that this remains the case today. *Id.* at 434-37 (arguing that this is shown by fact that poverty was, and still is, inextricably bound up with court-ordered relinquishment of parental rights to the state).

47. Purinton v. Jamrock, 195 Mass. 187, 201, 80 N.E. 802, 805 (1907). "Nor have parents any inherent right of property in their minor child." *Id. See also* 67A C.J.S. *Parent & Child* § 16 (1978): "[P]arents have no property rights, in the ordinary sense of that term, in or to their minor children, and, accordingly, a parent's right of control or custody of a minor child is not a property right which may be bargained, sold, or otherwise disposed of."

48. Santosky v. Kramer, 455 U.S. 745, 753 (1982). "[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. . . . [There is a] fundamental liberty interest of natural parents in the care, custody, and management of their child. . . ." *Id.*

49. "The right of the parents . . . is in the nature of a trust reposed in them . . . ." *Purinton*, 195 Mass. at 201, 80 N.E. at 805. "[T]he parental right to control a child's nurture is . . . akin to a trust. . . ." Custody of a Minor, 375 Mass. 733, 748, 379 N.E.2d 1053, 1063 (1978). *See also* 67A C.J.S. *Parent & Child* § 16 (1978):

> A parent's right to the custody of a minor child is more in the nature of a personal trust reposed in the parent by the state, as parens patriae, which trust imposes the reciprocal obligation to maintain, care for, and protect the child, and in which trust the parent will be secured as long as the parent discharges such correlative duties.

See also MASS. GEN. L. ch. 119, § 21 (1972): "'Custody', shall include the following powers: (1) to determine the child's place of abode, medical care and education; (2) to control visits to the child; (3) to consent to enlistments, marriages and other contracts otherwise requiring parental consent."

50. *See* Custody of a Minor (No. 2), 392 Mass. 719, 724, 467 N.E.2d 1286, 1290 (1984); Custody of a Minor, 375 Mass. at 749, 379 N.E.2d at 1063; *Purinton*, 195 Mass. at 201, 80 N.E. at 805; Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 383 Mass. 573, 587, 421 N.E.2d 28, 36 (1981); Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 376 Mass. 252, 264, 381 N.E.2d 565, 572 (1978); *Little Wanderers*, 367 Mass. 631, 642, 328 N.E.2d 854, 861 (1975).

and terminate that parent's rights to the child,[51] even to the point of dispensing with the need for the parent's consent to adoption.[52]

Where the extinguishing of parental rights is concerned, the Massachusetts courts' development of the appropriate legal test has been a winding road, often seeming to double back upon itself, or to lose track of its destination altogether.

The court has traditionally relied upon two grounds for dispensing with consent: consideration of the child's best interests, and determination of the parents' fitness.[53] "Under a best interests test the rights of the parent are likely to be heavily subordinated to those of the child while under an unfitness test the focus of inquiry is more on the conduct and character of the parent as it affects the child."[54] A survey of consent cases over the past sixty years reveals inconsistent application of these tests, but with a recent trend toward greater protection of the parent's rights by an increasing reliance upon the parental fitness standard.[55]

In 1932, the Massachusetts Supreme Judicial Court, in *Richards v. Forrest*,[56] declared that "the first and paramount duty of courts is to consult the welfare of the child. To that governing principle every other public and private consideration must yield . . . . [The parent's] right will not be enforced to the detriment of the child."[57]

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51. *See* Custody of a Minor, 375 Mass. at 749, 379 N.E.2d at 1063; Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 389 Mass. 793, 799, 452 N.E.2d 497, 501 (1983); *Little Wanderers*, 367 Mass. at 642, 328 N.E.2d at 861.

52. *See* Adoption of Carlos, 413 Mass. 339, 348, 596 N.E.2d 1383, 1388 (1992); Care and Protection of Martha, 407 Mass. 319, 327, 553 N.E.2d 902, 906 (1990); Care and Protection of Three Minors, 392 Mass. 704, 717-18, 467 N.E.2d 851, 860-61 (1984); Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 392 Mass. 696, 698-700, 467 N.E.2d 861, 863-64 (1984); Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 383 Mass. at 587, 421 N.E.2d at 36; Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 376 Mass. at 260-69, 381 N.E.2d at 570-75. When a petition dispensing with a parent's consent to his child's adoption is granted, the parent has no power to prevent the termination of his rights and duties to his child. Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 391 Mass. 113, 119, 461 N.E.2d 186, 190 (1984).

53. *See infra* notes 54-82 and accompanying text.

54. *Little Wanderers*, 367 Mass. at 648, 328 N.E.2d at 864 (Hennessey, J., dissenting).

55. *See infra* notes 63-85 and accompanying text.

56. 278 Mass. 547, 180 N.E. 508 (1932). An aunt and uncle of the child in question were given custody of her by her natural parents when she was four months old. *Id.* at 549, 180 N.E. at 509. After caring for her as their own for six years, the aunt and uncle attempted to gain legal guardianship of her under MASS. GEN. L. ch. 201, § 5. *Id.* The court applied a parental fitness test and refused to grant legal guardianship because the petitioners failed to prove the natural parents were unfit. *Id.* at 556, 180 N.E. at 512.

57. *Id.* at 553, 180 N.E. at 511.

Much later, in 1975, the court held that although the "best interests of the child" had been the primary focus in the adoption statute,[58] it could not properly be considered apart from the unfitness of the parent;[59] the tests were interwoven and cognate.[60] Just three years later, however, in 1978, the court focused exclusively on the best interests of the child when removing two minors from their parents.[61] No mention whatsoever was made regarding the parents' fitness.[62]

Three years later, in 1981, the court declared that the parental fitness standard *must* be applied whenever the adoption statute was invoked.[63] The court hastened to add that unfitness could not be considered independently of the child's best interest, but must be determined with respect to both the parents' personality traits and conduct, and to the child's unique situation.[64] The two tests, the court explained, simply reflect different emphasis on the same factors.[65]

The courts have held to this position, using the tests flexibly and periodically articulating different factors for consideration. With respect to parental unfitness, all of the following are to be considered: "character, temperament, capacity, and conduct"[66] of the parents; "lengthy separation between parent and child, the growth of emotional ties between the child and a different custodian, and the effect of a forced return of the child to the biological parents";[67] "the failure of the parents to maintain service plans, visitation schedules, and counseling programs designed to strengthen the family unit . . . [and their] ability to manage financial affairs."[68] Unfitness may not, however, be based on the parents' poverty[69] or unusual lifestyle.[70]

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58. MASS. GEN. L. ch. 210, § 3 (1972) (amended 1993); see app. for amended version of § 3.

59. *Little Wanderers*, 367 Mass. at 641, 328 N.E.2d at 860.

60. *Id.* "[T]he tests are not separate and distinct but cognate and connected." *Id.*

61. Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 376 Mass. 252, 265-66, 381 N.E.2d 565, 573 (1978).

62. *Id.* Much language was quoted emphasizing the importance of the children's interest, but no parental fitness language was used at all. *Id.*

63. Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass 573, 589, 421 N.E.2d 28, 37 (1981). "It is now clear that the unfitness standard must be applied whenever the State seeks to terminate parents' rights to the custody of their minor children. . . ." *Id.*

64. *Id.*

65. *Id.* at 591, 421 N.E.2d at 38.

66. *Id.* at 589, 421 N.E.2d at 37.

67. *In re* Adoption of Frederick, 405 Mass. 1, 7, 537 N.E.2d 1208, 1212 (1989).

68. Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 399 Mass. 279, 289, 503 N.E.2d 1275, 1281-82 (1987).

69. Petition of Catholic Charitable Bureau of the Archdiocese of Boston, Inc. to Dispense with Consent to Adoption, 395 Mass. 180, 184, 479 N.E.2d 148, 152 (1985) [hereinafter Petition of the Catholic Charitable Bureau].

Nearly all of the cases have considered parental unfitness in the context of the best interests of the child,[71] but growing emphasis on the unfitness of the parent as the decisive factor in dispensing with consent to adoption has seemed to correspond with less weight being given to the best interests of the child. As a result of this uneasy balance, the court's reasoning has sometimes appeared inconsistent, and the results sometimes skewed in favor of the parents.[72] For example, the court has held that in examining the best interests of the child, a judge may properly contrast the child's condition while he lived with his parent with his condition since he has been removed from parental care,[73] but that a petition to dispense with consent cannot be based strictly on "the fact that the child would be hurt by being returned to the natural parent."[74]

In 1980 and 1981 the court narrowed the scope of the parental fitness test to the parents' "current" fitness.[75] While the court has acknowledged that current parental unfitness may be shown by evidence of past unfitness,[76] it has heretofore declined to make any speculative use of that same evidence in its decisions, holding fast to the current unfitness standard.[77]

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70. Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 383 Mass. 573, 591, 421 N.E.2d 28, 38 (1981). The court has stated that a natural mother's lesbianism would not, absent other evidence, render her an unfit parent. Bezio v. Patenaude, 381 Mass. 563, 578, 410 N.E.2d 1207, 1215 (1980).

71. *Little Wanderers*, 367 Mass. 631, 641, 328 N.E.2d 854, 860 (1975). "[T]he word 'unfit' has implications with respect to the child as well as to the parent. It is conceivable that certain parents might be fit to bring up one child and unfit to bring up another." Richards v. Forrest, 278 Mass. 547, 553, 180 N.E. 508, 511 (1932).

72. *See* Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 391 Mass. 113, 461 N.E.2d 186 (1984). A ten year old child who had no contact with her natural father from the age of two weeks, had formed deep psychological bonds with her foster parents, and would be seriously upset, frustrated and damaged was subject to her father's refusal to consent to her adoption by the foster parents. *Id.* at 117-18, 461 N.E.2d at 190. "If the parent has the ability, capacity, fitness and readiness to assume parental responsibility . . . we believe that a petition to dispense with consent should be denied." *Id.* at 119, 461 N.E.2d at 190.

73. *Petition of the Catholic Charitable Bureau*, 395 Mass. 180, 187, 479 N.E.2d 148, 153 (1985).

74. Care and Protection of Three Minors, 392 Mass. 704, 716, 467 N.E.2d 851, 860 (1984).

75. "[T]he critical question is whether the natural parents are *currently* fit to further the welfare and best interests of the child." Bezio v. Patenaude, 381 Mass. 563, 576, 410 N.E.2d 1207, 1214 (1980). *See also* Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 589, 421 N.E.2d 28, 37 (1981).

76. *Petition of the Catholic Charitable Bureau*, 395 Mass. at 185, 479 N.E.2d at 151.

77. *See* Care and Protection of Martha, 407 Mass. 319, 327, 553 N.E.2d 902, 906 (1990); Adoption of Frederick, 405 Mass. 1, 4, 537 N.E.2d 1208, 1211 (1989); In the Matter of J.S.V., 402 Mass. 571, 574, 524 N.E.2d 826, 828 (1988); *Petition of the Catholic Charitable Bureau*, 395 Mass. at 183, 479 N.E.2d at 151; Petition of the Dep't

Despite the unpredictability of the outcomes, at least the point in time where fitness was to be measured was consistent: *currently*, at the time of trial.[78] With *Carlos*,[79] the court has thrown even this temporal factor into doubt by holding that henceforth the possible *future* fitness of the parent must also be taken into account:[80]

> [I]n weighing the question whether parental rights are to be irrevocably terminated, it is appropriate for a judge to consider whether, on the basis of credible evidence, there is a reasonable likelihood that the parent's unfitness at the time of trial may be only temporary. . . . In determining whether that extreme step should be taken, consideration of the future is a necessity.[81]

The Massachusetts Legislature, with the statutory revision of section 3, has given its stamp of approval to consideration of future fitness.[82] At the same time it has made a weak attempt to put a lid on the open-endedness of the *Carlos*[83] decision by requiring courts to consider whether there is a reasonable expectation that the parent will not be fit to take custody of the child within a "*reasonable time* considering the age of the child."[84] But this language, too, is subject to the interpretation of the courts. Like *Carlos*, section 3 makes no attempt to answer the next logical question: how long is too long? At what point does a parent's "temporary" unfitness become unacceptable?[85]

B. *The Standard of Proof*

The standard of proof required in cases seeking to dispense with parental consent to adoption has evolved along a straighter, more well-defined, and clearly reasoned course. As recently as 1979, the Supreme Judicial Court demanded only that the evidence adduced *persuasively*

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of Soc. Serv. to Dispense with Consent to Adoption, 391 Mass. 113, 120, 461 N.E.2d 186, 191 (1984).

78. *See Martha*, 407 Mass. at 327, 553 N.E.2d at 906; *Frederick*, 405 Mass. at 4, 537 N.E.2d at 1211; *J.S.V.*, 402 Mass. at 574, 524 N.E.2d at 828 (1988); Custody of a Minor (No. 2), 392 Mass. 719, 724, 467 N.E.2d 1286, 1290 (1984); Custody of a Minor, 389 Mass. 755, 766, 452 N.E.2d 483, 490 (1983); *Petition of the Catholic Charitable Bureau*, 395 Mass. at 183, 479 N.E.2d at 151; Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 391 Mass. at 120, 461 N.E.2d 186 at 191; Petitions of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 389 Mass. 793, 799, 452 N.E.2d 497, 501 (1983); Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 383 Mass. 573, 589, 421 N.E.2d 28, 37 (1981).

79. 413 Mass. 339, 596 N.E.2d 1383 (1992).

80. *Id.* at 350, 596 N.E.2d at 1389. For a full discussion of *Carlos*, 413 Mass. 339, 596 N.E.2d 1383 (1992), see *infra* notes 103-151 and accompanying text.

81. *Carlos*, 413 Mass. at 350, 596 N.E.2d at 1389.

82. MASS. GEN. L. ch. 210 § 3(b)(vii) (1993).

83. 413 Mass. at 339, 596 N.E.2d at 1383.

84. MASS. GEN. L. ch. 210 § 3(b)(vii) (1993).

85. 413 Mass. at 339, 596 N.E.2d at 1383.

show the necessity of removing the child from parental custody.[86] When pressed, two years later, to adopt the more stringent "clear and convincing" standard, the court refused, rejecting a due process argument and citing fear that such a standard would be the functional equivalent of a "beyond a reasonable doubt" standard.[87] The court reasoned that, although important parental rights are implicated in these decisions, such an "onerous" standard of proof might unduly burden the State's ability to protect the interests of an abused or neglected child.[88]

Such arguments were rendered moot a year later with the United States Supreme Court's decision in *Santosky v. Kramer*.[89] The Supreme Court, in an opinion written by Justice Blackmun, held that the Due Process Clause of the Fourteenth Amendment demands that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child . . . the State [must] support its allegations by at least *clear and convincing* evidence."[90] The Court based its opinion on a fundamental liberty interest in matters of family life,[91] and analyzed the nature of the process due by applying the balancing test first set forth in *Mathews v. Eldridge*,[92] and previously applied by the Court in the context of parental rights termination in *Lassiter v. Department of Social Services of*

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86. Custody of a Minor (No. 1), 377 Mass. 876, 886, 389 N.E.2d 68, 75 (1979).

87. Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 592, 421 N.E.2d 28, 38-39 (1981).

88. *Id.* at 592-93, 421 N.E.2d at 39. "[T]he requirement of a persuasive showing, coupled with the high degree of harm that must be demonstrated, adequately protects parental rights . . . while not unduly burdening the ability of the State to act." *Id.* at 593, 421 N.E.2d at 39.

89. 455 U.S. 745 (1982) (bringing a successful constitutional challenge to a New York law allowing termination of parental rights if shown by a fair preponderance of the evidence that child was "permanently neglected").

90. *Id.* at 747-48 (emphasis added).

91. *Id.* at 753. *See also* 67A C.J.S. *Parent & Child.* § 16 (1978).

> The right of parents to the care, custody and control of their children is an important and substantial right. It has been characterized by the courts as an inherent, fundamental, and constitutionally protected right. However, such right is merely a prima facie right. Thus, even though the parent is a fit and proper person, the right to such care, custody and control is not an absolute, unconditional right, even though there has been no voluntary abandonment of the right, and it may be invaded or entirely nullified. Even though the right is not an absolute right, it may be limited or interfered with only for the most substantial, compelling, and sufficient reasons, and it is subject to judicial control only when the interest of the child demands it.

Id.

92. 424 U.S. 319, 335 (1976) (challenging the termination of a worker's disability benefits under the Social Security Act.). The Court fashioned a three part balancing test to determine the constitutional (due process) sufficiency of pre-termination administrative procedures. *Id.* at 335.

Durham County, N.C.[93] The *Eldridge* test balances three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing government interest supporting use of the challenged procedure."[94]

In *Santosky*, the Court found a strong private interest (the fundamental liberty interest of parents); a weak government interest (minimal fiscal and administrative considerations); and a high risk of erroneous deprivation where quantity rather than quality of the evidence was the chief consideration.[95] This more or less equal distribution of the risk of error, where the private interest is so great and the government interest so slight, was "constitutionally intolerable" in the eyes of the Court.[96] While deciding upon the "clear and convincing" standard as the constitutional minimum, the Court left it open to state legislatures to adopt the higher hurdle of the "reasonable doubt" standard at their discretion.[97]

Subsequent to *Santosky*, the Massachusetts Supreme Judicial Court incorporated the "clear and convincing evidence" standard, and continues to apply it today.[98] The court refused, when later asked, to

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93. 452 U.S. 18, 27-31 (1981). The child in question was removed from his mother's custody as a neglected child. *Id.* at 20. A year later the mother was convicted of second degree murder and sentenced to twenty-five to forty years in prison. *Id.* Two years after her imprisonment, the state (North Carolina) petitioned to dispense with consent to adoption. *Id.* at 20-21. The Court applied the Mathews v. Eldridge balancing test to determine whether due process requires the appointment of counsel for indigent parents in a termination proceeding. *Id.* at 27-29. The Court concluded that the decision is one for the trial court, subject to appellate review. *Id.* at 32.

94. Santosky v. Kramer, 455 U.S. 745, 754 (1982).

95. *Id.* at 758-68. The standard of proof under consideration in *Santosky* was "preponderance of the evidence." *Id.* at 764.

96. *Id.* at 768.

97. *Id.* at 769. "A majority of the States have concluded that a 'clear and convincing evidence' standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. . . . [D]etermination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts." *Id.* at 769-70.

98. *See* Petitions of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 389 Mass. 793, 799, 452 N.E.2d 497, 501 (1983) (judge correctly reconsidered findings in light of Santosky v. Kramer, 455 U.S. 745 (1982)); Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 391 Mass. 113, 119, 461 N.E.2d 186, 190 (1984) (applying "clear and convincing" standard); *Petition of the Catholic Charitable Bureau*, 395 Mass. 180, 184, 479 N.E.2d 148, 153 (1985) (petitioner's burden of proving parental unfitness is "clear and convincing evidence"); Adoption of Frederick, 405 Mass. 1, 5, 537 N.E.2d 1208, 1211 (1989) ("extreme step" of parental rights termination must be supported by "clear and convincing" evidence); Care and Protection of Martha, 407 Mass. 319, 327, 553 N.E.2d 902, 906 (1990) (evidence must be "clear and convincing" that parent is unfit); *Carlos*, 413 Mass. 339, 348, 596 N.E.2d 1383, 1388 (1992) (parent's right to custody may not be terminated

require the 'reasonable doubt' standard,[99] but with the *Carlos* decision, the court has added a burden of a different type.[100] This new test compels a judge to "consider whether, on the basis of credible evidence, there is a *reasonable likelihood* that the parent's unfitness at the time of trial may be only temporary."[101] The court's reasoning in adding this new test and its possible ramifications are discussed in the following section.[102]

IV. ADOPTION OF CARLOS[103]

A. *Facts*

Carlos was born in 1982.[104] His father died without ever showing an interest in him, and his stepfather, whom his mother married in 1984, was the man he knew as his father.[105]

In April, 1986, Carlos spent two weeks with his maternal grandparents, during which time he told them, "Daddy put his peter in my bum."[106] Apparently Carlos had already said this to his mother a few weeks earlier, but she didn't believe him.[107] When questioned by a Danvers detective, responding to complaints by another relative, Carlos' mother claimed it was an attempt by her mother to take custody away from her and her husband.[108] Carlos was questioned privately by both

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absent "clear and convincing" evidence of unfitness).

99. Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 392 Mass. 696, 699, 467 N.E.2d 861, 864 (1984).

> In the balancing of interests that affect the choice of a burden of proof, the child's rights to safety, security, and stability are entitled to special respect. After a point, a child's interests are not necessarily the same as his or her parents' interests and the selection of a heavy burden of proof, favorable to the parents' interests, could only be made at the expense of placing 'almost the entire risk of error' on the child. We decline to impose a higher burden of proof than proof by clear and convincing evidence in proceedings requesting that parental consent to adoption be dispensed with.

Id. at 699-700, 467 N.E.2d at 864 (citations omitted).

100. 413 Mass. at 339, 596 N.E.2d at 1383. See *infra* notes 99-150 and accompanying text for discussion of *Carlos*.

101. 413 Mass. at 350, 596 N.E.2d at 1389 (emphasis added). The Massachusetts Legislature has since adopted similar language querying whether there is a "reasonable expectation" that the parent will not be fit to take custody within a reasonable time. MASS. GEN. L. ch. 210 § 3(b)(vii) (1993).

102. *See infra* notes 130-221 and accompanying text.

103. *Carlos*, 413 Mass. 339, 596 N.E.2d 1383.

104. *Id.* at 340, 596 N.E.2d at 1384.

105. *Id.* at 340-41, 596 N.E.2d at 1384.

106. Adoption of Carlos, 31 Mass. App. Ct. 233, 235, 576 N.E.2d 701, 702 (1991).

107. *Id.*, 576 N.E.2d at 702.

108. *Id.*

an officer of the sexual abuse unit and an investigator.[109] He repeated his statement and, showing the officers a jar of Vaseline, described his stepfather as having applied it to "his peter . . . [before] he put it in my bum."[110] A physical exam two days later at the North Shore Children's Hospital was negative for physical trauma.[111]

After meeting once with an evaluator from the hospital's Sexual Information Trauma team, Carlos' parents refused to do so again.[112] But the evaluator met with Carlos five times, concluding that Carlos, given his age and the detail of his recollection, would find it virtually impossible to maintain his story over the period of the evaluation unless it were true.[113]

B. *Procedure*

In response to a care and protection petition filed by the Department of Social Services (DSS), Carlos was placed in the Department's custody in May, 1986, and into foster care.[114] The case was reviewed periodically by the court, and two years later, in May, 1988, the Department filed a petition under Massachusetts General Laws chapter 210, section 3 (1981) to dispense with parental consent to adoption.[115] Evidence was taken and the judge found that it clearly and convincingly showed that at least one act of sexual abuse had been consummated.[116] He further found that Carlos' mother was "pathologically unable" to "acknowledge the sexual abuse her son had been subjected to," and was therefore unable to protect him from future abuse.[117] Although she tried to benefit from services offered by the DSS, her success was limited by her refusal to tolerate the direct or indirect implication of the words "sexual abuse."[118] Finding Carlos' mother and the DSS at an impasse, the judge provided the mother with a "blueprint . . . [to] a finding of [her] parental fitness":[119]

> (1) learn about the effects of sexual abuse upon a child; (2) learn how the child is to be protected and taught his right to say 'no' and to make disclosures free of fear and hostile reaction; (3) confront the phenomenon of denial and how it works in general and how it may be working in her; and (4) develop the autonomy and independence to demand of

109. *Id.*
110. *Id.* at 235, 576 N.E.2d at 702-03.
111. *Id.*
112. *Id.* at 235-36, 576 N.E.2d at 702-03.
113. *Id.*
114. *Id.* at 236, 576 N.E.2d at 703.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Carlos*, 413 Mass. at 342-43, 596 N.E.2d at 1385-86.
119. Adoption of Carlos, 31 Mass. App. Ct. at 236, 576 N.E.2d. at 703.

her husband that he undertake a course of action not unlike what was being suggested to her.[120]

Awarding permanent custody of Carlos to the DSS in June, 1989, the judge issued an interlocutory order in the petition to dispense with consent to adoption.[121] While he found Carlos' mother *currently* unfit,[122] he stayed the decree for six months to allow her an opportunity to alter her response to the DSS allegations.[123] Further testimony was taken in January and February of 1990 and, based on testimony that the mother's position had changed, albeit incrementally, the judge denied the petition to dispense with consent to adoption.[124] Although the change amounted to little more than the fact that the mother was "now prepared to say that her child *may have* been abused and to consider action necessary to protect him from future assault and to believe the consequences of past assault on the assumption it occurred,"[125] the judge construed it as indicating that she might become a fit parent in the future.[126]

On appeal, the Massachusetts Appeals Court found this "future parental fitness" standard impermissible,[127] citing precedent,[128] and stating that the "[t]he rationale against allowing a determination of parental fitness to be based on speculative predictions of future capabilities is solidly grounded in the 'best interest of the child' policy."[129] The court observed that Carlos has spent half his life in foster care, and reasoned that after waiting five years for his mother to respond it would be in Carlos' best interest to put an end to such temporary arrangements.[130] Otherwise, he faced the potential of waiting out his minority in foster care, never knowing the security and stability of a permanent home.[131]

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120. *Id.* at 236 n.5, 576 N.E.2d at 703 n.5.

121. *Id.*

122. *Carlos*, 413 Mass. at 344, 596 N.E.2d at 1386. "The mother's uncompromising, unyielding allegiance to her husband makes her presently [June 19,1988] unfit to function as [Carlos's] parent." *Id.*

123. *Carlos*, 31 Mass. App. Ct. at 237, 576 N.E.2d at 703.

124. *Carlos*, 413 Mass. at 346, 596 N.E.2d at 1387.

125. *Id.* at 346-47, 596 N.E.2d at 1387.

126. *Carlos*, 31 Mass. App. Ct. at 241.

127. *Id.* at 242, 576 N.E.2d at 706.

128. *Id.* at 239, 576 N.E.2d at 705. "[T]he focus of the court's inquiry into parental fitness . . . is limited to the present, that is, the time at which the parent is before the court." (citing Adoption of Oliver, 28 Mass. App. Ct. 620, 622, 554 N.E.2d 40, 42 (1990)).

129. *Id.* at 242, 576 N.E.2d at 706.

130. *Id.* at 243, 576 N.E.2d at 706.

131. *Id.*

The Massachusetts Supreme Judicial Court reversed the Appeals Court's decision,[132] ruling that consideration of the parent's future fitness is not only appropriate, it is necessary where the "natural bond between parent and child" is to be "permanently severed."[133]

C. *Analysis*

1. The Reasoning of the Supreme Judicial Court

In promulgating a new standard of review for petitions seeking to dispense with consent to adoption, the Supreme Judicial Court relies not on legal reasoning, but on its own social policy. The opinion, authored by Judge O'Connor, cites no cases that would lead to the conclusion that the future fitness of the parent must be considered.[134] In fact, the court's language plainly shows that this revision is based upon personal, rather than legal, authority: "*[W]e think that* . . . it is *appropriate* for a judge to consider whether . . . the parent's unfitness at the time of trial may be only temporary."[135]

In moving through its opinion, the court's language gains force: "In determining whether that extreme step [of terminating the parent and child's legal relationship] should be taken, consideration of the future is a *necessity*."[136] But still the court makes no effort to support its conclusion with cited authority.[137] Instead, the court's legal reasoning turns on one sentence: "None of our cases, in which we have said that current parental unfitness is a prerequisite to the allowance of a petition to dispense with consent to adoption, should be construed as . . . limiting the inquiry to parental fitness at the time of trial."[138] While scrutiny of the court's past decisions reveals some implication that future fitness may be a valid consideration,[139] there is much stronger authority that it is not.[140] The court has stated plainly in the past that "[w]hile it is true that 'an assessment of prognostic evidence . . . is appropriate

132. *Carlos*, 413 Mass. at 340, 596 N.E.2d at 1384.
133. *Id.* at 350, 596 N.E.2d at 1389.
134. *Id.* at 350-51, 596 N.E.2d at 1389-90.
135. *Id.* at 350, 596 N.E.2d at 1389 (emphasis added).
136. *Id.* at 340, 596 N.E.2d at 1389 (emphasis added).
137. *See id.* at 350-51, 596 N.E.2d at 1389-90.
138. *Id.* at 350, 596 N.E.2d at 1389.
139. "[A]n assessment of prognostic evidence derived from an ongoing pattern of parental neglect or misconduct is appropriate in the determination of future fitness and the likelihood of harm to the child." *See* Custody of a Minor (No. 1), 377 Mass. 876, 883, 389 N.E.2d 68, 73 (1979).
140. Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 391 Mass. 113, 120, 461 N.E.2d 186, 191 (1984). *See also* Care and Protection of Martha, 407 Mass. 319, 328, 553 N.E.2d 902, 907 (1990). "'[G]ood intentions are not alone sufficient indicia of ability to adequately care for children.'" *Id.* (citing Custody of Two Minors, 396 Mass. 610, 620, 487 N.E.2d 1358, 1366 (1986)).

in the determination of future fitness' . . . the *critical inquiry* is 'current parental [fitness].'"[141]

The court ignores this lack of support and dismisses the appellate court's opinion, grounded in legal precedent,[142] that "speculative pre-dictions" of future fitness are not in the best interest of the child.[143] The Supreme Judicial Court does this semantically, by equating "speculation" with impliedly arbitrary "guesswork."[144] It concludes that, because "credible evidence" is required by the new test, any dangers associated with predicting the future are eliminated.[145]

The Supreme Judicial Court gives little guidance as to what will be required to satisfy the new standard, but if this case is to be the measure, the burden imposed could be very slight indeed. Despite the fact that Carlos' mother, over the course of five years,[146] has but shifted her position from "pathological" denial,[147] to where she is "now prepared to say that her child *may have* been abused,"[148] the court considers this "credible evidence"[149] that there is a "reasonable likelihood"[150] that her unfitness at the time of trial may be only temporary.[151]

The Appeals Court has noted in the past that the law's standard for parental fitness is already "undemanding."[152] Coupled with the parents' very slight "credible evidence . . . reasonable likelihood"[153] burden of proving their progress toward fitness, it appears that in the future it will be extremely difficult to succeed in any contested petition to dispense with consent to adoption. Where the parent shows any interest in retaining rights in the child and makes the slightest showing of effort at all, notwithstanding that this parent has already failed to meet the low standard required for current parental fitness, the judge must deny the petition.[154]

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141. Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 391 Mass. at 120, 461 N.E.2d at 190-91 (quoting Bezio v. Patenaude, 381 Mass. 563, 577, 410 N.E.2d 1207, 1215 (1980)) (quoting Custody of a Minor (No. 1), 377 Mass. 876, 883, 389 N.E.2d 68, 73 (1979)) (emphasis added).

142. Adoption of Carlos, 31 Mass. App. Ct. 236, 243, 576 N.E.2d 703, 706-07 (1991).

143. *Id.*

144. *Carlos*, 413 Mass. at 351, 596 N.E.2d at 1390.

145. *Id.* at 350-51, 596 N.E.2d at 1389-90.

146. *Adoption of Carlos*, 31 Mass. App. Ct. at 242, 576 N.E.2d at 706.

147. *Id.* at 236, 576 N.E.2d at 703.

148. *Carlos*, 413 Mass. at 346, 596 N.E.2d at 1387.

149. *Id.* at 350, 596 N.E.2d at 1389.

150. *Id.*

151. *Id.*

152. Adoption of Oliver, 28 Mass. App. Ct. 620, 625, 554 N.E.2d 40, 44 (1990).

153. *Carlos*, 413 Mass. at 350, 596 N.E.2d at 1389.

154. *See supra* text accompanying notes 146-151.

While the court uses no legal precedent to support its position, neither does it attempt a sociological explanation. But where such sensitive public policy issues are implicated,[155] no analysis of the court's motivation is complete without exploration of relevant schools of thought on child welfare.

2. The Theories

In 1973, Joseph Goldstein, Anna Freud, and Albert J. Solnit published *Beyond the Best Interests of the Child*,[156] a psychoanalytically-based proposal for reforming the child welfare system.[157] Their proposal has gained widespread acceptance and strongly influenced state legislatures with respect to termination of parental rights.[158] Their reform movement is grounded on two cornerstones: (1) the child's needs are paramount,[159] and (2) psychoanalytic theory establishes the "need of every child for unbroken continuity of affectionate and stimulating relationships with an adult."[160] The authors believe it is the responsibility of the state to see that every child has such a relationship with an adult who is personally committed to safeguarding that child's interests.[161]

They also believe that safeguarding the rights of parents in their child safeguards the child's need for continuity.[162] A child's emotional, intellectual, and moral growth are functions of his environment,[163] and continuity and stability are crucial to smooth development.[164] They recognize, however, that at times it will be impossible to leave the child's care to his or her parents, and in such cases they advocate strenuously

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155. *See supra* notes 13-34 and accompanying text.

156. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (Macmillan Publishing Co., Inc. 2d ed. 1979). Joseph Goldstein is a Professor of Law at Yale University Law School; Anna Freud was Director of the Hampstead-Child Therapy Clinic and the author of numerous books on child development and psychoanalysis; and Albert J. Solnit was a Professor of Pediatrics and Psychiatry at Yale University School of Medicine and Director of the Yale University Child Study Center.

157. Garrison, *supra* note 46, at 446.

158. *Id.* at 449-50. Several state codes reflect the proposal's premise that the interest of the child is best served by taking definitive steps to determine the child's permanent placement as quickly as possible. *Id.* at 449-50 n.128.

159. GOLDSTEIN, *supra* note 156, at 7.

160. *Id.* at 6.

161. *Id.* at 3.

162. *Id.* at 7.

163. *Id.* at 10. "Each child's development unfolds in response to the environmental influences to which he is exposed." *Id.*

164. *Id.* at 32. "Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones." *Id.*

for placement with an adult who can assume the role of psychological parent.[165]

In outlining three guidelines for child placement decisionmakers, the authors look to continuity of relationships,[166] the child's perception of time involved,[167] and the law's limitations in supervising relationships.[168] They are concerned that foster-care placements can change frequently, and that without continuity a child cannot form the critical parent-child relationship.[169] "To maximize each child's opportunity . . . to facilitate the establishment of new relationships to 'replace' old ones," adoption decisions must be made and acted upon with "all deliberate speed."[170] Any attempt by the law to guess at the future will be harmful and lead to discontinuity.[171]

While stressing that the child's needs are the overriding concern, the authors reject the "best interests of the child" standard because in application it has come to mean something less than that.[172] In the actual decisionmaking process, the child's best interests are often made subordinate to adult rights and concerns.[173] The authors propose a new standard, "the least detrimental available alternative for safeguarding the child's growth and development."[174] This over-arching test would be comprised of the three guidelines already described;[175] a child's placement decision would revolve entirely around consideration of the child's needs,[176] and if adoption is implicated it would go forward immediately to allow for as much continuity and stability as possible.[177]

Marsha Garrison, Professor of Law at Brooklyn Law School and author of two prominent law review articles on child welfare issues,[178] takes a different view. While she acknowledges the influence of the Goldstein proposal with respect to termination of parental rights,[179]

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165. *Id.* at 31.

166. *Id.* at 31. "Placement decisions should safeguard the child's need for continuity of relationships." *Id.*

167. *Id.* at 40. "Placement decisions should reflect the child's, not the adult's, sense of time." *Id.*

168. *Id.* at 49. "Child placement decisions must take into account the law's incapacity to supervise interpersonal relationships and the limits of knowledge to make long-range predictions." *Id.*

169. *Id.* at 32-34.

170. *Id.* at 42.

171. *Id.* at 52.

172. *Id.* at 54. For a history of the subordination of the "best interests" standard in Massachusetts, see *supra* notes 54-81 and accompanying text.

173. GOLDSTEIN, *supra* note 156, at 55.

174. *Id.* at 53.

175. *See supra* notes 166-68 and accompanying text.

176. GOLDSTEIN, *supra* note 156, at 53.

177. *Id.* at 42.

178. *Supra* notes 13 and 46.

179. Garrison, *supra* note 46, at 449-50.

Garrison takes issue with some of their assertions. For example, Garrison finds no evidence to support the claim that foster placement without adoption instills a sense of instability in a child.[180] Moreover, she cites studies indicating that adopted children suffer from the same problems as foster children,[181] and that adoption does not resolve the insecurity or emotional problems that children in long-term foster care suffer.[182] Furthermore, one well-known study has shown that overall, in spite of these potential problems, children who had been placed in long-term foster care compared favorably with the general population.[183] Therefore, Garrison argues, since under the Goldstein theory it is "[o]nly the child's alleged need for an unconditional and continuous relationship with a parent figure [that] provides support for termination [of parental rights],"[184] the empirical evidence belies their advocacy of quick and final adoption decisions.[185]

Garrison fears that under the Goldstein standard[186] there is a risk of terminating the rights of parents who are committed to their children and willing to work to get them back.[187] She turns instead to the traditions and values of family law, "family autonomy, privacy, and parental authority," as the policy base for a coherent standard.[188] Deference to these values, she posits, "reflects a social consensus that the family, rather than the state or other organized interests, should play the primary role" in caring for children.[189] Garrison believes termination decisions should be made on an individualized basis.[190] Since the court's role in making these decisions has grown in recent years,[191] it is the standard that the court applies that will most greatly impact the behavior of parents by telling them what is expected of them if they wish to regain their child.[192] She argues for a standard that would require the state to show both that conditions exist such that continued foster care is in the best interest of the child, and that the parent has made no "substantial" progress toward regaining the child, despite assistance from the foster care agency.[193] The parents should be given time to resolve

180. Garrison, *supra* note 13, at 1780.
181. Garrison, *supra* note 46, at 469-70.
182. *Id.* at 470-71.
183. Garrison, *supra* note 13, at 1782-83.
184. Garrison, *supra* note 46, at 455.
185. Garrison, *supra* note 13, at 1768.
186. *See supra* notes 156-77 and accompanying text.
187. Garrison, *supra* note 13, at 1825-26.
188. *Id.* at 1768-69.
189. *Id.* at 1770.
190. Garrison, *supra* note 46, at 477.
191. *See* Garrison, *supra* note 13, at 1759.
192. *See* Garrison, *supra* note 46, at 482.
193. Garrison, *supra* note 13, at 1826. "[T]he state should be required to show: (1) the existence of conditions that require continued foster care; and (2) the parent's

their problems.[194] Severance of the parent-child relationship should be a last resort.[195]

3. The Supreme Judicial Court's Reasoning Revisited

Placed in the context of current sociological theory, the Supreme Judicial Court's decision in *Carlos*[196] is a logical next step in the court's move away from Goldstein-type reasoning[197] and toward a more parent-protective stance. The court has aligned itself with Garrison's test to the extent that the test advocates looking to the parent's progress as an indication of future parental fitness,[198] but the court goes well beyond her approach in establishing the burden of proof. Where Garrison calls for "substantial progress toward achieving reunification,"[199] the court asks only for a "reasonable likelihood" that the parent may be fit at some unspecified time in the future.[200]

The court also differs from Garrison in its seeming abandonment of the "best interests" standard, which Garrison to some degree retains.[201] The Supreme Judicial Court, in *Carlos*,[202] never addresses the Appeals Court's claim that "[t]he rationale against allowing a determination of parental fitness to be based on speculative predictions of future capabilities is solidly grounded in the 'best interests of the child' policy."[203] Echoing Goldstein, the Appeals Court declares that enough is enough, that temporary arrangements lack the stability and security of an adoption, and that such a tenuous situation cannot be in the best

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failure to make substantial progress toward achieving reunification, despite meaningful assistance from the foster care agency." *Id.*

194. *Id.* at 1822.

195. Garrison, *supra* note 46, at 477. Garrison advocates a permanent custody arrangement that would provide continuous care, but allow the natural parents to retain contact with the child. *Id.* at 473. She buttresses this argument with psychological evidence from foster care research. *Id.* at 461-67. It is the current position of the Massachusetts Supreme Judicial Court that post-adoptive visitation is at the judge's discretion. Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 392 Mass. 696, 703, 467 N.E.2d 861, 866 (1984). The Massachusetts Court of Appeals has held that the judge may opt to leave visitation rights to the discretion of the adoptive parents. Adoption of Gwendolyn, 29 Mass. App. Ct. 130, 139, 558 N.E.2d 10, 15 (1990).

196. 413 Mass. 339, 596 N.E.2d 1383 (1992).

197. *See supra* notes 156-77 and accompanying text.

198. Garrison, *supra* note 13, at 1826.

199. *Id.*

200. *Carlos*, 413 Mass. at 350, 596 N.E.2d at 1389.

201. Garrison, *supra* note 46, at 476.

202. 413 Mass. 339, 596 N.E.2d 1383 (1992).

203. Adoption of Carlos, 31 Mass. App. Ct. 233, 241, 576 N.E.2d 701, 706 (1991).

interests of the child.[204] The Appeals Court had relied on this reasoning before,[205] as has the Supreme Judicial Court itself.[206]

By ignoring its own precedent[207] and going beyond accepted social theories, the court is setting social policy in an apparent attempt to preserve the family unit, legally if not physically, as long as there is any hope, no matter how faint, that the family may one day be reunited.[208]

This flies in the face of the weight of authority, both theoretical and legal, that holds "prompt resolution of custody issues is *essential.*"[209] The court's strategy fails to reckon with the effect of time on the child. While the years are passing, in this case five years,[210] the child is growing older, and thus less adoptable.[211] Meanwhile, the child risks multiple placements,[212] instability increases,[213] family ties weaken,[214] and his chances of ever returning home diminish.[215]

4. Other Influences Considered

If the court's opinion in *Carlos*[216] is neither based on legal precedent nor fully explained by sociological analysis, the question remains as to what grounds it may be based upon.

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204. *Id.* at 242, 576 N.E.2d at 706.

205. Adoption of Gwendolyn, 29 Mass. App. Ct. 130, 136, 558 N.E.2d 10, 14 (1990).

206. Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 588, 421 N.E.2d 28, 36 (1981). "[A] child's interest is best served in a stable, continuous family environment." *Id.*

207. *See id; see also* Adoption of Frederick, 405 Mass. 1, 4, 537 N.E.2d 1208, 1211 (1989); Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 391 Mass. 113, 120, 461 N.E.2d 186, 191 (1984).

208. *Carlos,* 413 Mass. at 350, 596 N.E.2d at 1389.

209. Custody of a Minor, 389 Mass. 755, 764, 452 N.E.2d 483, 488-89 (1983) (emphasis added). *See Frederick,* 405 Mass. at 5, 537 N.E.2d at 1211. "Public policy encourages prompt and final resolution of custody issues."; Custody and Adoption of Ned, 28 Mass. App. Ct. 557, 560, 553 N.E.2d 552, 554 (1990). There is a "recognized legislative objective of avoiding unnecessary delays in determination of . . . adoption disputes."; Adoption of Oliver, 28 Mass. App. Ct. 620, 626, 554 N.E.2d 40, 44 (1990) ("[C]ontinuing uncertainty caused by . . . litigation undermines . . . familial security and stability."). *See also* GOLDSTEIN, *supra* note 156. "The child's-sense-of-time guideline would require decisionmakers to act with 'all deliberate speed.'" *Id.* at 42.

210. *See* Adoption of Carlos, 31 Mass. App. Ct. 233, 576 N.E.2d 701 (1991).

211. *Parental Rights, supra* note 46, at 438.

212. Garrison, *supra* note 13, at 1823.

213. *Id.*

214. *Id.*

215. *Id.* Most children "who went home within five years did so during the first two." *Id.*

216. 413 Mass. 339, 596 N.E.2d 1383 (1992).

This decision cannot be explained simply as an attempt to honor the intent of the legislature to strengthen and encourage family life.[217] The language of Massachusetts General Laws ch. 119, section 1 has not been altered in more than twenty years,[218] and the court makes no claim here that any Massachusetts court has failed to honor it.[219]

Nor can this decision be regarded as a cost cutting measure. Some commentators have argued that the Department of Social Services, attempting to reduce foster care costs, is too hasty in returning children to troubled homes.[220] The opposite is true here. While foster care can be expensive for the state, once a child is placed in an adoptive home, the adoptive parents assume expenses and the child costs the state nothing.[221]

The question remains open, however, whether the court may have been influenced by the recent public preoccupation with family values. In 1992, an election year, the public was bombarded by political rhetoric.[222] "Family values," what they are and who has them, became a politically charged topic assuming the proportions of a make-or-break issue for the candidates.[223] The family, the unit upon which the fate of a nation rests, took on the significance of a national symbol.

Professor Garrison has chosen traditional family law values as the bases for her approach to child welfare decisions, elevating family

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217. MASS. GEN. L. ch. 119, § 1 (1972); for a description of the Commonwealth's policy, *see supra* note 45.

218. *See supra* note 45.

219. In fact, the Supreme Judicial Court has consistently attempted to honor the legislature's intent. *See* Petition of the New Eng. Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass 631, 645-46, 328 N.E.2d 854, 863 (1975); Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 376 Mass. 252, 266-67, 381 N.E.2d 565, 573 (1978); Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 383 Mass. 573, 582-83, 421 N.E.2d 28, 33 (1981); Custody of a Minor, 389 Mass. 755, 764-65, 452 N.E.2d 483, 489 (1983); Petition of the Dep't of Soc. Serv. to Dispense with Consent to Adoption, 389 Mass. 793, 802, 452 N.E.2d 497, 503 (1983).

220. Bella English, *Let's Dump DSS and Start Over*, BOSTON GLOBE, Oct. 14, 1992, at 25; Sally Jacobs, *Decision on Child by DSS Decried*, BOSTON GLOBE, Oct. 1, 1992, at 23, 26.

221. *Parental Rights*, *supra* note 46, at 479.

222. During July 1992, in the Boston Globe alone, more than 25 news stories and editorials discussed "family values." *See, e.g.*, John W. Mashek, *Barbara Bush to Speak in Convention Prime Time*, BOSTON GLOBE, July 30, 1992, at 12 ("Barbara Bush will address the Republican National Convention with a prime-time speech on family values."); Ellen Goodman, *A Real-Life Family Portrait*, BOSTON GLOBE, July 19, 1992, at 63 ("A debate about 'family values' is expected to track this campaign all the way to November."); Adam Pertman, *Clinton Girds for Battle on Family Values*, BOSTON GLOBE, July 2, 1992, at 8 ("Clinton lambasted Bush for a record that he said shows the president advocates family values but 'does not value families.'").

223. *See generally supra* note 222.

autonomy and parental authority almost to the status of a philosophy.[224] The court's inclination toward Garrison's approach is entirely consonant with the conservative ideology from which the recent "family values" rhetoric sprung, and indicates that the court's decision in *Carlos*[225] is reflecting, if not public policy, at least public concerns.

V. CONCLUSION

The inner workings of the Supreme Judicial Court, and the personal motivations of its members, are unavailable for examination in *Carlos*,[226] and the public can only speculate about them, and about where the court might go with this issue in the future.

The court has broken with precedent and formulated a new test, which has now been endorsed by the Massachusetts Legislature. Like the old one, this test will, in its application, seal the fate of many children and many families. In the following months the court will flesh out this new standard and define, on a case by case basis, what will be required of parents to hold on to their most precious possession, their children, when there is some question about their fitness as parents. In the process, the court will balance the rights of the parties—the parents, the children, and the state. It is to be hoped that the court will be guided in this undertaking not by the fickle wind of public opinion, but by the accumulated wisdom of the courts and the sciences, and by the desire to consider, above all, the welfare of each child.

Lisa M. Connelly[*]

224. Garrison, *supra* note 13, at 1768-69.
225. 413 Mass 339, 596 N.E.2d 1383 (1992).
226. *Id.*

* This article is dedicated to my husband, William Henry Harrison.

I. APPENDIX

MASS. GEN. L. ch. 210, § 3(a)(b)(c)(1993).

(a) Whenever a petition for adoption is filed by a person having the care or custody of a child, the consent of the persons named in section two, other than that of the child, shall not be required if:

(i) the person to be adopted is eighteen years of age or older, or if

(ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child, as defined in paragraph (c).

(b) The department of social services or any licensed child care agency may commence a proceeding, independent of a petition for adoption, in the probate court of Suffolk county or any other county in which said department or agency maintains an office, to dispense with the need for consent of any person named in section two to the adoption of a child in the care or custody of said department or agency. Notice of such proceeding shall be given to such person in a manner prescribed by the court. The court shall appoint counsel to represent the child in the proceeding unless the petition is not contested by any party. The court shall issue a decree dispensing with the need for said consent or notice of any petition for adoption of such child subsequently sponsored by such department or agency if it finds that the best interests of the child as defined in paragraph (c) will be served by said decree. Pending a hearing on the merits of a petition filed under this paragraph, temporary custody may be awarded to the petitioner.

A petition brought pursuant to this paragraph may be filed and a decree entered notwithstanding the pendency of a petition brought under chapter one hundred and nineteen or chapter two hundred and one regarding the same child. The chief administrative justice of the trial court may, pursuant to the provisions of section nine of chapter two hundred and eleven B, assign a justice from any department of the trial court to sit as a justice in any other department or departments of the trial court and hear simultaneously a petition filed under this paragraph and any other pending case or cases involving custody or adoption of the same child. A temporary or permanent custody decree shall not be a requirement for the filing of such petition.

A juvenile court or district court shall enter a decree dispensing with the need for consent of any person named in section two to the adoption of a child named in a petition filed pursuant to section twenty-four of chapter one hundred and nineteen in such court upon a finding that such child is in need of care and protection pursuant to section twenty-six of said

chapter one hundred and nineteen and that the best interests of the child as defined in paragraph (c) will be served by such decree. Facts may be set forth either in the care and protection petition filed pursuant to said section twenty-four of said chapter one hundred and nineteen or upon a motion made in the course of a care and protection proceeding, alleging that the allowance of the petition or motion is in the best interests of the child.

(c) In determining whether the best interests of the child will be served by granting a petition for adoption without requiring certain consent as permitted under paragraph (a), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section two to assume parental responsibility and shall also consider the ability, capacity, fitness and readiness of the petitioners under paragraph (a) to assume such responsibilities.

In considering such fitness of the child's parent or other person named in section two, the court shall consider including without limitation, the following factors.

(i) the child has been abandoned;

(ii) the child or another member of the immediate family of such child has been abused or neglected as a result of the acts or omissions of one or both parents, the parents were offered or received services intended to correct the circumstances which led to the abuse or neglect and refused or were unable to utilize such services on a regular and consistent basis such that a substantial danger of abuse or neglect continues to exist;

(iii) a court of competent jurisdiction has transferred custody of the child from the child's parents to the department, the placement has lasted for at least six months and the parents have not maintained significant and meaningful contact with the child during the previous six months, nor have they, on a regular basis, accepted or productively utilized services intended to correct the circumstance;

(iv) the child is four years of age or older, a court of competent jurisdiction has transferred custody of the child from the child's parents to the department and custody has remained with the department for at least twelve of the last fifteen consecutive months and, the child cannot be returned to the custody at the end of such fifteen month period; provided, however, that the parents were offered or received services intended to correct the circumstance and refused or were unable to utilize such services on a regular and consistent basis;

(v) the child is younger than four years of age, a court of competent jurisdiction has transferred custody of the child from the child's parents to the department and custody has remained with the department for at least six

of the last twelve consecutive months, and the child cannot be returned to his parents at the end of such twelve month period; provided, however, that the parents were offered or received services intended to correct the circumstance and refused or were unable to utilize such services on a regular or consistent basis;

(vi) the parent, without excuse, fails to provide proper care or custody for the child and there is reasonable expectation that the parent will not be able to provide proper care or custody within a reasonable time considering the age of the child; provided, however, that the parents were offered or received services intended to correct the circumstance and refused or were unable to utilize such services on a regular basis;

(vii) because of the lengthy absence of the parent or the parent's inability to meet the needs of the child, the child has formed a strong, positive bond with his substitute caretaker; the bond has existed for a substantial portion of the child's life; the forced removal of the child from the caretaker would likely cause serious psychological harm to the child; the parent lacks the capacity to meet the special needs of the child upon such removal;

(viii) a lack of effort by a parent or other person named in section two to remedy conditions which create a risk of harm due to the abuse or neglect of the child;

(ix) severe or repetitive conduct toward the child or another child in the home of a physically, emotionally, or sexually abusive or neglectful nature;

(x) the willful failure to visit the child where the child is not in the custody of the parent or other person named in section two;

(xi) the willful failure to support the child where the child is not in the custody of the parent or other person named in section two. Failure to support shall mean that the parent or other person named has failed to make material contribution to the child's care when contribution has been requested by the department or ordered by the court;

(xii) a condition which is reasonably likely to continue for a prolonged indeterminate period such as alcohol or drug addiction, mental deficiency, or mental illness, and the condition makes the parent or other person named in section two unlikely to provide minimally acceptable care of the child; or

(xiii) the conviction of a parent or other person named in section two of a felony offense that the court finds is of such a nature that the child will be deprived of a stable home for a period of years; provided, however, that that incarceration in and of itself shall not be grounds for termination of parental rights.

For the purposes of this paragraph, the term "abandoned" shall mean being left without any provision for support, and without any person responsible to maintain care, custody, and control because the whereabouts of the person responsible is unknown and reasonable efforts to locate such person have been unsuccessful. A brief and temporary absence from the home, without the intent to abandon the child shall not constitute abandonment.

If said child has been in the care of the department of a licensed child care agency for more than one year, in each case irrespective of incidental communications or visits from his parents or other person named in section two, irrespective of a court decree awarding custody of said child to another and notwithstanding the absence of a court decree ordering said parents or other person to pay for the support of said child there shall be a presumption that the best interests of the child will be served by granting a petition for adoption as permitted under paragraph (a) or by issuing a decree dispensing with the need for consent as permitted under paragraph (b).

Abortion and the Freedom to Travel in the European Economic Community: A Perspective on *Attorney General v. X*

Imagine there's no countries
it isn't hard to do
Nothing to kill or die for
and no religion too
Imagine all the people
living life in peace.[1]

I. INTRODUCTION

A pregnant fourteen-and-a-half-year-old rape victim wants to travel to Britain with her parents to obtain an abortion; illegal in Ireland, but legal in Britain.[2] The Irish Attorney General argues that the constitutionally-protected right to life of the unborn gives the Irish Supreme Court the power to "enjoin an individual from leaving the jurisdiction" for the purpose of having an abortion.[3] The defendant contends that the freedom to travel was guaranteed to all European Community (EC) citizens and one Member State could not prohibit a woman from travelling to another Member State to receive a service which was legal in the other State.[4] The Irish Supreme Court permits X to leave the country, but, by invoking public policy, reserves the power to protect the life of the unborn in the future through restrictions on the travel of pregnant women.[5] This restrictive response by the court creates a furor within the EC.[6] The social and political pressure from other EC states

1. JOHN LENNON, *Imagine, on* IMAGINE (McLean Music 1971).

2. Attorney General v. X, 12 I.L.R.M. 401, 405-06 (Ir. H. Ct.) (1992), *rev'd* I.L.R.M. 414 (Ir. S.C.) (1992).

3. THE ATTORNEY GENERAL V. X AND OTHERS; JUDGEMENTS OF THE HIGH COURT AND SUPREME COURT WITH SUBMISSIONS MADE BY COUNSEL TO THE SUPREME COURT 41 (Sunniva McDonagh ed., Incorporated Council of Law Reporting for Ireland, 1992).

4. *Id.* at 33-36. *See also infra* note 22 (discussing four fundamental freedoms).

5. *Attorney General v. X*, 12 I.L.R.M. at 428-29.

6. Angela Long, *Irish Problem Confounds Europe*, AUSTL. FIN. REV., Apr. 16, 1992, at 29.

forces the Irish government to hold a national referendum: major changes occur in the abortion laws in Ireland.[7]

Sensitive social and cultural issues[8] provide a basis for analyzing the ability of a EC Member State to invoke national public policy as a basis for restricting fundamental freedoms. This Note focuses on the conflict which arises when a Member State's constitutional ban on abortion is in direct opposition to fundamental freedoms nominally guaranteed to every EC citizen. The resolution of this impasse requires that socio-political sacrifices and compromises be made in order to achieve some form of economic unity. This struggle was vividly illustrated in the 1992 Irish Supreme Court decision, *Attorney General v. X*,[9] and the resolution of this particular conflict will have a lasting impact on EC law and on the foundations of European integration.

Part II of this Note discusses the historical background of the European Economic Community (EEC).[10] Part III reviews the source of authority vested in EC institutions.[11] Part IV examines the fundamental freedoms established by the EEC Treaty and how those freedoms may be curtailed by a Member State.[12] Part V discusses Ireland's constitutional ban on abortion and the Court's interpretations of that ban leading up to and including the *X* case.[13] Part VI analyzes how EC institutions have reacted to the way Member States have dealt with abortion.[14] Part VII reviews Ireland's reaction to the political pressure which occurred in the wake of the *X* decision.[15] Finally, this Note concludes that social and cultural change is an inevitable consequence from the economic integration of the European Community.[16]

II. HISTORICAL BACKGROUND

Contrary to the perception of many North Americans that the EC only establishes economic policies and regulations for its Member States,

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7. Kevin Cullen, *Irish Vote Today on Abortion Law*, BOSTON GLOBE, Nov. 25, 1992, at 2. The right of pregnant women to travel abroad to obtain an abortion and the right of clinics in Ireland to distribute information on foreign abortion clinics were major steps taken by Irish voters in loosening the most restrictive abortion laws within the EC. *Id. See, e.g., infra* notes 205-16 and accompanying text.

8. Such is the case with the abortion debate where there can only be winners and losers. Either the fetus has a right to life or the woman has a right to choose to abort the fetus. There appears to be no middle ground, no room for compromise.

9. 12 I.L.R.M. 401(Ir. H. Ct.) (1992), *rev'd.* 12 I.L.R.M. 414 (Ir. S.C.) (1992).

10. *See infra* notes 17-24 and accompanying text.

11. *See infra* notes 25-34 and accompanying text.

12. *See infra* notes 35-87 and accompanying text.

13. *See infra* notes 88-181 and accompanying text.

14. *See infra* notes 182-207 and accompanying text.

15. *See infra* notes 208-16 and accompanying text.

16. *See infra* notes 217-18 and accompanying text.

the law of the EC impacts the social and political policies affecting all EC citizens. This misconception may be based on the notion that the first Treaty of Rome in 1957[17] (EEC Treaty) established the European Economic Community, which created a "Common Market."[18] Economic development, however, was only the foundation for the political integration of all the Member States.[19]

The unification of Western Europe that began at the close of World War II has progressed steadily over the last half of the twentieth century. Western Europe is rapidly evolving as a supranational entity now that the realization of the Single European Act[20] has taken full effect as of January 1, 1993 and the ratification process of the Maastricht Treaty has concluded.[21]

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17. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty]. Article 2 of the EEC Treaty set forth the mission statement of the European Economic Community:

> It shall be the aim of the Community, by establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.

Id. at 14.

18. DAVID A. O. EDWARD & ROBERT C. LANE, EUROPEAN COMMUNITY LAW 3-4 (1991). Although economic activity was the basis, social progress was an important aspect to the drafters of the treaty. Case 43/75, Defrenne v. Sabena, [1976] E.C.R. 455, 472, [1976] 2 C.M.L.R. 98, 122. "[T]he social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasised by the preamble to the Treaty." *Id.*

19. EDWARD & LANE, *supra* note 18, at 4.

20. The Single European Act, 1987 O.J. L 169/1 [hereinafter S.E.A.]. The S.E.A. established the "Single European Market," which took effect on January 1, 1993. The impact of a unified market meant that customs checks at borders between EC Member States ended, banks and businesses that operate in one State could operate in all 12, and rates on value-added taxes were at least 15% in all States to prevent lower tax rates in one State from luring business from another. Joel Haverman, *Solving the Euro Puzzle*, L.A. TIMES, Dec. 8, 1992, at 1.

21. Treaty on European Union and Final Act, 31 I.L.M. 247 (1992) [hereinafter Maastricht Treaty]. The Maastricht Treaty amends the EEC Treaty and sets out to establish a European Union with "an even closer union among the peoples of Europe." *Id.* at pmbl.

There are three pillars to the Maastricht Treaty. *A Guide to the Treaty*, BOST. GLOBE, Sept. 21, 1992, at 6. The central pillar gives the EC a greater role in areas like the environment, consumer protection, education, public health, energy, roads, and communications, as well as establishing a timetable towards a single currency. *Id.* The second pillar seeks to establish a common foreign and security policy which includes steps toward a joint military force. *Id.* The final pillar covers cooperation in matters like political asylum, visa controls, immigration, and the fight against organized crime, drug trafficking, and terrorism. *Id.*

The EEC Treaty established four fundamental freedoms: the free movement of workers, services, capital, and products as essential pillars supporting and facilitating economic unity.[22] The signatories ("Member States") of the original EEC Treaty[23] relinquished their power to close their borders and were prohibited from interfering with any of these freedoms unless there existed some sound public policy reason.[24]

III. THE EUROPEAN COMMUNITY'S SOURCE OF AUTHORITY

Membership in the EC carries with it the benefit of being part of the largest and most affluent consumer market in the world.[25] Companies operating within the borders of Member States have access to this market, and the Member States benefit from the economic growth of these companies. EC citizens realize a higher standard of living and greater access to a variety of products and services.[26] In addition, a harmonious and unified Europe provides for political stability and greatly enhances the prospects for peace.[27] EC membership, however,

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The Maastricht Treaty also provides for an economic and social cohesion fund to help subsidize Ireland, Spain, Portugal, and Greece with the economic integration process. *Id.* Conservative estimates place this economic aid at five billion dollars in aid to Ireland alone through 1993. *Irish Voters Approve EC Maastricht Treaty; Process Toward Closer Unity Rekindled*, FACTS ON FILE WORLD NEWS DIG., June 25, 1992, at 473 F3.

22. EEC Treaty, *supra* note 17, arts. 9-84. The S.E.A. likewise affirmed these fundamental rights. Article 13 of the S.E.A. states that "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this Treaty." S.E.A., *supra* note 20, at 7.

23. France, Germany, Italy, Belgium, Luxembourg, and the Netherlands were the six initial signatories of the Treaty of Rome. Denmark, Ireland, and the United Kingdom formally joined the EC on January 1, 1973, followed by Greece on January 1, 1981. The addition of Spain and Portugal on January 1, 1986 created a composite of twelve Member States. *See* EEC Treaty, *supra* note 17.

24. EEC Treaty, *supra* note 17, arts. 36, 59, 60; *see also* Council Directive 73/148, art. 8, OJ L172/14 (1973), providing that, "[m]ember states shall not derogate from the provisions of this directive save on grounds of public policy, public security or public health." *Id.*

25. DOMINIC LASOK & JOHN W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 28 (1990). Figures from 1990 place the total population of the twelve EC Member States at approximately 340 million. *Id.*

26. Sean Flynn, *Joy From EC Partners–Irish Yes Vote on Maastricht*, IRISH TIMES, June 20, 1992, at 1. Jacques Delors, EC President, stated, "When one looks to the future, when one sees these enormous economic forces of the United States, Japan, the tigers of Southeast Asia, and tomorrow of India and China, what weight can our countries carry alone?" *Id.*

27. EEC Treaty, *supra* note 17. The Member States are "[d]etermined to establish the foundations of an ever closer union" and "[a]nxious to strengthen the unity of their economies . . . to ensure their harmonious development. . . ." *Id.* at 14.

also carries with it the responsibilities of giving up some national sovereign prerogatives for the greater good of the whole community.[28]

The EEC Treaty is "self-executing" in that it automatically becomes the law within the Member States once it has been ratified.[29] By definition, a treaty is a contract between two or more states and is not a legislative act.[30] The Member States essentially transferred rights and obligations from their domestic legal systems to EC institutions, effectively and permanently limiting the Member States' sovereignty.[31] The power which was conferred by the Member States could not be taken back without an express provision in the EEC Treaty.[32] Thus, the Treaty established the primacy of Community law, much like the United States Constitution established the "supreme law of the land."[33]

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28. This process has been called *engrenage*, which literally means "gearing" or "meshing." LASOK & BRIDGE, *supra* note 25, at 238. Once a state gets involved in the process of economic integration, it gets "progressively drawn further into the machine so that matters which in the past were within the sole competence of national governments gradually and irrevocably became part of the Community's decision-making process." *Id.* (quoting ROBERT MAYNE, THE INSTITUTIONS OF THE EUROPEAN COMMUNITY 50 (1968)).

29. LASOK & BRIDGE, *supra* note 25, at 113.

30. *Id.*

31. JOHN USHER, EUROPEAN COMMUNITY LAW AND NATIONAL LAW, THE IRREVERSIBLE TRANSFER 34 (1981).

> [S]ince the creation of the Community and the endowment of its Institutions with executive, legislative and judicial functions implies a delegation of sovereignty, the Community could not function as a supranational organisation if the delegated powers were insufficient or capable of being withdrawn. Therefore supremacy does not reflect any inherent superiority of Community Law but merely a working relationship.

LASOK & BRIDGE, *supra* note 25, at 176. *See also* Case 6/64, Costa v. ENEL, [1964] E.C.R. 585, 593-94, [1965] C.M.L.R. 425, 456.

32. USHER, *supra* note 31, at 35. *See also* Case 106/77, Italian Minister for Finance v. Simmenthal S.p.A., [1978] E.C.R. 629, [1978] 3 C.M.L.R. 263. In *Simmenthal*, the European Court of Justice [hereinafter ECJ] stated that:

> Direct applicability in such circumstances means that rules of Community law must be fully and uniformly applied in all the Member States .... [I]n accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty ... and the national law of the Member States ... render[s] automatically inapplicable any conflicting provision of current national law but ... also preclude[s] the valid adoption of new legislative measures to the extent to which they would be incompatible with Community provisions.

Simmenthal, [1978] E.C.R. 643, [1978] 3 C.M.L.R. at 282-3.

33. *Costa*, [1964] E.C.R. at 585, 594, [1965] C.M.L.R. at 425. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

> [T]he law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. Therefore the validity of a Community measure or its effect within a

It is not always relevant, however, to try to juxtapose the legal system of the United States with that of the EC. There is a greater divergence of social, cultural, and religious traditions in Europe than in the United States. These diverse cultural heritages have evolved over centuries and comprise the character of each sovereign Member State. The protection of that culture (or religion) and the extreme nationalism which any cultural attack arouses, makes the integration process within Europe all the more difficult.[34]

IV. FUNDAMENTAL FREEDOMS IN THE EUROPEAN COMMUNITY

Within the Community, "respect for fundamental rights forms an integral part of the general principles of law protected by the [c]ourt . . . [and] protection of those rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."[35]

A. *The Free Movement of Persons and Services*

Article 48 of the EEC Treaty imposes on Member States the duty to permit the free movement of workers within the Community,[36] while Article 59 of the EEC Treaty calls for the Member States to abolish the restrictions on the free supply of services across internal frontiers.[37] These articles are meant to assist in removing the hurdles to a common market by allowing nationals of Member States free movement within the EC to pursue their "economic activities."[38] Community activities qualifying as services must normally be supplied for remuneration,[39]

Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr-und-Vorratsstelle fur Getreide und Futtermittel, [1970] E.C.R. 1125, 1134, [1972] C.M.L.R. 255, 283.

34. *See* Scott Sullivan, *A 'Non' to European Unity?*, NEWSWEEK, Sept. 14, 1992, at 44.

35. *Handelsgesellschaft*, [1970] E.C.R. 1126, 1134, [1972] C.M.L.R. at 283. *Cf.* Case 4/73, Nold v. EC Commission, [1974] E.C.R. 491, [1974] 2 C.M.L.R. 338 (The ECJ empathized with the fundamental human rights of petitioner to have access to his source of supply but ruled against his argument on the basis of the greater interest of market rationalization under the Coal and Steel Treaty).

36. EEC Treaty, *supra* note 17, art. 48. Article 48 provides, in part, that "[f]ree movement for workers shall be within the Community. [And] shall involve the abolition of any discrimination based on nationality. [And] shall include the right . . . to move about freely . . . within the territory of Member States." *Id.*

37. EEC Treaty, *supra* note 17, art. 59. *See also* S.E.A. *supra* note 4.

38. Joined Cases 35 and 36/82, Morson and Jhanjan v. Netherlands, [1982] E.C.R. 3723, 3736, [1983] 2 C.M.L.R. 221, 231.

39. EEC Treaty, *supra* note 17, art. 60. Article 60 states that:

even if the payment for services is nominal.[40] In addition, "services" have a limited scope to the extent that they are not defined under the Community provisions for the free movement of goods, capital, or workers.[41]

Furthermore, the European Court of Justice (ECJ) has ruled that by virtue of Article 59 of the EEC Treaty, the freedom to supply services entitles the provider free access to the Member State of the consumer of that service.[42] Conversely, it also allows the consumer of the service free access to the Member State of the provider of that service.[43] In *Luisi and Carbone v. Ministero del Tesoro*,[44] Mr. Luisi and Mrs. Carbone (both Italian nationals residing in Italy) were fined, under Italian law, for

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> Services within the meaning of this treaty shall be deemed to be services normally supplied for remuneration, to the extent that they are not governed by the provisions relating to the free movement of goods, capital and persons.
>
> Services shall include in particular:
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> (a) activities of an industrial character;
>
> (b) activities of a commercial character;
>
> (c) artisan activities; and
>
> (d) activities of the liberal professions.
>
> Without prejudice to the professions of the Chapter relating to the right of establishment, a person supplying a service may, to carry out the service, temporarily exercise his activity in the State where the service is supplied, under the same conditions as are imposed by the State on its own nationals.

Id.

40. Case 186/87, Cowan v. Le Trésor Public, [1989] E.C.R. 195, [1990] 2 C.M.L.R. 613 (tourist qualified as a recipient of service when using the Metro).

41. EEC Treaty, *supra* note 17, art. 60. Without this provision, the supply of goods or capital across frontiers could be considered as a provision of a service rather than governed by the provisions relating to free movement of goods and capital. *Id.* Through ECJ decisions, services have been further defined to include a number of professional pursuits. *See* Case 279/80, *Re* Alfred John Webb, [1981] E.C.R. 3305, [1982] 1 C.M.L.R. 719 (employment agencies); Case 52/79, Procureur du Roi v. Debauve, [1980] E.C.R. 833, [1981] 2 C.M.L.R. 362 (television broadcasting); Case 115/78, Knoors v. Secretary of State, [1979] E.C.R. 399, [1979] 2 C.M.L.R. 357 (plumbing and heating); Case 110/78, Ministére Public and ASBL v. Van Wesemael and Poupaert, [1979] E.C.R. 35, [1979] 3 C.M.L.R. 87 (entertainment agents); Case 15/78, Société Générale Alsacienne de Banque S.A. v. Koestler, [1978] E.C.R. 1971, [1979] 1 C.M.L.R. 89 (banking); Case 13/76, Dona v. Mantero, [1976] E.C.R. 1333, [1976] 2 C.M.L.R. 578 (professional sports); Case 36/74, Walgrave and Koch v. Association Union Cycliste Internationale, [1974] E.C.R. 1405, [1979] 1 C.M.L.R. 320 (cycling); Case 155/73, Italian State v. Sacchi, [1974] E.C.R. 409, [1974] 2 C.M.L.R. 177 (television broadcasting).

42. Joined Cases 286/82 and 26/83, Luisi and Carbone v. Ministero del Tesoro, [1984] E.C.R. 377, 401, [1985] 3 C.M.L.R. 52, 76. *See also* Council Directive No. 73/148, art. 1(1)(b), O.J. L 172/14 (recipient of a service entitled to travel or even take up residence in another Member State in order to receive services from a person who is established in that other Member State).

43. *Luis and Carbone* [1984] E.C.R. at 401, [1985] 3 C.M.L.R. at 76.

44. *Id.* at 377, [1985] 3 C.M.L.R. at 52.

exceeding the legal limitation on the amount of lire they could export from Italy.[45] Both admitted that they had used the money for tourism and medical expenses in other Member States, but contended that the export restrictions on currency for the purpose of tourism or medical expenses were contrary to those provisions of the EEC Treaty that relate to the free movement of services and capital.[46] The ECJ found that if, under Article 60 of the Treaty, the provider of a service could temporarily offer his service in another Member State, then the corollary which "fulfils the objective of liberalizing all gainful activity" would also permit free travel to another Member State to *procure* services.[47]

The removal of barriers to the free movement of persons, services, and capital is a fundamental objective of the Community contained under Article 3(c) of the Treaty.[48] In *Watson and Belmann*,[49] the ECJ found that a formal Italian registration requirement for foreigners might create an obstacle for the free movement of persons.[50] Miss Watson, a seventeen-year-old British national who spent several months living in Italy with an Italian family, was arrested for failing to register with the police, as required by law for all foreign nationals.[51] Although the ECJ upheld the registration requirement, on the ground that EC Member States had the authority to collect information on population movements, it stated that "such an infringement might . . . limit the right conferred by the Treaty on nationals of Member States to enter and reside in the territory of any other Member State for the purposes intended by Community law."[52] The ECJ added that penalties such as

45. *Id.* at 397-98, [1985] 3 C.M.L.R. at 74.

46. *Id.*, [1985] 3 C.M.L.R. at 74.

47. *Id.* at 401, [1985] 3 C.M.L.R. at 76 (emphasis added). *See also*, Council Directive No. 148/73, *supra* note 41, at 14 (recipient of a service entitled to travel or even take up residence in another Member State in order to receive services there).

48. Case 36/74, Walrave and Koch v. Association Union Cycliste Internationale, [1974] E.C.R. 1405, [1975] 1 C.M.L.R. 320. Association Union Cycliste Internationale (UCI), the professional cycle racing supervisory body, amended the rules to require the "pacer" (motor cyclist) and the "stayer" (pedal cyclist) to be of the same nationality. *Id.* at 1407, [1975] 1 C.M.L.R. at 321-22. The amended rule was challenged by two Dutch professional pacers who were associated with a Belgian and a German stayer. *Id.* at 1407, [1975] 1 C.M.L.R. at 321. UCI argued that Art. 59 could not bind private persons because the EEC Treaty only applied to the activities of a State. *Id.* at 1415, [1975] 1 C.M.L.R. at 327. The ECJ held that the freedom to provide services would be frustrated if national barriers could be imposed by the actions of associations which do not come under the authority of public law. *Id.* at 1419, [1975] 1 C.M.L.R. at 332-33.

49. Case 118/75, Re Watson and Belmann, [1976] E.C.R. 1195, [1976] 2 C.M.L.R. 552.

50. Id. at 1199, [1976] 2 C.M.L.R. at 567.

51. *Id.* at 1195-96, [1976] 2 C.M.L.R. at 569.

52. Id. at 1198, [1976] 2 C.M.L.R. at 572.

deportation, detention, or stiff fines would be incompatible and disproportionate with the intent of the EEC Treaty.[53]

B. *Derogations by Member States for Public Policy Reasons*

According to the EEC Treaty, Member States may restrict the free movement of workers, self-employed persons, and providers of services on grounds of public policy, national security, or public health.[54] A Member State deviation from the EEC Treaty and laws on such grounds is called a derogation.[55] What constitutes a public policy derogation, however, is subject to interpretation by the national courts and the ECJ.[56] Due to the sovereign nature of each State, it is natural for them to take advantage of open borders where they may benefit their national agenda.[57] On the other hand, it might be in the same State's best interest to protect local interests by keeping out foreign influences where those influences may be a detriment.[58] It is up to the ECJ to protect the essence of the EEC Treaty and to defend the basic ideals of a unified Europe.[59] Therefore, public policy derogations to the EEC Treaty, which permit the Member State to "take back" powers that had been delegated to the Community, have been narrowly construed by the ECJ.[60]

In effect, the use of a derogation is limited to cases where the State is attempting to expel or deny entry into the country to an individual whose behavior is considered socially harmful.[61] The derogation may

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53. *Id.* at 1199, [1976] 2 C.M.L.R. at 573. *See also* Case 16/78, Public Prosecutor v. Michel Choquet, [1978] E.C.R. 2293, [1979] 1 C.M.L.R. 535 (Court found that requiring a registered driver from France, permanently residing in Germany for over a year, to obtain a German driver's license was not incompatible with Community law. However, the requirement would be disproportionate if the rules imposed on the holder of the license issued by another Member State were not in "due proportion to the requirements for the safety of highway traffic"). *Id.* at 2302-03, [1979] 1 C.M.L.R at 545.

54. EEC Treaty, *supra* note 17, arts. 48(3), 56(1), and 66.

55. LASOK & BRIDGE, *supra* note 25, at 203.

56. P. J. G. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 164-65 (Laurence W. Gotuley, ed., 2d ed. 1990).

57. Elizabeth Spahn, *Abortion, Speech and the European Community*, 1 J. SOC. WELFARE & FAM. L. 17, 24 (1992).

58. *Id.*

59. *Id.*

60. Case 36/75, Rutili v. Ministère de l'Interieur, [1975] E.C.R. ___ 1219, 1236, [1976] 1 C.M.L.R. 140, 148. *See also,* Case 41/74, Van Duyn v. Home Office, [1974] E.C.R. 1337, 1350, [1975] 1 C.M.L.R. 1, 17.

61. Case 41/74, Van Duyn v. Home Office, [1974] E.C.R. 1337, 1350, [1975] 1 C.M.L.R. 1, 17 (where the activities of an organization are considered to be socially harmful, the State may counteract these activities through administrative measures which are appropriate under the circumstances). *See also* Case 67/74, Bonsignore v. Oberstadtdirektor der Stadt Koln, [1975] E.C.R. 297, 307, [1975] 1 C.M.L.R. 472,

not serve a purely economic purpose, such as to protect jobs of a Member State's citizens.[62]

There are three bases for a public policy derogation recognized by the ECJ: necessity, proportionality, and non-discrimination.[63] First, there must be an objective basis for the proposed restriction to protect the public morality, public policy, or public security interests of the State;[64] secondly, the method used must not require extreme measures, which are disproportional to the result sought;[65] and finally, the derogation must not unnecessarily discriminate against nationals of other Member States.[66]

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488 (State may not deport an individual if the deportation is of a "general preventative nature" seen as a deterrent to other aliens); Case 30/77, Regina v. Bouchereau, [1977] E.C.R. 1999, 2012, [1977] 2 C.M.L.R. 800, 823 (previous criminal convictions are not, per se, grounds for expulsion; the State may only take a prior conviction into account if it evidences personal conduct which constitutes a present threat to public policy).

62. Council Directive No. 64/221, art. 2 (2), OJ L 1952-66 (1964). *See also* Case 120/78, Rewe-Zentral v. Bundesmonopolverwaltung fur Branntwein (Re Cassis de Dijon), [1979] E.C.R. 649, 663, [1979] 3 C.M.L.R. 494, 506 [hereinafter *Cassis de Dijon*].

63. N. GREEN ET AL., LEGAL FOUNDATIONS OF THE SINGLE EUROPEAN MARKET 82 (1991). In addition to public health, public policy and public security which are specifically noted in the text of the EEC Treaty, public morality was added via case law. *Id.* In *Regina v. Henn and Darby,* Case 34/79, [1979] E.C.R. 3795, [1980] 1 C.M.L.R. 246, the ECJ held that the importation of pornography into England from Denmark was subject to a public morality derogation because there was no lawful domestic trade in such literature in England. *Id.* at 3813-14, [1980] 1 C.M.L.R. 3807.

See also Cathleen M. Colvin, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan: Irish Abortion Law and the Free Movement of Services in the European Community,* 15 FORDHAM INT'L L.J. 476, 484-85 (1991-1992).

64. Colvin, *supra* note 63, at 485. *See* Case 36/75, Rutili v. Ministere de l'Interieur, [1975] E.C.R. 1219, 1230, [1976] 1 C.M.L.R. 140, 155 (requirement that national law impose a specific limitation and that there must be a "genuine and sufficiently serious threat to public policy" necessary for derogation).

65. Colvin, *supra* note 63, at 485. *See* Case 16/78, Public Prosecutor v. Michel Choquet, [1978] E.C.R. 2293, 2303, [1979] 1 C.M.L.R. 535, 545.

66. Colvin, *supra* note 63, at 485. *See* Case 98/79, Pecastaing v. Belgium, [1980] E.C.R. 691, [1980] 3 C.M.L.R. 685; *Cf.* Joined cases 115 and 116/81, Adoui and Cornuaille v. Belgium, [1982] E.C.R. 1665, [1982] 3 C.M.L.R. 631. These cases dealt specifically with prostitution and public morality. In *Adoui,* the ECJ found that the Belgian State had exceeded its authority by refusing to issue a residency permit to the plaintiffs (French citizens) and by invoking public policy-based anti-prostitution measures because prostitution was not a criminal offense under Belgian law. A Member State is only empowered to adopt such measures where there was no arbitrary distinction between nationals of other Member States and Belgium nationals. *Id.* at 1707, [1982] 3 C.M.L.R. at 661.

1. Necessity

Public policy restrictions, which are necessary to protect State security, require more than previous criminal convictions to allow deportation of an EC citizen.[67] In *Regina v. Bouchereau*,[68] a French worker in the United Kingdom was convicted of two separate drug offenses within six months.[69] Called upon to assess whether or not the repeat offender could be deported, the magistrate requested a preliminary ruling from the ECJ on whether a repeat offense might be viewed as evidence of likely future criminal conduct.[70] The ECJ held that a Member State in each individual case should assess what public policy interpretation is required.[71] Therefore, under its view, derogation on public policy grounds could justifiably be invoked in circumstances which would vary from country to country, and from one time period to another.[72]

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67. Case 67/74, Bonsignore v. Oberstadtdirektor der Stadt Koln, [1975] E.C.R. 297, 306, [1975] 1 C.M.L.R. 472, 488. In *Bonsignore*, an Italian worker living in Germany accidentally shot his brother with an unlawfully acquired Beretta pistol. *Id.* at 305, [1975] 1 C.M.L.R. at 486. He was fined for unlawful possession and the Auslanderbehorde, the Aliens Authority, ordered him to be deported. *Id.* at 307, [1975] 1 C.M.L.R. at 472. The ECJ held that expulsions were only permissible when there were clear indications that an EEC national would commit further offenses or in some other demonstrable way disregard public security or public policy. *Id.*, [1975] 1 C.M.L.R. at 486. *See also Directive* 64/221, *supra* note 62, art. 3(1) & (2).

68. Case 30/77, [1977] E.C.R. 1999, [1977] 2 C.M.L.R. 800.

69. *Id.* at 2005, [1977] 2 C.M.L.R. at 806.

70. *Id.* at 2008, [1977] 2 C.M.L.R. at 811.

71. *Id.* at 2010, [1977] 2 C.M.L.R. at 812. *See also* Joined Cases 115 & 116/81, Adoui and Cornuaille v. Belgian State and City of Liege, [1982] E.C.R. 1665, 1707, [1982] 3 C.M.L.R. 631, 661. Here, the ECJ elaborated on how a Member State should assess "a genuine and sufficiently serious threat affecting one of the fundamental interests of society," as follows:

> Although Community law does not impose upon the Member States a uniform scale of values as regards the assessment of conduct which may be considered as contrary to public policy, it should nevertheless be stated that conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals repressive measures or genuine and effective measures intended to combat such conduct.

Id. at 1708, [1982] 3 C.M.L.R at 662.

72. *Bouchereau*, [1977] E.C.R. at 2015, [1977] 2 C.M.L.R. at 825. The Court stated:

> [I]n so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the

2. Proportionality

The principle of proportionality is used by the ECJ to determine if the restriction on the free movement exceeds that which is necessary to achieve the permitted objective. In *Officer van Justitie te Rotterdam v. de Peijper*,[73] the ECJ dealt with a Dutch importer who bought Valium manufactured by the drug's United Kingdom licensee.[74] The drug was very similar, if not identical, to drugs sold in Holland under the same brand name, but at a lower price.[75] The defendant imported the drug without the documents required to establish that the drug met Dutch standards.[76] The documentation requirement effectively created a barrier to trade by putting importers at a disadvantage.[77] The United Kingdom manufacturing licensee was not compelled under Dutch law to provide the certification and was unwilling to cooperate with the importer, whereas sellers of Dutch produced drugs had already complied.[78] The ECJ ruled that national practices which restricted imports were "only compatible with the Treaty to the extent they are necessary for the effective protection of health and life of humans."[79] Thus, in this case, the requirement was unnecessarily restrictive and did not fall within the derogations permitted in the EEC Treaty.[80]

3. Non-Discrimination

Finally, a derogation is allowed if the restriction does not discriminate unnecessarily against a national from another Member State.[81] For example, in *Groener v. Minister for Education*,[82] a Dutch woman applied for a full-time permanent position as an art teacher at the College of Marketing and Design in Dublin.[83] Her application was turned down because she did not have sufficient knowledge of the Irish language, which was required by the Ireland education system.[84] She challenged this requirement on the grounds that it unfairly discriminated against

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fundamental interests of society.
Id.

73. Case 104/75, Officer van Justitie te Rotterdam v. de Peijper, [1976] E.C.R. 613, 636, [1976] 2 C.M.L.R. 271, 304.

74. *Id.* at 633, [1976] 2 C.M.L.R. at 302.

75. *Id.* at 613, [1976] 2 C.M.L.R. at 271.

76. *Id.*, [1976] 2 C.M.L.R. at 302.

77. *Id.* at 637, [1976] 2 C.M.L.R. at 305.

78. *Id.*, [1976] 2 C.M.L.R. at 305.

79. *Id.* at 636, [1976] 2 C.M.L.R. at 304.

80. *Id.* at 638, [1976] 2 C.M.L.R. at 306.

81. Colvin, *supra* note 63, at 485.

82. Case 379/87, Groener v. Minister of Education, [1989] E.C.R. 3937, [1990] 1 C.M.L.R. 401.

83. *Id.* at 3975, [1990] 1 C.M.L.R. at 412.

84. *Id.*

non-nationals and that it was incompatible with her Community rights to work anywhere in the EC without unnecessary restrictions.[85] The ECJ held that it was permissible to impose upon lecturers the requirement of proficiency in Gaelic, under Article 3(1) of Regulation 1612/68,[86] as long as the requirement was applied in a *proportionate* and *non-discriminatory* manner.[87]

V. IRELAND'S CONSTITUTIONAL PROTECTION OF THE RIGHT TO LIFE

Under the Constitution of Ireland, the sole and exclusive power to make laws for the State is vested in the Irish Parliament; no other legislative authority may enact laws affecting the State.[88] Likewise, the Supreme Court of Ireland has the final word in all legal proceedings.[89] Ireland's Constitution also states that no international agreement may become a part of the domestic law of the State without the approval of Parliament.[90] Therefore, when Ireland joined the EC in 1972 (membership effective, January 1, 1973), the Irish Constitution had to be amended to enable the State to become a member of the EC and to provide that European law would become part of Irish domestic law.[91]

A. *The Right to Privacy and Abortion Legislation in Ireland*

There has always been a ban against abortion in Ireland; more specifically, the right to life of the unborn child has always been

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85. *Id. See also* Case 94/71, Schlüter & Maack v. Hauptzollamt Hamburg-Jonas, [1972] E.C.R. 307, [1973] C.M.L.R. 113 (national requirements may be attached to rights arising under Community law, but not as a precondition to their exercise).

86. Regulation 1612/68, O.J. L 257 (1968). Member States are not entitled to impose on non-nationals conditions relating to linguistic knowledge required by reason of the nature of the post to be filled. *Id.*

87. *Groener*, [1989] E.C.R. at 3975, [1990] 1 C.M.L.R. at 412 (emphasis added). Equal access to jobs in a Member State does not apply to civil servants and, although that was not the issue before the ECJ, it may have colored the Court's opinion. *See also* Case 1/78, Kenny v. Insurance Officer, [1978] E.C.R. 1489, [1978] 3 C.M.L.R. 651. The Community is "not concerned with any disparities in treatment which may result . . . from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them in accordance with objective criteria and without regard to their nationality." *Id.* at 1498, [1978] 3 C.M.L.R at 668.

88. IR. CONST. art. 15.2.

89. IR. CONST. art. 34.4.6.

90. IR. CONST. art. 29.6.

91. IR. CONST. art. 29.4.3. "No provision of the Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State." *Id.*

protected by law in Ireland.[92] Under English common law, which had been directly applied in Ireland for over 800 years, abortion was held to be a "heinous misdemeanor."[93]

In 1861, The Offences Against the Person Act provided, in section 58, that the intentional killing of a child in the womb of the mother was a felony for both the abortionist and the mother.[94] Section 59 made it a misdemeanor to supply or procure items (i.e. poison, instruments, etc.) designed to cause an intentional miscarriage.[95] When Ireland separated from England in 1921 and became a free State, they drafted their own Constitution, providing that all laws previously in force would remain in full force so long as consistent with the 1937 Constitution or until amended or replaced by the Irish Parliment.[96]

In 1967, the English Parliament passed The Abortion Act, which significantly narrowed the scope of an unlawful abortion, essentially making abortion available on demand in England.[97] To counteract the change in the liberalized English law,[98] as well as to calm fears and

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92. Attorney General ex rel. Society for the Protection of Unborn Children (SPUC) v. Open Door Counselling Ltd., [1988] I.R. 593, 597 (Ir. H. Ct.), *aff'd in part, rev'd in part*, [1988] I.R. 618 (Ir. S.C.).

93. John A. Quinlan, Note, *The Right to Life of the Unborn - An Assessment of the Eighth Amendment to the Irish Constitution*, 1984 B.Y.U. L. REV. 371, 371-72 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 129-30 (4th ed. 1771)).

94. *Id.* at 372-73 (quoting 24 & 25 Vict. ch. 100 (1861)). Section 58 provides:

> Every Woman, being with Child, who with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious Thing . . . and whosoever, with Intent to procure the Miscarriage of any Woman . . . shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing . . . shall be guilty of Felony . . . to be kept in Penal Servitude for Life or for any Term not less than Three Years . . . .

Id. at 372.

95. *Id.* at 373 (quoting 24 & 25 Vict., ch. 100 (1861)).

96. *Id.*

97. *Id.* at 376. Under the Abortion Act, an abortion may be performed when the woman's life is in danger or when there is a substantial risk that the child would be seriously handicapped. Kate O'Callaghan, *Ireland's Other Troubles; After Centuries of Silence and Fear, the Irish Finally Confront the Reality of Abortion*, L.A. TIMES MAG., Jan. 3, 1993, at 22. *See* Table 1 at pp. 568-69; *see also* O'Callaghan, *supra*. The Act also allows for abortion if the mental or physical risk to the mother or her existing children is "greater than if the pregnancy were terminated." *Id.*

According to the law two doctors must approve the abortion and there must be a twenty-four hour wait before the abortion may occur. *Id.* In practice, the doctors will defer to the woman to make the choice that she is psychologically distressed and proceed with the abortion. *Id.*

98. Attorney General ex rel. SPUC v. Open Door Counselling, [1988] I.R. 593, 597 (Ir. H. Ct.), *aff'd in part, rev'd in part*, [1988] I.R. 618 (Ir. S.C.). Section 10 of the Act provides: "Nothing in this Act shall be construed as authorizing -
(a) the procuring of abortion,

reassure the large Catholic population that Ireland would not follow the legal precedence of the United States,[99] Ireland specifically stipulated that the Health (Family Planning) Act of 1973, which allows limited use of contraceptives could not be used "as a stepping-stone to some sort of abortion legislation."[100] This act reaffirmed both sections 58 and 59 of the Offences Against the Person Act.[101]

In the 1960s and 1970s, decisions of the Irish Supreme Court began to define and protect individual rights not explicit within the Irish Constitution.[102] In *Ryan v. Attorney General*,[103] Mrs. Ryan sought to prevent the Health Ministry from fluoridating the public water supply.[104] Although the Irish Supreme Court denied Mrs. Ryan's claim that the fluoridation of the water supply was unconstitutional, the court noted in dicta that the right to bodily integrity was a constitutionally-guaranteed individual right.[105] Subsequently, in the landmark decision of *McGee v. Attorney General*,[106] the Irish Supreme Court, by a four-to-one majority, recognized the right to marital privacy and the use of contraception within the marriage.[107]

(b) the doing of any other thing the doing of which is prohibited by Section 58 or 59 of the Offences Against the Person Act, 1861 . . .
(c) the sale, importation into the State, manufacture, advertising or display of abortifacients." *Id.* at 598.

99. Roe v. Wade, 410 U.S. 113 (1973) (establishing a woman's right to first and second trimester abortions in the United States).

100. Quinlan, *supra* note 93, at 396. *See also id.* at 380 n.59 (quoting Justice D'Arcy of the Irish High Court: "Decisions of the Supreme Court of the United States will always be received by this Court with the greatest of respect").

101. *Id.* at 393.

102. *Id.* at 377-83.

103. [1965] I.R. 294 (Ir. S.C.).

104. *Id.* at 341. Mrs. Ryan sought to have fluoridation of the water supply prevented on the constitutional grounds that such state action encroached on her parental rights of raising her children, as well as her personal right of bodily integrity. *Id.*

105. *Id.* at 295. "[T]he personal rights which may be invoked to invalidate legislation are not confined to those specified in Article 40 [of the Irish Constitution] but include all those rights that flow from the Christian and democratic nature of the State." *Id.* at 312.

106. [1974] I.R. 284 (Ir. S.C.).

107. *Id.* at 319-320. Mrs. McGee had a history of medical problems, and when she had four children within three years her doctor, fearing a further pregnancy would be life-threatening, fitted her with a diaphragm. *Id.* at 290. In conjunction with the diaphragm, the doctor prescribed the use of a spermicidal jelly. *Id.* Since the contraceptive jelly was unavailable in Ireland, the plaintiff sent her prescription to England to have it filled. *Id.* When the prescribed contraceptive was mailed back to the plaintiff, the Irish customs authorities seized the package since the importation of contraceptives was prohibited by the Customs Consolidation Act. *Id.* It is interesting to note that the importation of the contraceptive was illegal, but its use was not. Quinlan, *supra* note 93, at 379.

During the 1970s and early 1980s, in the wake of *McGee*[108] in Ireland, *Roe v. Wade*[109] in the United States, and the tendency for Irish courts to give great credence to decisions of the United States Supreme Court,[110] concern grew among Irish conservatives that there needed to be an amendment to the Irish Constitution to make certain that the life of the unborn child was forever protected in Ireland.[111] Thus the Pro-Life Amendment Campaign (PLAC), begun in the early 1980s, received the endorsement of the Professors of Obstetrics and Gynaecology in the Irish Universities, as well as the leaders of the major political parties in Ireland.[112] Although the idea of the amendment had overwhelming and wide-spread support, the exact wording of the amendment was the subject of a national controversy.[113]

The debate centered around the right to life of the mother versus the right to life of the unborn child.[114] In cases where the mother had cancer of the womb, the only available treatment would be to perform the operation to remove the cancerous organ thereby killing the fetus.[115] Other cancers, however, like breast cancer, would present a dilemma to the doctor between saving the life of the mother versus the "absolute right to life of the unborn child."[116]

The plaintiff relied upon three United States Supreme Court decisions: Eisenstadt v. Baird, 405 U.S. 438 (1972) (decision to use contraceptives is one of individual privacy belonging to both single and married persons), Griswold v. Connecticut, 381 U.S. 479 (1965) (permitting married couples to use contraceptives), and Poe v. Ullman, 367 U.S. 497 (1961) (refusal by court to overturn an anti-contraception law which had not been enforced for 80 years because issue was not ripe). *McGee*, [1974] I.R. at 319 (Ir. S.C.). *See infra* note 127 for a description of the Ireland court system.

108. [1974] I.R. 284 (Ir. S.C.).

109. 410 U.S. 113 (1973).

110. See Quinlan, *supra* notes 93 and 100, discussing Irish deference to United States Supreme Court decisions prior to *Roe v. Wade*.

111. Quinlan, *supra* note 93, at 383. The fear that abortion might become legal was based, in part, on the fact that 3,600 Irish women went to England to obtain an abortion in 1981. *Id.* (*citing* O'Leary, *The Management of Problem Pregnancies*, ABORTION NOW 69 (1983) (estimating numbers of Irish women who went to English clinics and used their Irish address)).

According to the British Office of Population, Censuses and Surveys, 4,154 Irish women traveled to England in 1991 to terminate unwanted pregnancies. O'Callaghan, *supra* note 97, at 22. Some Irish women use the address of an English relative or make up an English address to avoid embarrassment back home, and therefore, the exact counts are not an accurate measure. *Id.*

112. Quinlan, *supra* note 93, at 383-84.

113. *Id.* at 386.

114. *Id.*

115. *Id.* at 387.

116. *Id.* at 388 (quoting Attorney General Sutherland from THE IRISH TIMES, Feb. 16, 1983). This dilemma is best illustrated by the unfortunate case of Sheila Hodgers.

After ten months of debate and negotiation over the amendment's wording, the controversial Eighth Amendment was incorporated into the Irish Constitution by roughly a two-to-one majority in September of 1983.[117] The Eighth Amendment, Article 40, section 3, subsection 3, reads: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."[118]

B. *Irish Case Law on Abortion*

The mood of the Irish Supreme Court changed to incorporate the conservative trend which resulted from the debate over the Eighth Amendment referendum.[119] Consequently, four months before the amendment was ratified, the Supreme Court in *Norris v. Attorney General*,[120] was reluctant to recognize additional fundamental rights that were annunciated in *Ryan*,[121] *An Bord Uchtala*,[122] and *McGee*.[123] The *Norris*[124] decision, purportedly placing a "sacred trust" on the Irish courts to uphold morality and the "Christian beliefs" of Irish society, determined that it was constitutionally permissible for Ireland to criminalize homosexual conduct.[125]

In December of 1986, the controversial decision of *Attorney General ex rel. Society for the Protection of Unborn Children (SPUC) v. Open Door Counselling Ltd.*[126] was handed down by the Irish High Court.[127] In

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In 1983, Sheila became pregnant with her third child while in remission from breast cancer. Alan Murdoch, *Casualties of Ethics: The Cradle and the Grave*, INDEPENDENT, June 14, 1992, at 10. At the advice of her doctors, she discontinued the cancer drugs and, within a month, the tumor had reactivated. *Id.* Bound by the hospital's ethics code, the Bishop's Contract, the doctors could not give her x-rays, chemotherapy, cancer drugs, or pain killers for fear of damaging the fetus. *Id.* When Sheila's husband inquired about aborting the fetus to save her life, there was no reply. *Id.* She gave birth prematurely after a seven month pregnancy, but the baby died almost immediately. *Id.* Sheila died two days later. *Id.* This paradox between the mother and the fetus remains unresolved in light of the decision in *Attorney General v. X*, 12 I.R.L.M. 401 (1992). *See infra* notes 149-79 and accompanying text.

117. Quinlan, *supra* note 92, at 390.

118. IR. CONST. art. 40.3.3.

119. Quinlan, *supra* note 93, at 394.

120. 1984 I.R. 36 (Ir. S.C.).

121. 1965 I.R. 294 (Ir. S.C.). *See supra* notes 103-05 and accompanying text.

122. 1980 I.R. 32 (Ir. S.C.)(dealing with the constitutional rights of an unmarried mother in a custody case).

123. 1974 I.R. 284 (Ir. S.C.). *See supra* notes 106-08 and accompanying text.

124. 1984 I.R. 36 (Ir. S.C.).

125. *Id.* at 64.

126. 1988 I.R. 593 (Ir. H. Ct.), *aff'd. in part, rev'd in part*, 1988 I.R. 618 (Ir. S.C.).

127. Criminal law in Ireland is administered through the Irish courts, which consist of a District Court, a Circuit Court, the High Court (also referred to as the

Open Door Counselling, the defendant offered a range of clinical services to pregnant women, including counselling and assistance on abortion.[128] The Society for the Protection of Unborn Children (SPUC) went to the High Court to seek an injunction against the defendants, preventing them from counselling or assisting any woman seeking an abortion.[129] The plaintiff contended that the clinic's activities were "corrupt[ing] public morals" and "promoting depraved moral standards."[130] The defendants claimed that they were exercising their rights to freedom of expression, freedom to communicate, and to free access of information as guaranteed by Article 29, Section 4(3) of the Irish Constitution, which incorporated the EEC Treaty into Irish law.[131] The High Court, concluding that the law of the European Communities did not apply to the issue and facts of the case because the activities of the defendants took place entirely within Ireland, issued an injunction against Open Door Counselling, preventing them from providing any further abortion counselling to Irish women.[132] On appeal to the Irish Supreme Court, the issue was found to be whether the activities of the clinic to assist in the destruction of the life of the unborn were protected by the freedom of expression under the EEC Treaty.[133] The Irish Supreme Court held that the defendants should be permanently restrained from offering abortion assistance, and that since the order of the court was to restrain activities within Ireland, Article 177 of the EEC Treaty did not apply.[134]

Central Criminal Court), the Court of Criminal Appeal, and the Irish Supreme Court. V.T.H. DELANY, THE ADMINISTRATION OF JUSTICE IN IRELAND 46-56 (1975). The District Court has limited jurisdiction to deal with only minor offenses with penalties of six months or less and fines limited to £100. *Id.* at 46. The Circuit Court handles most indictable offenses except treason, murder, attempted murder, and similar major offenses under the Offenses against the State Act 1939. *Id.* at 48. The High Court has original jurisdiction for those major offenses which are not heard at the Circuit Court (abortion is included in these offenses). *Id.* at 49.

The Circuit Court is the lowest level appellate court, hearing appeals from the District Court. *Id.* The Court of Criminal Appeal hears appeals by persons convicted in the Circuit Court or the High Court. *Id.* at 51. The Supreme Court usually hears appeals from the Court of Criminal Appeal but is not precluded from hearing a direct appeal from the High Court. *Id.* at 53. The Court of Criminal Appeals consists of three judges while the Supreme Court is comprised of five judges. *Id.* at 51, 53.

128. *Open Door Counselling*, [1988] I.R. at 601 (Ir. H. Ct.).

129. *Id.* at 600.

130. *Id.*

131. *Id.* at 605.

132. *Id.* at 618.

133. *Id.* at 626 (decision of the Irish Supreme Court).

134. *Id.* *See also* EEC Treaty, *supra* note 17, art. 177. Article 177 provides that: "[w]here any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a

What is noteworthy about *Open Door Counselling* is the discussion about the superiority of fundamental rights.[135] In a sort of moral absolutism, the court found that fetal rights were superior to other competing constitutional rights, and because of the "sacred trust" conferred upon the courts by the Eighth Amendment of the Irish Constitution, the right of the fetus must be "preserved and defended."[136]

An equally controversial decision, *Society for the Protection of Unborn Children v. Grogan*,[137] raised the issue of whether a group of students could publish and distribute information concerning the identity and location of clinics in the United Kingdom where abortions were performed.[138] Based on the defendant's claim that the right to publish and distribute the information was protected under the EEC Treaty, the High Court referred the case to the ECJ for a preliminary ruling pursuant to Article 177.[139]

The Irish Supreme Court, on an appeal brought by SPUC, the plaintiff, decided to hear the case, even though the decision made by the High Court was merely to refer the issue of the case to the ECJ.[140] The defendant challenged the jurisdiction of the Irish Supreme Court on the ground that only a "decision" by the High Court could be appealed to the Irish Supreme Court.[141] The Supreme Court found that the High Court had actually made two "decisions," the first in referring the

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preliminary decision on this question, request the Court of Justice to give a ruling thereon." *Id.*

135. [1988] I.R. 593, 617 (Ir. H. Ct.).

136. *Id.* at 606-07.

> The right to life of the unborn is acknowledged by the Constitution and this right necessarily implies the right to have that right preserved and defended. . . . [T]he court is entitled and indeed obliged, on [the Attorney General's] application, to restrain the activities of the defendants if satisfied that such activities constitute an interference with the right to life of the unborn or a failure to respect, vindicate and preserve that right.

Id. at 607.

See also James Friedman, *On the Dangers of Moral Certainty and Sacred Trusts*, 10 DUBLIN U. L.J. 71, 77 (1988).

137. [1989] I.R. 753 (Ir. H. Ct.), *aff'd in part, rev'd in part* [1989] I.R. 760 (Ir. S.C.).

138. *Id.* at 761.

139. *Id.* at 759. *See also* EEC Treaty, *supra* note 17, art. 177. *See infra* notes 195-201 and accompanying text for discussion of the ECJ decision in *Grogan*.

140. *Grogan*, [1989] I.R. at 761. In its decision, the High Court stated that:

> [A] decision of the Court of Justice of the European Communities on the questions to be formulated and submitted to the Court is necessary to enable this Court to give judgment on the plaintiff's said motion . . . [that the] question be referred to the said Court . . . for a preliminary ruling in accordance with Article 177 of the Treaty . . . .

Id. at 761-62.

141. *Id.* at 761.

issue to the ECJ and the second in refusing to grant the requested injunction to SPUC.[142] Since at least an eighteen month delay would be required to get a decision from the ECJ, the delay in issuing the injunction was equivalent to a decision not to grant one.[143] Hence, the Irish Supreme Court found that it did have jurisdiction to hear the plaintiff's appeal.[144]

The defendants argued that the right to travel to another Member State to receive abortion services had, as a corollary, the right for women in Ireland to receive information about abortion clinics in another Member State.[145] The court was unable to distinguish the merits of *Grogan* from those of *Open Door Counselling*, based on the premise that information on abortions for pregnant women was already resolved.[146] An injunction, therefore, was issued to restrain an activity which had already been ruled to be unconstitutional and unlawful, and the court held that no question of European law was at issue.[147]

In reaching its decision, the Supreme Court of Éire stated that, if and when a decision came down from the ECJ, that decision would have to be considered in light of Ireland's constitutional provisions. The final word would have to be that of the Irish Supreme Court to resolve the conflict between the right to life of the unborn and the right to freedom of expression within Ireland.[148] In reaching its decision, the court realized that the information in the students' pamphlets could be

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142. *Id.* Justice Walsh severely criticized Justice Carroll of the High Court for referring the case to the ECJ because "such power does not give completely free and untrammelled power in respect to all other issues in the case." *Id.* at 768. A national judge is free to resolve issues arising under the EEC Treaty without referring them to the ECJ. *Id.* The failure to reach a decision in this case resulted in a "withdrawal, for the period at least, of the protection of the unborn lives in being." *Id.*

143. *Id.* at 761. The court accepted jurisdiction in this case because when the matter was presented before the High Court "it was clear beyond all doubt that the activities complained of were contrary to the Constitution." *Id.* at 767. However, for the judge to suspend any provision of the Constitution while awaiting a decision from another court was to act irresponsibly. *Id.*

144. *Id.* at 768.

145. *Id.* The ECJ had already determined that the right to travel to receive services was established in *Luisi and Carbone v. Ministero del Tesoro*, [1984] E.C.R. 377, [1985] 3 C.M.L.R. 52. *See supra* notes 42-47 and accompanying text.

146. *Grogan*, [1989] I.R. at 764.

147. *Id.* The court stated that:

> [W]here the right sought to be protected is that of a life, there can be no question of a possible or putative right which might exist in European law as a corollary to a right to travel so as to avail of services, counterbalancing as a matter of convenience the necessity for an interlocutory injunction.

Id. at 765.

148. *Id.* at 769. The court elaborated: "[i]t cannot be one of the objectives of the European Communities that a member state should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantees for the protection within the State of a fundamental right." *Id.*

obtained from a variety of foreign magazines and the mere granting of the injunction would not curtail the activities of a woman who really wanted to find out about a foreign abortion clinic.[149] The court, however, felt compelled to enforce the constitutional guarantee for the right to life, otherwise "the rule of law will be set at nought."[150]

C. *Attorney General v. X*

The plight of a fourteen-and-a-half-year-old schoolgirl, who became pregnant after being raped by a friend of the family, raised the question of the right to life and the freedom of EC citizens to travel when her parents sought to take her to England for an abortion.[151] Attempting to provide proof of paternity, the girl's parents contacted the gardaí (Irish police) and inquired whether the aborted fetus could be used for DNA testing.[152] The gardai asked the office of the Director of Public Prosecutions about the admissibility of DNA evidence and were informed that it would not be admissible in court.[153] Although the parents were distressed to learn this, nonetheless, they proceeded with their plans to take the girl to England for an abortion the following day.[154] While making arrangements for the abortion in England, an Irish court issued a temporary injunction preventing them from having the abortion performed in England.[155] The parents decided to comply

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149. *Id.* at 771.

150. *Id.*

151. Attorney General v. X, 12 I.L.R.M. 401, 405-06 (Ir. H. Ct.)(1992), *rev'd.* 12 I.L.R.M. 414 (Ir. S.C.) (1992).

152. *Id.* at 406.

153. *Id.* According to the Status of the Children Act, enacted in 1987, this was not entirely correct. Status of the Children Act §§ 38(1), 39(1). Section 38(1) of the act reads:

> In any civil proceedings before a court in which the parentage of any person is in question, the court may, either of its own motion or on an application by any party . . . give a direction for the use of blood tests [defined by § 37 of the Act as genetic fingerprinting] for the purpose of assisting the court to determine whether a person named in the application . . . is or is not a parent of the person whose parentage is in question . . . .

Id. Section 39(1), however, provides that the blood sample may not be taken without the party's consent. *Id. See* JPD v. MG, [1991] I.R. 47 (Ir. S.C.).

The gardaí and legal authorities later reversed their position on the admissibility of DNA fingerprint evidence. Alan Murdoch, *Irish Rape Victim to Undergo DNA Tests*, INDEPENDENT, Mar. 4, 1992, at 2. The original decision was thought to have been based on a legal view which prohibited the state from being a party to an abortion-related procedure. *Id.* There had been 48 DNA samples sent to British labs for testing for previous cases, but this was the first case involving fetal tissue. *Id.*

154. *Attorney General v. X*, 12 I.L.R.M. at 406.

155. *Id.* The summons contained the following orders:

> (a) An order restraining the defendants . . . from interfering with the right to life of the unborn as contained in Article 40.3.30 of the Constitution of

with the court order and to return to Ireland, making it clear that if a permanent injunction was not granted they would proceed with the planned abortion.[156]

After their return to Ireland, the parents took the girl to a psychologist, who assessed her emotional state as being socially withdrawn and suicidal.[157] Evidence at trial also revealed that the girl had told a member of the gardaí that she felt like "throwing herself downstairs," and in the presence of another member of the gardaí, she intimated that suicide would be her only way out of her problem.[158]

At trial, the Irish High Court issued a permanent injunction prohibiting X from travelling to England.[159] In its decision, the High Court addressed the defendants' argument that the right to travel to procure services was protected under the EEC Treaty as a fundamental right for all EC citizens.[160] While recognizing that this right to travel existed under the EEC Treaty, the High Court found that there is also a public policy derogation that could be invoked by a Member State to prohibit such travel.[161] The court relied on the restrictions imposed by national law, "unequivocally expressed" by the electorate through a constitutional amendment, that *required* the court to vindicate the right to life of the unborn.[162] Under these circumstances, Community law

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> Ireland on such terms as to this Honourable Court shall seem meet and just.
> (b) An order restraining . . . defendant[s] from leaving the jurisdiction . . . [or] from assisting the first defendant to leave the aforesaid jurisdiction for a period of nine months from the date hereof or such other period as may be specified . . . .
> (c) An order restraining the first named defendant . . . from procuring or arranging a termination of pregnancy or abortion whether within or without the jurisdiction . . . .

Id. at 408.

156. *Id.* at 406.

157. *Id.* at 407. The opinion of the psychologist was that the girl "coldly expressed a desire to solve matters by ending her life." *Id.* In his report, he wrote that "the psychological damage to her of carrying a child would be considerable and that the damage to her mental health would be devastating." *Id.*

158. *Id.* at 406-07.

159. *Id.* at 414.

160. *Id.* at 412. The ECJ had already handed down its ruling on the *Grogan* case concluding in part that abortion was a service within the meaning of Article 60 of the Treaty. *See* Case 159/90, S.P.U.C. v. Grogan, [1991] 3 C.M.L.R. 849, 861; *see also infra* notes 196-200 and accompanying text.

161. *Attorney General v. X,* 12 I.L.R.M. at 412.

162. *Id.* at 413 (emphasis added). The High Court relied on the ECJ decisions of R. v. Bouchereau, [1977] E.C.R. 1999, and Van Duyn v. Home Office, [1974] E.C.R. 1337, in its discussion of public policy derogations. *Id.* at 412-13. *See supra* note 61 for discussion of ECJ decisions. Noting in particular that the concept of public policy may vary spatially from country to country and temporally from time period to time period. 12 I.L.R.M. at 413 (citing Case 41/74, Van Duyn v. Home Office,

allowed the court an "area of discretion" to derogate from the Treaty and to impose the necessary restrictions on travel.[163]

The defendants appealed the High Court decision, arguing that the derogation by the Irish State under the Eighth Amendment failed to meet the proportionality requirements established under Community law.[164] The Irish Supreme Court decided to set aside the injunction because there was a real and substantial risk to the life of the mother.[165] It did, however, address the right to travel within the realm of *obiter dicta.*[166]

The Supreme Court recognized that the right to travel exists as an "unenumerated constitutional right," fundamental to the concept of a free society.[167] An order to restrain a person from travelling outside of the jurisdiction would constitute the suspension of that right.[168] Therefore, it was necessary for the court to "harmonise" the right to travel against the competing right to life of the fetus, and where such harmonisation is not possible, the court should "apply a priority of rights."[169] Under this priority scheme, the court would have to choose the right to life of the unborn child over the right of the mother to

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[1974] E.C.R. 1337, 1350, [1975] 1 C.M.L.R. 1, 17. *See generally supra* notes 60-92 and accompanying text.

163. *Attorney General v. X,* 12 I.L.R.M. at 413 (Ir. H. Ct.). The High Court elaborated by insisting:

> [There is] no provision or principle of community law which would prohibit the exercise of the discretionary power to derogate in the manner contained in the Eighth Amendment. On the contrary, community law already recognises that within the Community wide cultural differences exist and has permitted derogations which flow from such differences. I can see no reason why it should refuse to do so when the derogation by a member state arises because of deeply held convictions on moral issues. Indeed, I think the attainment of the fundamental objectives of the treaty is enhanced by laws which assist in the development of a community in which legitimate differences on moral issues are recognised and which does not seek to impose a spurious and divisive uniformity on its members on such issues.

Id. at 413-14.

164. *Id.* at 418. *See supra* notes 73-80 and accompanying text for discussion of proportionality.

165. *Attorney General v. X,* 12 I.L.R.M. at 427. The Supreme Court felt that it would be almost impossible to prevent a young girl, in a situation such as X, from "self-destruction" if she decided to carry out her threat of suicide. *Id.* Therefore, as a matter of probability, there was a "real and substantial risk to the life of the mother . . . which can only be avoided by termination of her pregnancy." *Id. See supra* notes 114-18 and accompanying text.

166. *Attorney General v. X,* 12 I.L.R.M. at 428 (Ir. S.C.). "[B]eing matters of considerable public interest, it seems to me that [the court] should express [its] views." *Id.*

167. *Id. See* State (M) v. Minister for Foreign Affairs, [1979] I.R. 73 (Ir. H. Ct.).

168. *Attorney General v. X,* 12 I.L.R.M. at 428.

169. *Id.* at 429.

travel.[170] The court stated unequivocally that there existed ample power for the court to "vindicate and defend the right to life of the unborn."[171] This authority by the court was limited to only those situations where the woman wishing to leave the jurisdiction was actually pregnant and was leaving for the purposes of having an abortion.[172]

The enforcement of such an injunction is questionable. There is no sure way to determine that a woman, wanting to travel abroad, is pregnant, and if so, that her intention in leaving the country is to abort the fetus.[173] Realizing the untenable predicament this posed, the court stated that no court should make a futile or unenforceable order.[174] Nevertheless, the court found that in this case the injunction had been very effective in preventing the abortion.[175] The court felt obligated to vindicate and defend the right to life of the unborn child; therefore, it was necessary to discharge its constitutional duty by restricting the travel of the mother.[176]

The Court was split three-to-two in the decision of this case. In one of the more impassioned opinions, Justice McCarthy[177] raised the question: just how broadly does this power extend?[178] Does it extend to *any* pregnant woman within the jurisdiction of the court, regardless of nationality, citizenship, or even where conception took place?[179] Or

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170. *Id.* The argument that the mother of an unborn child has an absolute right to travel was seen by the court to be invalid and unsustainable by law. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 430. Restraining a woman from leaving the country for a specific time period and for a specific purpose "would be impossible to enforce except in the negative sense of possible imposition of punishment or sanctions after the order had been disobeyed. The imposition of such penalties, except . . . [as] a deterrent, would not be an effective defence of the right of the unborn to life." *Id.*

174. *Id.* at 429. The duty of the court to protect the life of the unborn child only reaches so far as is "practicable." *Id.* at 430. *See supra* note 117 and accompanying text for the wording of the constitutional amendment.

175. *Attorney General v. X*, 12 I.L.R.M. at 430.

176. *Id.* The court noted other instances where the right to travel was not absolute. *Id.* at 443. A person who is out on bail may not leave the court's jurisdiction and wards of the court must have the express permission of the court to leave. *Id.*

177. Justice McCarthy and his wife were killed in an automobile accident while on holiday in Spain the first weekend in October 1992. Alan Murdoch, *Obituary: Judge Niall McCarthy*, THE INDEPENDENT, Oct. 5, 1992.

178. *Attorney General v. X*, 12 I.L.R.M. at 451.

179. *Id.* The court examined two examples. First, a pregnant girl residing in London, who came to Ireland for a holiday to get away from her ordeal, and was prevented from returning home because she had resolved to abort the fetus. *Id.* at 453. Second, the court considered the dilemma of a citizen of another State, who did not know she was pregnant until she arrived in Ireland, and wished to return home to terminate the pregnancy. *Id.*

is the restriction on travel unique to Irish citizens?[180] McCarthy concluded that the right to travel to procure a service, which is lawful in one location but illegal in Ireland, must become subject to the laws of the other State.[181]

VI. THE EUROPEAN COMMUNITY INSTITUTIONS AND ABORTION

A. *Abortion Legislation within the Member States*

The twelve Member States of the EC have the right to create their own legislation in matters affecting family life and morality, and each state has its own policies and legislation concerning abortion.[182] Although the legislation is unique to each Member State, there are four categories that loosely define the grounds for abortion in these twelve countries.[183] These categories are: (1) elective abortion on demand; (2) abortion for cause with a doctor's consent; (3) abortion restricted to limited circumstances with a doctor's consent; and (4) complete restriction on abortion.[184]

National boundaries are not inconsequential to procuring abortion services, and it is worth noting that the two countries with the most liberal policies on obtaining an abortion, the Netherlands and the United Kingdom, are closest to the two countries with the most restrictive abortion laws, West Germany and Ireland.[185] Free travel, therefore, means that those States with more restrictive laws will be powerless to stop the procurement of abortion services by their nationals who wish to travel to another EC country. As a result, a Member State's internal policies regulating morality have been diminished.

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180. *Id.*

181. *Id.* Justice McCarthy furthers his analysis by examining acts conceived in one State but carried out in another:

> Treason is thought to be the gravest of crimes. If I proclaim[ed] my intent to go to the other country there to plot against the government here, I may, by some extension of the law against sedition, be prosecuted and, consequently, subject to detention here, but I cannot be lawfully prevented from travelling to that other country there to plot the overthrow, since that would not be a crime in the other country. I go further. Even if it were a crime in another country, I cannot lawfully be prevented from leaving my own country for that purpose.

Id. at 453-54.

182. MARY A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 13 (1987); *see also* Reed Boland, *Recent Developments in Abortion Law in Industrialized Countries*, 18 LAW, MEDICINE & HEALTH CARE 404 (1990) and Reed Boland, *Recent Developments in Abortion Law*, 19 LAW, MEDICINE & HEALTH CARE 267 (1991). *See* Table I, at 568-69, for a compilation of abortion regulations within the Member States of the EC.

183. Glendon, *supra* note 182, at 13.

184. *Id.*

185. *See infra* notes 186-94 and accompanying text.

TABLE I

ABORTION REGULATIONS IN THE EUROPEAN COMMUNITY

COUNTRY	*LEGISLATION*	*REGULATIONS/CONDITIONS*
BELGIUM	Penal Code, arts. 348-353, amended by Law No. 441 (1990), 41 I.D.H.L. 447-49 (1990)	*With consent* of doctor during first 12 weeks of pregnancy. 6 day waiting period. 2d trimester: approval of 2 doctors based on risk to woman's life/health or fetal health/handicap. COUNSELLING REQUIRED.
DENMARK	Law No. 350 (1973), amended by Law No. 254 (1975), 27 I.D.H.L. 113 (1976)	*On demand* during first 12 weeks. 2d trimester: cases of rape/sex crimes, risk to woman's life/health, or risk to fetal health or handicap, may be obtained with permission of a committee of 4. NO NON-RESIDENTS allowed.
FRANCE	Law No. 75-17 (1975), 26 I.D.H.L 351-56 (1975), amended by Law No. 79-1204 (1979), 31 I.D.H.L. 505-07 (1980)	Obtained *with consent* of doctor 12 weeks from last menstrual period. 1 week waiting period. 2d trimester: risk to woman's life or physical health, or risk to fetal health/handicap with certificate signed by 2 doctors. COUNSELLING REQ'D.
GERMANY EAST ---- WEST	Gesetzblatt der Deutschen Demokratischen Republik, (1972), 23 I.D.H.L. 767-70 (1972); W. German Criminal Code, §§ 218-19(c), amended by Bundesgesetzblatt I (1976), 27 I.D.H.L. 562 (1976)	*On demand* during first 12 weeks. 2d trimester: serious threat to woman's life or serious harm to fetus. *Restricted* in first 12 weeks to only serious risk to woman's life/health, risk to fetal health/handicap, cases of rape, or psychological stress of pregnancy intolerable. 2d trimester only risk to woman or fetus. Must receive counselling and approval of 2 doctors.
GREECE	Law 1609 (1986), 37 I.D.H.L. 793-94 (1986)	*On demand* in first 12 weeks. 2d trimester: Rape/sex crimes, risk to woman's life/health/psychological health, risk to fetal health/handicap.
IRELAND	IR. CONST. art. 40.3.3 (1983)	*Restricted* from moment of conception.

ITALY	Law No. 194 (1978), 29 I.D.H.L. 589 (1978)	*With consent* of doctor (certification) in first 90 days. 1 week waiting period. 2d trimester: woman's life/health, fetal health/handicap, rape/sex crimes. FORCED COUNSELLING
LUXEMBOURG	Law No. 15, amending Penal Code, art. 353 (1978), A.R.P.L. 1978, 22 (1978)	*With consent* of doctor (certification) during first 12 weeks. 1 week waiting period. 2d trimester: woman's life/health/mental health, fetal health/handicap, rape/sex crimes. MANY GO TO NETHERLANDS.
NETHERLAND	Staatsblad, § 257 (1981), 32 I.D.H.L. 442 (1981)	*On demand* (joint decision between woman and doctor) up to first 24 weeks. 5 day waiting period.
PORTUGAL	Penal Code, arts. 139.•-41•, (1982), amended by Law No. 6184 (1984), 35 I.D.H.L. 768 (1984)	*Restricted* during first 12 weeks to risk of woman's life/health/mental health, fetal health/handicap, rape/sex crimes. Requires consent of 2 doctors. 3 day waiting period. Weeks 12-16 in cases of fetal health/handicap.
SPAIN	Organic Law No. 9 (1985), amending Codigo Penal, §§ 411-17, 36 I.D.H.L. 614-15 (1985)	*Restricted* during first 12 weeks to rape/sex crimes where rape is *reported*. Risk to woman's life/health/mental health at any time with doctor's consent. Risk to fetal health/handicap up to 22 weeks with consent of 2 doctors.
UNITED KINGDOM	Abortion Act (1967), amended (1990).	*On demand* with consent of 2 doctors up to first 24 weeks. Risk to woman's life/health/mental health, fetal health/handicap at any time.

Due to the diversity of laws governing abortion among the twelve Member States, there is a great deal of pressure on the ECJ, as well as the other EC institutions, to resolve border conflicts arising from restricting the free movement of pregnant women.[186]

B. *The European Parliament*

Under Article 137 of the Treaty, the representation of the people of the Member States is embodied in the European Parliament, which performs a function of consultation and co-operation with the European Council

186. Spahn, *supra* note 57, at 19.

and the European Commission.[187] One of the most noteworthy free travel incidents involving the European Parliament occurred at the border between Germany and Holland at Gronau, West Germany in North Rhine-Westphalia.[188]

This incident, known as the "Kathrin K." case, involved a woman who had gone out of the country to secure an abortion in neighboring Holland.[189] She was stopped upon her return by the German border patrol after they discovered "incriminating evidence" in her car that indicated that she had an illegal abortion out of the country.[190] Kathrin was forced to undergo an involuntary gynecological examination, which confirmed the guards' suspicions. She was charged with the criminal violation of Paragraph 218 of the West German Criminal Code.[191]

In the wake of this incident, The Justice Ministry of the Netherlands protested the action by the German border patrol, arguing that the involuntary gynecological examination violated Articles 59 and 60 of the EEC Treaty, which insure the free movement of persons for the purpose of procuring services.[192] The protest was taken before the European Parliament, where the actions of the German border patrol were

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187. EEC Treaty, *supra* note 17, art. 137. *See also* LASOK & BRIDGE, *supra* note 25, at 247.

188. Karen Y. Crabbs, Note, *The German Abortion Debate: Stumbling Block to Unity*, 6 FLA. J. INT'L. L. 213, 223 (1991).

189. *Id.*

190. *Id.* West German law prohibits citizens to have an abortion unless the woman receives a *Beratungsschein* or consultation certificate from a West German doctor prior to the abortion. *Id.* at 222. However, in East Germany, abortion has been legal since the 1950's. *Id.* at 215. This conflict over abortion has created a major obstacle to the unification of Germany. *Id.* at 216.

191. *Id.* at 223. West Germany had passed an Abortion Reform Act in 1974 but the Constitutional Court (West Germany's high court which deals only with constitutional issues) struck the law down, saying that the fetus' right to life and the duty to protect that right were overwhelming State interests when weighed against the woman's right to choose. *Id.* at 220. In place of the Abortion Reform Act, Germany codified Paragraph 218 of the Criminal Code, which only allows abortion when: the woman's health is in danger; the pregnancy resulted from criminal activity; the unborn child has an "incurable defect"; or when the pregnancy would be adversely affected by "overall poor social conditions." *Id.* A conviction for violation of Paragraph 218 can carry a sentence of up to three years imprisonment. *Id.* at 223.

What is ironic about Kathrin's plight is that she was East German and had escaped from East Germany three years before to gain her "freedom" from Communism, on the West German side of the Wall. *Id.* Had she remained in East Germany, there would have been no criminal repercussions from her ill-fated trip to the Netherlands. *Id.*

192. Spahn, *supra* note 57, at 18. *See also* EEC Treaty, *supra* note 17, arts. 59 and 60.

condemned as a "humiliating practice" and contrary to the goals of free movement of persons.[193]

Three months after this resolution, the West German government dropped all charges against Kathrin K.[194] The German government, however, still maintains that it has the authority to prosecute its citizens for extraterritorial abortions.[195]

C. *The European Court of Justice*

The ECJ confronted the abortion issue in the appeal from the Irish High Court in the case of S.P.U.C. v. Grogan.[196] The questions presented to the Court for preliminary ruling were: 1) does abortion constitute a service; 2) can a Member State prohibit the distribution of information concerning clinics offering abortions; and 3) is there a right under Community law for a person in a State where the service is constitutionally prohibited to distribute information concerning that service offered in another State where the service is legal?[197]

On the first question, the Court held that medical services, and therefore abortion services, were to be classified under the definition of "service" under Article 60 of the EEC Treaty.[198] The Court construed the second question very narrowly, holding that, since the medical clinics in the United Kingdom were not themselves involved in the distribution of information, and since the students were not acting as the agents of these clinics, there was no protection for Grogan under Article 59

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193. Parliamentary Resolution, O.J. C106/113 (1991). The resolution read in relevant part:

> The European Parliament, recognizing that the question of abortion is a matter for the Member States in accordance with the principle of subsidiarity,
>
> 1. Believes that the internal borders of the Community may not be used to threaten citizens with prosecution for activities that are perfectly legal in some Member States but not in others;
>
> 2. Condemns this humiliating practice . . . which is contrary to the aim of the free movement of persons between the Member States of the Community;
>
> 3. Expresses concern at this violation of the fundamental right of every individual to physical integrity;
>
> * * *

Id.

194. Spahn, *supra* note 57, at 18.

195. *Id.*

196. Case C-159/90, [1991] 3 C.M.L.R. 849. *See supra* notes 140-50 and accompanying text for discussion of the facts and the Irish Supreme Court's decision in *Grogan*.

197. Grogan, [1991] 3 C.M.L.R at 856.

198. *Id.* at 890. *See also*, Cases 286/82 and 26/83, Luisi and Carbone v. Ministero del Tesoro, [1984] E.C.R. 377, [1985] 3 C.M.L.R. 52; *see also supra* notes 41-46 and accompanying text.

concerning the free movement of services.[199] Finally, the Court held that the freedom of expression and the freedom to receive and impart information were beyond its jurisdiction to decide, because the national legislation at issue was outside the scope of Community law.[200]

In announcing its decision, the Court distinguished *Grogan* from its judgment in *GB-INNO-BM*[201] by inventing the "economic interest of the speaker test."[202] This invention may have been a way for the Court to avoid deciding this very controversial, highly emotional, and potentially divisive issue.

D. *The European Council*

The European Council has also gotten involved in the abortion controversy through the drafting of the Maastricht Treaty.[203] Incorporated into the Maastricht Treaty is the "Irish Exception" Protocol, which provides: "Nothing in the Treaty on the European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the

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199. *Grogan*, 3 C.M.L.R at 891.

200. *Id.* at 893. The freedom of expression and freedom to receive and impart information are guaranteed under Article 10(1) of the European Convention of Human Rights (E.C.H.R.), but the ECJ does not have any authority to compare national legislation lying outside the scope of EEC law with the E.C.H.R. Case 12/86, Demirel v. Stadt Schwabisch Gmund, [1987] E.C.R. 3719, 3754, [1989] 1 C.M.L.R. 421-439-40.

See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1950, art. 10, 213 U.N.T.S. 221. Article 10 states that: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . . ." *Id.* at 230.

See also Grogan, [1991] 3 C.M.L.R. at 850 (citing Case 260/89, Elliniki Radiophonia Tileorasi v. Dimotiki Etairia Pliroforissis (not yet reported), stating that when national legislation falls within Community law, the ECJ must provide all essential interpretive elements for evaluation by the national jurisdiction as to whether or not the national legislation is in conformity with fundamental human rights).

201. Case 362/88, GB-INNO-BM v. Confederation du Commerce Luxembourgeois, [1990] E.C.R. 667, [1991] 2 C.M.L.R. 801 (leaflet advertising by supermarkets in Belgium to promote sales of their products to citizens of Luxembourg were permitted to inform and entice customers from Luxembourg, even though the Luxembourg government had specific restrictions on similar advertising for "sale" items).

202. Spahn, *supra* note 57, at 26. The ECJ distinguished the Irish students from Belgian grocery stores solely on the basis that the students were not "commercially" tied to the abortion clinics they purported to represent in England, whereas the grocery stores in Belgium had an "economic interest" in distributing advertising flyers to potential customers in Luxembourg. *Id.*

203. Maastricht Treaty, *supra* note 21.

application in Ireland of Article 40.3.3 of the Constitution of Ireland."[204]

Within a month of the *X* decision, the Irish Prime Minister, Albert Reynolds, tried to have the "Irish Exception" Protocol changed by the EC foreign ministers to allow free travel for women and free access to information on abortion in Ireland.[205] The EC foreign ministers did not permit the Protocol to be changed for fear that other amendments would then be requested which might have unraveled the Maastricht Treaty.[206] Ten days later, EC envoys met in Brussels and agreed to a "solemn declaration," toning down the Protocol by stating that it did not intend to restrict the free travel of women or to deny Irish women information on abortion.[207]

VII. REGULATING THE RIGHT TO TRAVEL—THE IRISH REFERENDUM

After the controversial decision in the *X* case, pressure from other EC States as well as unrest among the Irish people, caused Ireland to reevaluate the Irish Supreme Court position on the issue of restricting free travel for pregnant women.[208] Irish Prime Minister Albert Reynolds announced a referendum on three separate issues regarding abortion: the right to travel, the free access to abortion information, and the availability of abortions in Ireland itself.[209]

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204. *Id.*

205. Alan Murdoch, *Irish Abortion Crisis Forces Referendum*, INDEPENDENT, Apr. 8, 1992, at 3. The amendment to the Protocol was motivated by Ireland's upcoming referendum in June 1992, on the ratification of the Maastricht Treaty. *Id.* There was a growing concern among the EC ministers and the Irish government that the ratification vote would be turned into a referendum on abortion and that the importance of the Maastricht Treaty would be blurred by the emotional debate over abortion. *Id.*

206. *Id.*

207. *EC Reaches Compromise Over 'Irish Protocol'*, INDEPENDENT, Apr. 16, 1992, at 10. This "solemn declaration" was a diplomatic solution which did not actually change the text of the Maastricht Treaty on abortion but did help to eliminate the abortion issue from the domestic debate in Ireland leading up to the ratification referendum and ensure the safe passage of the treaty. *Id.*

The Maastricht Treaty was subsequently approved in Ireland by 69% of the vote. Denis Coghlan, *Maastricht - Comprehensive 'Yes' Vote Heavy Blow to Anti-Abortion Lobby*, IRISH TIMES, June 20, 1992, at 1. The results on the vote were more sweeping than had been predicted, providing a comfortable margin for the parties that campaigned for greater European integration by the Irish, and a major set back for the anti-abortion forces. *Id.*

208. Long, *supra* note 6, at 29. The Dutch even attempted to obtain a general censure against the Irish government from Brussels. *Id. See also* Cullen, *supra* note 7 for description of the divisive abortion debate in Ireland.

209. Geraldine Kennedy, *Attorney General Believes Abortion Legislation Will Still Be Necessary*, IRISH TIMES, Oct. 12, 1992, at 1. The three issues regarded the right to receive information, the right to travel to another State to get an abortion and the

Over seventy percent of those eligible voted in the referendum on November 25, 1992, in which both the right to free information and the right of free travel won by approximately a two to one margin.[210] It has been suggested by journalists and political analysts that the vote indicated a desire by Irish citizens to "become less Irish and more European when it comes to women's rights."[211]

The "substantive" question on abortion in Ireland, however, was defeated by almost the exact margin as the 1983 vote, which made abortion constitutionally illegal in Ireland.[212] Both the Pro-Life Campaign and the Alliance for Choice campaigned against the "substantive" abortion issue, and both sides claimed victory in this final referendum question, which left many Irish voters confused and frustrated over the lack of adequate debate.[213]

The net result of the three issue referendum was to export the controversy over abortion by "seeking an English solution to an Irish

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right to have an abortion in Ireland where the mother's life was in danger. The exact wording of the ballot questions were:

> INFORMATION
> Subsection 3 of [article 40.3.3] shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another State.
> TRAVEL
> Subsection 3 of [article 40.3.3] shall not limit freedom to travel between the State and another state.
> ABORTION ISSUE
> It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantive risk to her life, not being a risk of self-destruction.

Id.

210. Geraldine Kennedy, *Abortion Issue Is Heavily Defeated*, IRISH TIMES, Nov. 30, 1992, at 6. The final vote counts on the right to travel were 62.3% for and 37.7% against, and the vote on free access to information passed by a 59.9% to 40.1% margin. *Id.*

211. *See, e.g.*, Cullen, *supra* note 7.

212. *Id.* The vote on the abortion question in the referendum was 34.6% for and 65.4% against. *Id.*

213. David Israelson, *Both Sides Claim Win in Irish Abortion Vote*, TORONTO STAR, Nov. 28, 1992, at A1. The Pro-Life Campaign sought defeat of the referendum because they did not want *any* reason for abortion in Ireland and the results on the election were interpreted as a "clear vote in favor of the protection of the unborn in this country." Carol Craig, *Election Results Will Not Settle the Burning Issues*, INTER. PRESS SERV., Nov. 27, 1992 (emphasis added). The Alliance for Choice worked equally hard to defeat the measure because the distinction between the *life* and *health* of the mother and the issue of the *health* of a woman was a "huge issue." *Id.*

The wording of the referendum text was designed to appease both sides but failed to achieve its objective. Tim Coone, *Survey of Ireland*, LON. FIN. TIMES, Nov. 6, 1992, at 33.

problem."[214] Some voters felt that the electorate had found a middle ground, reaching a compromise by allowing Irish women access to abortion services in England while maintaining the abortion prohibition on Irish soil.[215] On the other hand, a more outspoken journalist claimed that, "'We are being asked to write into our Constitution, which articulates our aspirations as a people, an amendment which says that an act which is a heinous crime if committed in Ireland–the killing of an unborn child–is perfectly acceptable as long as it is done in England.'"[216]

VII. CONCLUSION

Economic unity requires that each State make sacrifices to benefit the common good of the entire European Community. Sometimes those sacrifices require a State to reduce its restrictions on incoming goods;[217] sometimes they require a State to permit unwanted individuals from another State to remain in the country;[218] and sometimes they require a State to permit an individual to leave the State to obtain a service which is illegal within its own borders but legal in the other State. Although the basis for the European Community is to develop a Common Market for goods and services, without common support for political goals, the EC will never grow beyond a free-trade area. These common political goals have necessitated significant changes in the social and cultural makeup of each individual Member State.

The *X* case was a catalyst for initiating major changes in Irish society. X's predicament forced Ireland to look at the *consequences* of the Eighth Amendment rather than the abstract "pious aspirations" of protecting the unborn. Consequently, the Irish government and the Irish people have adopted a more mainstream European view on a very controversial social issue.

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214. Jill Serjeant, *Abuse Part of the Job For Irish Abortion Campaigner*, REUTER LIB. REPT., Nov. 26, 1992.

215. Geraldine Kennedy, *Amendment on Abortion Is Facing Heavy Defeat*, IRISH TIMES, Nov. 28, 1992, at 1.

216. O'Callaghan, *supra* note 97, at 22 (quoting Mary Holland of the Irish Times).

217. *See supra* notes 73-80 and accompanying text for discussion of the *de Peijper* case.

218. *See supra* notes 60, 68-72 and accompanying text for discussion of the *Bouchereau* case.

An EC Member State can no longer live in isolation. Ireland is not just an island anymore but a part of Europe—a member of the community of nation states which places more and more emphasis on economic, social, and political integration than on the sovereignty of an individual country.

Seth S. Stoffregen[*]

* This article is dedicated to the two most important women in my life who made this all possible. To my late mother, who began practicing law in the 1930's, and who inspired me to become a lawyer. And to my wife, whose perspective, based on her Irish roots, kept me focused on both sides of the issues raised, and who unselfishly agreed to edit "just one more draft."

Domestic Relations Exception To Diversity Jurisdiction: *Ankenbrandt v. Richards*

I. INTRODUCTION

For more than a century, federal courthouse doors have been closed to family disputes. The so-called domestic relations exception[1] is a limitation on federal court diversity jurisdiction[2]. It mandates that federal courts dismiss a domestic relations case, even if it satisfies all of the diversity statute requirements.[3]

The exception is founded neither in the wording of the Constitution[4] nor in the specific statutory language conferring diversity jurisdiction on the federal courts.[5] Rather, it is a judicially-created doctrine applied by the federal courts, for over a century, to exclude a myriad of cases from the court's jurisdiction.[6]

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1. *See generally*, 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3609, *Judicially Created Limitations on Diversity Jurisdiction–Domestic Relations Cases* (1984).

2. Diversity jurisdiction refers to the federal court power to hear controversies between citizens of different states. 28 U.S.C. § 1332 (1991).

3. *Id.* The diversity statute provides in pertinent part that: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and cost, and is between–citizens of different States . . . ."

4. Congress enacted the diversity statute pursuant to Article III of the Constitution, which provides in part: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . . The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ." U.S. CONST. art. III, §§ 1,2.

5. 28 U.S.C. § 1332 (1991); *see also supra* note 3.

6. *See, e.g.*, Ingram v. Hayes, 866 F.2d 368 (11th Cir. 1988) (tort action for intentional infliction of emotional distress); Sutter v. Pitts, 639 F.2d 842 (1st Cir 1981) (suit to redress frustration of civil rights due to disobedience of visitation and custody orders); Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981) (counter-claim alleging alienation of child's affection and infliction of mental anguish); Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (suit to establish paternity and child support); Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967) (suit to establish custody and visitation rights); Albanese v. Richter, 161 F.2d 688 (3d Cir. 1947) (suit by illegitimate child against putative father to invalidate fraudulently obtained agreement), *cert.*

The United States Supreme Court first articulated the domestic relations exception in 1859, in dicta, stating: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony."[7] In a subsequent case, the Court further disclaimed federal jurisdiction over "the whole subject of husband and wife, parent and child."[8] As a result, federal courts have continued to avoid cases requiring an inquiry into a marital or parent-child relationship.[9]

Until recently, the nature and scope of the exception remained unclear.[10] The 1992 decision of the United States Supreme Court in *Ankenbrandt v. Richards*[11] is significant because a six-justice majority not only reaffirmed the existence of the domestic relations exception but also, for the first time, defined its scope and, more sigificantly, set forth a basis for the exception.[12] The case is especially notable for its unsupportable reasoning in construing a federal statute.[13] Although there may exist sound policy reasons to justify the Court's decision,[14] three justices offered persuasive alternative reasoning which could have decided the case without resorting to a distortion of important principles of statutory construction.[15] The *Ankenbrandt* decision also raises an important issue concerning the authority of federal courts to create

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denied, 332 U.S. 782 (1947); Carqueville v. Woodruff, 153 F.2d 1011 (6th Cir. 1946) (habeus corpus proceedings for child custody); Williamson v. Williamson, 306 F. Supp. 516 (W.D. Okla. 1969) (suit for division of marital assets); *In re* Freiberg, 262 F. Supp. 482 (E.D. La. 1967) (adoption proceedings); Bercovitch v. Tanburn, 103 F. Supp. 62 (S.D.N.Y. 1952) (suit to recover money for necessaries supplied to wife); Linscott v. Linscott, 98 F. Supp. 802 (S.D. Iowa 1951) (action to have property settlement declared void on grounds of fraud and duress); Garberson v. Garberson, 82 F. Supp. 706 (N.D. Iowa 1949) (suit for maintenance). *See generally*, WRIGHT, *supra* note 1.

7. Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859). For a discussion of *Barber*, see *infra* notes 47-50 and accompanying text.

8. *In re* Burrus, 136 U.S. 586, 593-94 (1890). For a discussion of *Burrus*, see *infra* notes 82-85 and accompanying text.

9. *Jagiella*, 647 F.2d at 561. "The general inquiry is whether hearing the claim will necessitate the court's involvement in domestic issues. i.e., whether it will require inquiry into the marital or parent-child relationship." *Id.* at 565.

10. *See, e.g.*, Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982). "The boundaries of the exception are uncertain." *Id.* at 492; Allen v. Allen, 518 F.Supp. 1234 (E.D.Pa 1981). "The critical question, of course, is what a domestic relations case is .... [There is] a large 'gray area' for future caselaw [sic] development." *Id.* at 1236; Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975) (Gibbons, J., dissenting). "[T]here is no well-established domestic relations exception .... Rather, there is a collection of misstatements of ancient holdings and ill-considered dicta." *Id.* at 1030.

11. 112 S. Ct. 2206 (1992).

12. *Id.* at 2209-15.

13. *See infra* notes 134-39, 202-205 and accompanying text.

14. *See infra* notes 89-91 and accompanying text.

15. *See infra* notes 104-11 and accompanying text.

expansive exceptions to the statutory jurisdiction that Congress has conferred.[16]

This Comment focuses on the reasoning of the majority in holding that a domestic relations exception to federal diversity jurisdiction exists as a matter of statutory construction.[17] Part II describes the *Ankenbrandt* case which raised the question of the existence of a domestic relations exception to the United States Supreme Court.[18] Part III examines the majority opinion relating to the validity and scope of the exception,[19] and then discusses the concurring yet disapproving opinions by Justice Blackmun[20] and Justice Stevens,[21] with whom Justice Thomas joined. Part IV analyzes the majority opinion's rationale for holding that the domestic relations exception exists as a matter of statutory construction and considers opposing arguments.[22] Part V then concludes that the *Ankenbrandt* case could have been narrowly decided,[23] but instead, the Supreme Court went to extreme lengths in finding that the basis for the exception rests upon a historical construction of the diversity statute.[24] The door is now open for Congress to either accept this questionable judicial construction of the diversity statute or, perhaps, to create by statute a special basis for federal jurisdiction in domestic relations disputes.

II. ANKENBRANDT V. RICHARDS

A. *Facts*

Petitioner Carol Ankenbrandt brought this tort action on behalf of her two minor daughters, against her former husband, Jon Richards, and his female companion, Debra Kesler.[25] Ankenbrandt sought to recover monetary damages for the alleged sexual and physical abuse of the children committed by Richards and Kesler.[26] Petitioner Ankenbrandt was a Missouri citizen; respondents Richards and Kessler were citizens of Louisiana.[27] Ankenbrandt brought this suit in the United States District Court for the Eastern District of Louisiana, alleging federal jurisdiction based on the diversity of citizenship provision of 28 U.S.C.

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16. *See infra* note 63 and accompanying text.
17. *See infra* notes 44-88 and accompanying text.
18. *See supra* notes 11-16, *infra* notes 25-43 and accompanying text.
19. *See infra* notes 44-103 and accompanying text.
20. *See infra* notes 104-08 and accompanying text.
21. *See infra* notes 109-11 and accompanying text.
22. *See infra* notes 112-201 and accompanying text.
23. *See infra* notes 109-11 and accompanying text.
24. *See infra* notes 87-88 and accompanying text.
25. Ankenbrandt v. Richards, 112 S. Ct. 2206, 2208-09 (1992).
26. *Id.* at 2208.
27. *Id.*

§ 1332.[28] Ankenbrandt represented[29] that prior to the filing of this federal court action, a Louisiana juvenile court had already entered a judgment under that State's child protection laws, permanently terminating all of Richards' parental rights.[30] Ankenbrandt further claimed that the decision was never appealed, and was final.[31]

The plaintiffs argued that, since Richards had lost his parental rights, he was no more than a defendant in a tort action, separate and distinct from any domestic dispute.[32] The defendants argued that the allegations of abuse were an integral part of the ongoing domestic jurisdiction of the state court, and hence, the federal action should be dismissed for lack of jurisdiction under the domestic relations exception.[33]

B. *Procedural History*

Upon the motion of the defendants, the district court dismissed the suit.[34] The court concluded that this case fell within the domestic relations exception to federal court jurisdiction and the federal abstention principles announced in *Younger v. Harris.*[35] The Fifth Circuit Court of Appeals affirmed the judgment in an unpublished opinion.[36] Following that decision, Ankenbrandt petitioned for certiorari to the Supreme Court of the United States.[37]

The United States Supreme Court granted certiorari[38] to resolve the following questions: (1) Is there a domestic relations exception to federal jurisdiction? (2) If so, does it permit a district court to abstain from exercising diversity jurisdiction over a tort action for damages? (3) Did

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28. *Id; see supra* note 3.

29. Petition for Writ of Certiorari at 1, Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992) (No. 91-367).

30. Neither the District Court, nor the Court of Appeals, nor the Supreme Court found it necessary to pass on the accuracy of this representation. *Ankenbrandt,* 112 S. Ct. at 2209, n. 1.

31. Petition for Writ of Certiorari at 1, *Ankenbrandt* (No. 91-367). Richards claimed that, on the advice of counsel, he did not defend himself against the allegations of abuse in the divorce and juvenile proceedings, or appeal the termination of his parental rights, because he was told that to do so would have prejudiced his defense against then-pending criminal charges. Opposition Brief to Writ of Certiorari at 5, *Ankenbrandt* (No. 91-367). Apparently, the criminal charges were later dropped. *Id.*

32. Petition for Writ of Certiorari at A3-4, *Ankenbrandt* (No. 91-367).

33. Opposition Brief to Writ of Certiorari at 12-19, *Ankenbrandt* (No. 91-367).

34. *Ankenbrandt,* 112 S. Ct. at 2209.

35. *Ankenbrandt,* 112 S. Ct. at 2209 (citing Younger v. Harris, 401 U.S. 37 (1971)). The district court also relied upon *In re* Burrus, 136 U.S. 586 (1890) in reaching this conclusion; *see infra* notes 82-85 and accompanying text (discussing *Burrus*); *see also infra* note 94 (discussing the Younger abstention doctrine).

36. *Ankenbrant,* 112 S. Ct. at 2209.

37. *Id.* at 2206.

38. 112 S. Ct. 855 (U.S. Jan. 10, 1992) (No. 91-367).

the District Court in this case err in abstaining from exercising jurisdiction under the doctrine of *Younger v. Harris*?[39]

The United States Supreme Court held that there is a domestic relations exception but that it only divests federal courts of the power to issue divorce, alimony, and child custody decrees.[40] Accordingly, the Court concluded that "[t]he exception ha[d] no place in a suit such as this one".[41] The Court further found that the Court of Appeals had erred by affirming the District Court's rulings to decline jurisdiction based on the domestic relations exception and to abstain under the doctrine of *Younger*.[42] As a result, the decision of the Court of Appeals was reversed and the case remanded for further proceedings.[43]

III. THE MAJORITY OPINION

A. *Validity of the Exception*

Justice White, writing for the majority,[44] began the decision in *Ankenbrandt* by noting that the domestic relations exception had been invoked repeatedly by the lower federal courts.[45] The Court also noted that there had been a general divergence in the Courts of Appeals in applying the exception to diversity-based tort suits brought in federal courts.[46] The *Ankenbrandt* Court determined that the origin of the domestic relations exception was rooted in an 1859 declaration in *Barber v. Barber*[47] that the federal courts have no jurisdiction over original

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39. *Id.*

40. *Ankenbrandt*, 112 S. Ct. at 2215.

41. *Id.* at 2216.

42. *Id.*; *see infra* note 94 (discussing doctrine of abstention).

43. *Ankenbrandt*, 112 S. Ct. at 2216-17.

44. Justice White was joined by Rehnquist, C.J., and O'Connor, Scalia, Kennedy, and Souter, JJ.. Blackmun, J., filed an opinion concurring in the judgment. Stevens, J., filed an opinion concurring in the judgment, in which Thomas, J., joined.

45. *Id.* at 2209 n.2.

46. *Id.*

47. 62 U.S. (21 How.) 582 (1859). In *Barber*, a wife brought suit in federal district court pursuant to diversity jurisdiction, against her former husband to enforce a New York state court divorce decree awarding her alimony. *Id.* at 583-84. The former husband had moved to Wisconsin and refused to make the alimony payments. The Wisconsin Federal District Court accepted jurisdiction, over the protests of the defendant, and gave judgment for the divorced wife. On appeal, the United States Supreme Court held that the Wisconsin District Court had jurisdiction to enforce the decree. *Id.* While allowing the enforcement of an existing decree, the *Barber* Court pointed out that this was not a suit asking to determine alimony anew, rather it was only asking the court to prevent the already-entered decree from being defeated by fraud. *Id.* at 584. The seminal language followed: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce." *Id.*

proceedings involving divorce or alimony.[48]

Although the dissent in *Barber* claimed that the English Chancery Courts, and thus the federal courts, lacked jurisdiction over the case at bar,[49] the *Barber* majority did not provide a clear rationale for its broad disclaimer of jurisdiction over domestic matters.[50] Acknowledging the absence of any subsequent explanations in the past 133 years for the basis of such a limitation, the *Ankenbrandt* Court stated: "Because we are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half, we feel compelled to explain why we will continue to recognize this limitation on federal jurisdiction."[51]

First, the Court looked to the language of the Constitution[52] and found that it does not contain any limitations on "subjects of a domestic

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48. *Ankenbrandt*, 112 S. Ct. at 2209.

49. *Barber*, 62 U.S. (21 How.) at 592. Three members of the *Barber* court dissented, offering the only rationale for the majority's broad disclaimer. The dissent stated that because the English Chancery did not have jurisdiction over divorce and alimony, and because federal courts historically derived their equity jurisdiction from the English Chancery, Congress did not intend to confer jurisdiction over these subjects under the Judiciary Act of 1789. *Id.* at 605.

The Judiciary Act of 1789 provided that diversity jurisdiction required a "suit of a civil nature at common law or in equity." Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78. This grant of equity jurisdiction had been interpreted to include only that jurisdiction held by the English Chancery Courts at the time the United States became a nation. *See generally* WRIGHT ET AL., *supra* note 1. At that time it was believed that since domestic relations cases had historically been the exclusive province of the ecclesiastical courts in England rather than the Chancery, they did not meet the statutory description. *Id.* This jurisdictional preclusion, in turn, purportedly bound the common law and equity courts of the United States, whose jurisdiction evolved from the Chancery. *Id.*

However, there has been widespread criticism of this historical explanation and it is no longer viewed as a justification for the exception. *See* Lloyd v. Loeffler, 694 F.2d 489, 491-92 (7th Cir. 1982) (noting the "unconvincing" nature of the historical account, and the "dubious . . . historical pedigree"); *see also* Spindel v. Spindel, 283 F. Supp. 797, 806-09 (E.D.N.Y. 1968) and cases cited therein effectively refuting this historical justification.

50. *Ankenbrandt*, 112 S. Ct. at 2210.

51. *Id.*

52. U.S. CONST. art. III, § 2 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

relations nature."[53] Then, after reviewing *Barber* and subsequent decisions, the Court concluded that "the exception is not grounded in the Constitution."[54] Furthermore, because the *Barber* Court did not purport to justify the domestic relations exception on constitutional grounds, the Court believed that it was "logical to presume that the [*Barber*] Court based its statement limiting such power on narrower statutory . . . grounds."[55]

This determination, the Court asserted, was supported by subsequent decisions such as *De La Rama v. De La Rama*.[56] The *De La Rama* court referred to the "long established rule" that federal courts have no jurisdiction over divorce and alimony, as having been based on the assumption that the requirements of diverse citizenship and amount in controversy cannot be met in domestic controversies.[57] As a result, the *Ankenbrandt* Court reasoned that "*De La Rama's* articulation of the 'rule' in terms of the statutory requirements for diversity jurisdiction further supports the view that the exception is not grounded in the Constitution."[58] In addition, because "the Court has heard appeals from territorial courts involving divorce,[59]. . . this Court implicitly has made clear its understanding that the source of the constraint on jurisdiction from *Barber* was *not* Article III; otherwise the Court itself would have lacked jurisdiction over appeals from these legislative courts."[60] Hence, the Court concluded that *Barber's* disclaimer of jurisdiction over the subject of divorce was not based on the Constitution.[61]

Next, the Supreme Court pointed out that even though the Constitution "does not mandate the exclusion of domestic relations cases from federal-court jurisdiction . . . [this] does not mean that such courts

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53. *Ankenbrandt*, 112 S. Ct. at 2211.

54. *Id.*

55. *Id.*

56. 201 U.S. 303 (1906). *De La Rama* involved an appeal from a divorce suit brought in a Court of First Instance in the Phillipines. *Id.* at 304. The Supreme Court stated once again that the United States courts have no jurisdiction over divorce and alimony. *Id.* at 307. However, the Court upheld its appellate jurisdiction over appeals from the Phillipine territorial courts concerning domestic controversies. *Id.* at 308. The *De La Rama* Court suggested that the role of the federal legislature, and presumably the federal courts as well, in the territories, is analogous to that of the state government, and not of the federal government. Thus, the *De La Rama* Court reasoned, the considerations in *Barber* which distinguished between state and federal interest in domestic matters, do not apply in territorial cases. *Id.*

57. *Ankenbrandt*, 112 S. Ct. at 2211.

58. *Id.*

59. *See, e.g., De La Rama*, 201 U.S. 303 (1906). For a discussion of *De la Rama*, see *supra* note 56-58 and *infra* notes 145-48 and 169-72 and accompanying text.

60. *Ankenbrandt*, 112 S. Ct. at 2211.

61. *Id.*

necessarily must retain and exercise jurisdiction over such cases."[62] The Court emphasized that their judicial power is entirely dependent upon the action of Congress[63] and to this end, began an analysis of the relevant jurisdictional statutes created by Congress which granted the courts' power to hear controversies between citizens of different states.[64]

The original diversity statute granted jurisdiction over "all suits of a civil nature at common law or in equity."[65] The Court noted that this phrase was the primary element in determining the boundaries of diversity jurisdiction[66] until 1948 when Congress changed the statutory language to "all civil actions".[67] After examining the *Barber* dissent,[68]

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62. *Id.* at 2212. The Court used other Constitutional provisions to buttress its position:

> Article I, Sec. 8, cl. 9, for example, authorizes Congress '[t]o constitute Tribunals inferior to the supreme Court' and Article III, Sec. 1, states that '[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'

Id. In addition, "[t]he Court's cases state the rule that 'if inferior federal courts were created, [Congress was not] required to invest them with all the jurisdiction it was authorized to bestow under Art. III.'" *Id.* (citation omitted).

63. *Ankenbrandt*, 112 S. Ct. at 2212. The Court explained that:

> this position has held constant since at least 1845, when the Court stated that 'the judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'

Id. (citations omitted).

64. *Id.*

65. *Id.* The First Judiciary Act, Act of Sept. 24, 1789, § 11, 1 Stat. 78, provided that:

> the circuit courts shall have original cognizance concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, . . . [and] the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

66. *Ankenbrandt*, 112 S. Ct. at 2212.

67. *Id.* (citing the 1948 Judicial Code and Judiciary Act, 62 Stat. 930, codified at 28 U.S.C. § 1332).

68. *Id.* Justice Daniel, dissenting in *Barber*, stated:

> '[T]he origin and the extent of [the federal courts'] jurisdiction must be sought in the laws of the United States, and in the settled principles by which those laws have bound them, [and that] as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in

and noting the absence of any rebuttal by the *Barber* majority, the *Ankenbrandt* Court inferred that the jurisdictional limitation set out in *Barber* was based on the premise that because the English courts of common law lacked authority to issue divorce and alimony decrees, so too did the federal courts.[69] In other words, a suit seeking such relief did not fall within the statutory language "all suits of a civil nature at common law or in equity."[70]

However, the Court did not feel compelled to follow this historical justification over which there has been much debate.[71] Instead, the *Ankenbrandt* Court declared that it was:

> content to rest [its] conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity."[72]

As additional support for its conclusion that there exists a domestic relations exception, the Court referred to the principle of stare decisis.[73]

Then, presuming that, in 1948, Congress was aware of the "nearly century-long interpretation of the prior statutes" construing the diversity statute to contain a domestic relations exception, and "absent any indication that Congress intended to alter this exception," the

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> chancery is bounded by that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States *in chancery* is equally excluded.'

Id. (quoting *Barber*, 62 U.S. (21 How.) at 605 (Daniel, J., dissenting)).

69. *Id.* at 2212-13. *See supra* note 49.

70. *Id.* at 2212.

71. *See supra* note 49. *See also* Sharon E. Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1, 15 (1984); Rebecca E. Swenson, Note, *Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction*, DUKE L.J. 1095, 1098-99 (1983); Anthony B. Ullman, Comment, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824, 1835 (1983).

72. *Ankenbrandt*, 112 S. Ct. at 2213.

73. *Id.* Stare decisis is a judicial doctrine which means to adhere to precedent and not disturb settled points. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). It is "a rule by which common law courts 'are slow to interfere with principles announced in the former decisions and often uphold them even though they would decide otherwise were the question a new one.'" BARRON'S LAW DICTIONARY, 461 (2d ed. 1984). The "[d]octrine is one of policy grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognized and followed . . . ." BLACK'S LAW DICTIONARY, 1406 (6th ed. 1990).

Ankenbrandt Court simply surmised "that Congress 'adopted that interpretation' when it reenacted the diversity statute."[74]

B. *The Scope of the Exception*

Having concluded that the domestic relations exception exists, as demonstrated by: (1) the inclusion of the defining phrase "all suits of a civil nature at common law or in equity" in the pre-1948 versions of the diversity statute;[75] (2) by Barber's implicit interpretation of that phrase to exclude divorce and alimony actions;[76] (3) by Congress' silent acceptance of this construction;[77] as well as, (4) considerations of stare decisis,[78] the Supreme Court set out to define the scope of the exception.

Once again, the Supreme Court looked to the decision in *Barber* and noted that many of the lower courts, in applying the exception, had gone "well beyond the circumscribed situations posed by *Barber* and its progeny."[79] The *Barber* Court articulated the scope of the exception to encompass a narrow range of domestic relations issues.[80] Accordingly, the *Ankenbrandt* Court determined that the exclusion announced in *Barber* covered only the issuance of divorce and alimony decrees.[81]

However, the Court noted, the exclusion was subsequently expanded in *In re Burrus*,[82] to include child custody decrees.[83] The key state-

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74. *Ankenbrandt*, 112 S. Ct. at 2213.

75. *See supra* notes 65-67 and accompanying text.

76. *See supra* notes 68-70 and accompanying text.

77. *See supra* note 72 and accompanying text.

78. *See supra* note 73 and accompanying text.

79. Ankenbrandt v. Richards, 112 S. Ct. 2206, 2214 (1992). *See, e.g.*, cases cited in *supra* note 6.

80. *Ankenbrandt*, 112 S. Ct. at 2214. The *Barber* Court maintained that:

> 'It is, that when a court of competent jurisdiction over the subject-matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony.'

Id. (quoting *Barber*, 62 U.S. (21 How.) 582, 591 (1859)).

81. *Id.* The Court noted that there was no dissent in *Barber* to the conclusion that federal courts lacked jurisdiction to issue divorce and alimony decrees. *Id.*

82. 136 U.S. 586 (1890).

83. *Id.* at 594. *Burrus* involved a dispute between a father and a grandfather over the custody of a child. The Supreme Court entertained a writ of habeas corpus brought by the grandfather who had been imprisoned for disobeying a child custody order. The custody order had been issued by a federal district court in a habeas corpus proceeding, granting custody of the child to the father. The grandfather argued that he had been improperly imprisoned because the federal court did not

ment made by the *Burrus* Court was that "[the] whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." [84] Despite the fact that *Burrus* did not involve diversity jurisdiction,[85] as *Barber* did, the *Ankenbrandt* Court stressed that the statement had nonetheless "been interpreted by the federal courts to apply with equal vigor in suits brought pursuant to diversity jurisdiction."[86]

Claiming that this interpretation was consistent with *Barber's* ruling excluding jurisdiction over suits for divorce and alimony decrees, the *Ankenbrandt* Court concluded that: "the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of the power to issue divorce, alimony, and child custody decrees."[87] The Court reasoned that "[g]iven the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders."[88]

C. *Policy Considerations*

The Court offered further support for its conclusion with "sound policy considerations".[89] The first was that of judicial economy; the Court explained that "state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees."[90]

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have jurisdiction to hear the original habeas corpus proceeding. *Id.* at 589. The Supreme Court agreed and issued the writ. *Id.* at 597. The *Burrus* Court ruled that the right of the father and grandfather to custody of the child did not depend upon any law or treaty of the United States or its Constitution, as "[the] whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Id.* at 593-94.

84. *Ankenbrandt*, 112 S. Ct. at 2214 (quoting *Burrus*, 136 U.S. at 593-94).

85. In fact, the *Burrus* Court reserved the question of whether there was federal diversity jurisdiction over the adjudication of custody rights:

> But whether the diverse citizenship of parties contesting this right to the custody of the child, could, in the courts of the United States, give jurisdiction to those courts to determine that question, has never been decided by this court that we are aware of. Nor is it necessary to decide it in this case . . . .

Burrus, 136 U.S. at 596.

86. *Ankenbrandt*, 112 S. Ct. at 2214. *See, e.g.*, Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982); Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975); Hernstadt v. Hernstadt, 373 F.2d 316, 317 (2d Cir. 1967). *See generally* WRIGHT., *supra* note 1, at 477-79 nn.28-32.

87. *Ankenbrandt*, 112 S. Ct. at 2215.

88. *Id.*

89. *Id.*

90. *Id.*

The second policy reason given by the *Ankenbrandt* Court was that of judicial expertise. The court asserted that "it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees."[91]

The Court then reiterated its holding that the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree.[92] Accordingly, since *Ankenbrandt* in no way sought such a decree, the Court found that the Court of Appeals had erred by affirming the District Court's invocation of this exception.[93]

D. *Abstention as an Alternative*

Next, the Court addressed the use of abstention,[94] by the Court of Appeals and the District Court, as an alternative ground for dismissing the case.[95] Stating that "[a]bstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise

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91. *Id.*
92. *Id.*
93. *Id.*
94. In addition to the domestic relations exception, some federal courts invoke abstention doctrines to decline jurisdiction over these types of cases. The doctrine of abstention permits a federal court, in the exercise of its discretion, to relinquish jurisdiction where necessary to avoid needless conflict with the administration by a state of its own affairs. BLACK'S LAW DICTIONARY 9 (5th ed. 1979); *see e.g.*, Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir. 1972).

Under the domestic relations exception, once a case is characterized as a domestic relations case, jurisdiction does not exist. Conversely, abstention doctrines are characterized as only a postponement of proper jurisdiction. *See generally*, 1A J. MOORE, MOORE'S FEDERAL PRACTICE § 0.203 (3d ed. 1985).

The United States Supreme Court has sanctioned abstention in three instances. First, the Supreme Court has abstained when a state court decision might eliminate the need to decide a federal question. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Second, the Court has sanctioned abstention when the area of activity at issue is intimately regulated by a state. Burford v. Sun Oil Co., 319 U.S. 315 (1943). Third, the Court has abstained if a state criminal proceeding was pending. Younger v. Harris, 401 U.S. 37 (1971). The Court has also extended *Younger* abstention to certain civil contexts as well. *See, e.g.*, Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987) (extended to pending state appeal proceedings); Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) (extended to pending state administrative proceedings); Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982) (extended to pending state disciplinary proceeding).

For a further discussion on the application of the abstention doctrines to the domestic relations exception to federal court diversity jurisdiction, see Barbara A. Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571 (1984); Swenson, *supra* note 71, at 1095.

95. *Ankenbrandt*, 112 S. Ct. at 2215.

the jurisdiction given them'",[96] the Court concluded that "[a]bsent any *pending* proceeding in state tribunals, . . . application by the lower courts of *Younger* abstention was clearly erroneous."[97]

The Court did suggest however, that the *Burford* abstention principles[98] might be relevant in certain cases involving "elements of the domestic relationship, even when the parties do not seek divorce, alimony, or child custody."[99] This would apply, "when a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.'"[100] Nonetheless, the *Ankenbrandt* Court concluded that this did not apply to the case at bar because state law had already determined the status of the parties and that, in any event, the parties' status had "no bearing on the underlying torts alleged."[101]

As a result, the decision of the Court of Appeals was reversed[102] and the lawsuit was held to be appropriate for the exercise of diversity jurisdiction, given the existence of diverse citizenship between the plaintiff and defendants, and the pleading of the relevant amount in controversy.[103]

E. *Concurring Opinion by Justice Blackmun*

Justice Blackmun wrote a separate opinion concurring in the judgment that the Federal District Court in Louisiana did have jurisdiction over this tort action.[104] He also agreed that federal courts normally should not issue divorce, alimony, or child custody decrees.[105] Nevertheless, Justice Blackmun took strong exception to the Court's statutory construction and its interpretation of congressional intent. He asserted that:

> The Court is correct that abstention 'rarely should be invoked.' But rarer still – and by far the greater affront to Congress – should be the occasions when this Court invents statutory exceptions that are simply not there. It is one thing for this Court to defer to more than a century

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96. *Id.*
97. *Id.* at 2216.
98. Burford v. Sun Oil Co., 319 U.S. 315. For an explanation of the *Burford*-type abstention principle, see *supra* note 94.
99. *Ankenbrandt,* 112 S. Ct. at 2216.
100. *Id.* (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976)).
101. *Id.*
102. *Id.* at 2216-17.
103. *Id.* at 2216.
104. *Id.* at 2217 (Blackmun, J., concurring).
105. *Id.* (Blackmun, J., concurring).

> of practice unquestioned by Congress. It is quite another to defer on a pretext that Congress legislated what in fact it never did.[106]

Instead, Justice Blackmun suggested that "continued discretionary abstention rather than mandatory limits on federal jurisdiction"[107] provides a more principled basis for the Court's refusal to issue divorce, alimony, or child custody decrees.[108]

F. *Justice Stevens' Concurring Opinion, Joined by Justice Thomas*

Justice Stevens announced that *Ankenbrandt* "should be an exceedingly easy case."[109] In his view, the case presented a simple diversity suit in tort, and as such, did not come within whatever domestic relations exception may or may not exist.[110] Accordingly, Justices Stevens and Thomas would have left consideration of the domestic relations exception for another day.[111]

IV. ANALYSIS

This case presented a simple tort action between parties that were, at one time, members of the same family.[112] All the requirements of federal court subject matter jurisdiction, pursuant to the diversity statute, were met.[113] In addition, resolution of Ankenbrandt's claim did not require adjudication of her marital or custody status, child support, or alimony. Accordingly, a unanimous Court[114] agreed that the Federal District Court had proper jurisdiction over Ankenbrandt's tort claim.[115]

The first question to be asked then is, if all nine justices agreed that petitioner Ankenbrandt had properly invoked the federal court's jurisdiction to hear her tort claim, why did the Court go much further than it had to and feel "compelled to explain"[116] the basis for the domestic relations limitation on federal court jurisdiction? Secondly, why did the Court go to great lengths to base the limitation on statutory construction,[117] thereby disclaiming jurisdiction altogether over domestic relations cases? What, if any, historical support exists for this statutory construction rationale? Thirdly, would the application of

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106. *Id.* at 2221. (Blackmun, J., concurring).
107. *Id.* at 2217. (Blackmun, J., concurring).
108. *Id.* (Blackmun, J., concurring).
109. *Id.* at 2222. (Stevens, J., concurring).
110. *Id.* (Stevens, J., concurring).
111. *Id.* (Stevens, J., concurring).
112. *Id.* at 2208.
113. *Id.* at 2216.
114. *Id.* at 2208.
115. *Id.* at 2216.
116. *Id.* at 2210.
117. *Id.* at 2212-13.

modern doctrines of federal abstention, as suggested by Justice Blackmun,[118] have been a better path to follow by allowing federal courts the discretion to refuse to excercise jurisdiction over domestic relations cases? It was these questions which caused a rift in the *Ankenbrandt* Court.

A. *Dicta or Needed Direction? Why The Court Felt "Compelled to Explain"*

Of the three separate opinions written in *Ankenbrandt*, arguably, only Justice Stevens' was correct. The case presented a simple diversity tort, and as such, did not fall within any domestic relations exception that might or might not exist.[119]

One possible reason why the Court diverged from its historical practice of deciding cases on their narrowest possible grounds was that lower federal courts had been applying the domestic relations exception inconsistently.[120] Also, many lower federal courts were questioning the very existence and nature of a domestic relations exception,[121] and many commentators were calling for its abolition.[122] This lack of consistency among the courts faced with the difficult task of deciding whether a case falls within the judicially-created domestic relations exception is mainly due to the murky origins of the exception.[123]

The United States Supreme Court has never set forth, in an unequivocal direct holding, the basis for the exception.[124] The absence of any previous clear jurisdictional explanation enabled the Court in *Ankenbrandt* to follow a traditional pattern of narrowly construing federal jurisdiction.[125] By holding that the exception is based on century-old

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118. *Id.* at 2221 (Blackmun, J., concurring). *See supra* notes 92-96.

119. *Id.* at 2222 (Stevens, J., concurring).

120. *See* Pet. for Writ of Cert. at 3, Ankenbrandt v. Richards, No.91-3037 (5th Cir. May 31, 1991) (No. 91-367).

121. *See supra* note 10.

122. *See, e.g.*, Linda A. Ouellette, Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 B.C. L. REV. 661, 663 (1983) "[B]ecause the exception is based on a notion no longer reflecting the reality of federal law regarding the family, it ought to be abolished"; Mark S. Poker, Comment, *A Proposal For The Abolition Of The Domestic Relations Exception*, 71 MARQ. L. REV. 141, 165 (1987) "[C]oncerns of fairness and uniformity must override any practical reasons for continued adherence to the exception"; Barbara F. Wand, *A Call For The Repudiation Of The Domestic Relations Exception To Federal Jurisdiction*, 30 VILL. L. REV. 307, 401 (1985) "[G]iven the changing nature of domestic relations law . . . judicial repudiation of the exception, rather than any makeshift revision, is the appropriate course of action."

123. *Ankenbrandt*, 112 S. Ct. at 2210.

124. *Id.*

125. 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.60 at 623 (2d ed. 1985) "[G]enerally it is proper to resolve any ambiguity or uncertainty by construing the statute against federal jurisdiction."

statutory construction of the diversity statute[126] and Congress' century-long silent acceptance of this construction,[127] the Court has taken domestic relations cases involving divorce, alimony, and child custody decrees completely out of its jurisdiction.[128] The Court's rationale, however, is flawed for two reasons.

First, it is far from clear that *Barber* and its progeny were relying on statutory grounds as a basis for the exception.[129] Second, as a result of this uncertainty, the Court errs in imputing a congressional intent based upon this premise.[130] As stated by Justice Blackmun, "[t]he Court today has a difficult enough time arriving at this unlikely interpretation of the *Barber* decision. I cannot imagine that Congress ever assembled this construction on its own."[131]

Traditional doctrines of statutory construction hold that the imputation of Congressional intent should be based on a clear coherent doctrine.[132] The primary flaw with the Court's rationale is that "no coherent 'jurisdictional' explanation for this [exception] emerges" from *Barber* and its progeny, and "it is unreasonable to presume that Congress divined and accepted one from these cases."[133]

B. *Murky Origins of the Statutory Construction Rationale*

The main argument against the Court's statutory construction rationale can be found in Justice Blackmun's concurring opinion.[134] Justice Blackmun insisted that the Court's interpretation of *Barber*, the original source of the domestic relations exception, was seriously flawed because *Barber* itself "did not express any intent to construe the diversity statute."[135] In fact, as the majority opinion pointed out, "*Barber* 'cited no authority and did not discuss the foundation for its announcement' disclaiming jurisdiction over divorce and alimony matters."[136] The majority could only "infer" that the *Barber* Court based its disclaimer on a "common law or equity" limitation of the diversity statute.[137] In so doing, the *Ankenbrandt* majority incorrectly reasoned that Congress must have been aware of, and accepted, this century-long disclaimer as an

126. *Ankenbrandt*, 112 S. Ct. at 2213; *see supra* notes 65-72 and accompanying text.
127. *Ankenbrandt*, 112 S. Ct. at 2213.
128. *Id.* at 2215.
129. *Id.* at 2218 (Blackmun, J., concurring).
130. *Id.* at 2217 (Blackmun, J., concurring).
131. *Id.* at 2218 (Blackmun, J., concurring).
132. *See infra* notes 160-64 and accompanying text.
133. *Ankenbrandt*, 112 S. Ct. at 2220 (Blackmun, J., concurring).
134. *Id.* at 2217-22 (Blackmun, J., concurring); *see supra* notes 104-108 and accompanying text.
135. *Id.* at 2218 (Blackmun, J., concurring).
136. *Id.* (Blackmun, J., concurring) (quoting from the majority opinion, at 2210).
137. *Id.* at 2213.

interpretation of the diversity statute when, in 1948, the language was changed to "all civil actions".[138] This reasoning, however, can hardly be said to constitute evidence of Congressional approval, especially if Congress was never even aware that the *Barber* Court was relying on the diversity statute as the basis for declining jurisdiction.[139]

Indeed, the *Barber* Court, as evidenced by the dissenting opinion, was in disagreement as to the nature of the exception.[140] It would be just as logical to "presume"[141] that Congress accepted a nonstatutory basis for the *Barber* Court's disclaimer over domestic relations cases in the years prior to 1948.[142] Consequently, the *Ankenbrandt* Court should not have presumed Congressional acceptance of a statutory construction which cannot clearly be found in *Barber*.

C. *Vague Historical Underpinnings*

Justice Blackmun points to three subsequent Supreme Court cases which, he claims, "seriously undermine any inference that *Barber's* recognition of a domestic relations 'exception' traces to a 'common law or equity' limitation of the diversity statute."[143] The first two cases, where the Supreme Court initially applied its half-century old *Barber* dictum, involved divorce cases on appeal from territorial courts. *Simms v. Simms*[144] was an appeal from a divorce order, with an award of alimony, by the territorial Supreme Court of Arizona. *De La Rama v. De La Rama*[145] involved an appeal from a decision of the Supreme Court of the Phillipines reversing a lower court decree granting the wife a divorce, division of property, and allowance for support. In both cases, the Court reiterated the *Barber* dictum and, despite its apparent approval of the domestic relations exception, held that it had jurisdiction to review the decisions of the territorial courts.[146] As Justice Blackmun pointed out, in neither case was the "common law or equity" limitation

138. *Id.*
139. *Id.* at 2217 (Blackmun, J., concurring).
140. *Id.* at 2212-13.
141. *Id.* at 2213.
142. A possible nonstatutory basis for the federal court's disclaimer over domestic relations cases could have been the notion of federalism. That is, a recognition by the federal government that they should keep their hands off what is primarily a state's affair. This is similar to the modern-day doctrine of abstention exercised by the federal courts to avoid possible conflict with the administration by a state of its own affairs; *see supra* note 94 and *infra* notes 191-94 and accompanying text.
143. *Id.* at 2218 (Blackmun, J., concurring).
144. 175 U.S. 162 (1899); *see also infra* notes 166-72 and accompanying text (discussing *Simms*).
145. 201 U.S. 303 (1906); *see also supra* notes 56-59 and *infra* notes 169-72 and accompanying text (discussing *De La Rama*).
146. *Ankenbrandt*, 112 S. Ct. at 2218-19 (Blackmun, J., concurring).

relied on as a bar to jurisdiction.[147] Rather, *Simms* and *De La Rama*, in upholding jurisdiction over these domestic relations cases, "distinguished *Barber* on grounds that it involved domestic relations matters in the States rather than in the territories."[148] The fact that the Supreme Court may review the decisions of territorial courts in divorce cases suggests only that such cases are not excluded from federal court jurisdiction by the Constitution.[149] It does not indicate to Congress that the Court's longstanding practice for disclaiming jurisdiction was based on an interpretation of the diversity statute.[150]

The third decision which Justice Blackmun claimed undermines the Court's interpretation of *Barber* was *Ohio ex rel. Popovici v. Agler*.[151] In *Popovici*, a vice-consul of a foreign country, who was stationed and residing in Ohio, was sued by his wife for a divorce and alimony in an Ohio state court.[152] The vice-consul asserted that the state court lacked jurisdiction because "federal statutes granted *exclusive* jurisdiction to the federal courts of 'all suits and proceedings against . . . consuls or vice consuls.'"[153] The Supreme Court rejected the vice-consul's claim and found that "the jurisdictional statutes 'do not affect the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce.'"[154] Instead, as Justice Blackmun pointed out, the *Popovici* Court traced this lack of federal jurisdiction to the Constitution itself and not to the diversity statute.[155]

Because of the inconsistencies in these leading Supreme Court opinions disclaiming jurisdiction over domestic relations cases prior to 1948, Justice Blackmun believes, and understandably so, that the *Ankenbrandt* Court was not justified in claiming that Congress accepted the limitation in *Barber* as a construction of the diversity statute.[156]

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147. *Id.* (Blackmun, J., concurring).

148. *Id.* (Blackmun, J., concurring).

149. *Id.* at 2219 n.6 (Blackmun, J., concurring). This supports Justice Blackmun's position that federalism and modern-day abstention principles were the more likely basis for denying jurisdiction; *see also infra* notes 191-94 and accompanying text.

150. *Ankenbrandt*, 112 S. Ct. at 2219 (Blackmun, J., concurring).

151. 280 U.S. 379 (1930).

152. *Ankenbrandt*, 112 S. Ct. at 2219 (Blackmun, J., concurring).

153. *Id.* (Blackmun, J., concurring) (quoting *Popovici*, 280 U.S. at 383). Note, however, that the diversity statute was not at issue in *Popovici*.

154. *Id.* (Blackmun, J., concurring) (quoting *Popovici*, 280 U.S. at 383).

155. *Id.* (Blackmun, J., concurring). The *Popovici* Court stated:
"'If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes.'" *Id.* (Blackmun, J., concurring) (quoting *Popovici*, 280 U.S. at 383-84).

156. *Ankenbrandt*, 112 S. Ct. at 2219 (Blackmun, J., concurring).

The fact that Congress, in 1948, did not mention domestic relations cases in the new diversity statute more likely indicates that Congress "had no idea . . . that the diversity statute contained an exception for domestic relations matters"[157] rather than indicating that Congress adopted, what the majority refers to as, the prior "well-known construction"[158] of the diversity statute. As a result, "the Court is without a requisite foundation for ratifying what Congress intended" in 1948 when it reenacted the diversity statute.[159]

Moreover, the *Ankenbrandt* Court's reasoning is based on the inherently speculative assumption that congressional inaction indicates specific congressional intent.[160] The Court has previously described the weight to be given congressional silence as follows:

> 'It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines. It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases.'[161]

Although Congress is presumed to be aware of judicial interpretation of a statute and to adopt that interpretation upon reenactment,[162] legislative inaction is a weak indicator of congressional intent unless there is clear proof that Congress considered the particular interpretation.[163] In fact, the *Ankenbrandt* Court noted that there was no "indication that Congress" even considered the matter.[164]

Although the Court's rationale is somewhat flawed, as Justice Blackmun indicated,[165] there does exist some historical underpinning for the majority's view. In *Simms v. Simms*,[166] the United States Supreme Court denied jurisdiction to review a divorce granted by a territorial court because the case did not meet the amount in controversy requirement,[167] but upheld the jurisdiction of the Supreme Court to

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157. *Id.* at 2217 (Blackmun, J., concurring).
158. *Id.* at 2213.
159. *Id.* at 2219-20 (Blackmun, J., concurring).
160. *Id.* at 2217 n.1 (Blackmun, J., concurring).
161. Girouard v. United States, 328 U.S. 61, 69-70 (1946) (quoting Helueric v. Hallock, 309 U.S. 106, 119 (1940)).
162. *See, e.g.*, Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).
163. *See generally* 2 B. SUTHERLAND STAT. CONST. § 49.10 (5th ed. 1992); *see also supra* 161 and *infra* note 205 and accompanying text.
164. *Ankenbrandt*, 112 S. Ct. at 2213.
165. *Id.* at 2217-22 (Blackmun, J., concurring).
166. 175 U.S. 162 (1899); *see also supra* notes 144-48 and accompanying text (discussing *Simms*).
167. *Id.* at 168-69.

review alimony awards of territorial courts that met the requirement.[168] In *De La Rama v. De La Rama*,[169] the Court went a little further than *Simms* and upheld the jurisdiction of the Supreme Court to review territorial court decisions regarding both the granting of a divorce and the award of alimony.[170] In both cases, the Court characterized the exception as evolving, not from any historical restriction on the federal courts, as purported by the *Barber* dissent,[171] but rather from the potential difficulties faced by divorce and alimony litigants in satisfying either the diversity requirement or the amount in controversy requirement. [172]

Because the *Simms* and *De La Rama* Courts did, in fact, make some mention of the statutory prerequisites of diversity jurisdiction,[173] the *Ankenbrandt* Court is not entirely without a historical foundation for its holding that the domestic relations exception exists as a matter of statutory construction of the diversity statute. Nevertheless, neither of these cases sets forth a *clear* coherent jurisdictional basis for the exception from which Congress can be said to have accepted and understood in the years prior to 1948. Furthermore, the *Ankenbrandt*

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168. *Id.* The Court's referral to the amount in controversy requirement suggests that the Court was relying on the diversity statute as a basis for denying review of the divorce decree.

169. 201 U.S. 303 (1906); *see also supra* notes 56-59, 145-48 and accompanying text (discussing *De La Rama*).

170. *Id.* at 307.

171. *See supra* note 68 and accompanying text.

172. In *Simms*, the Court held that the domestic relations exception had "no application to the jurisdiction of the courts of a Territory, or to the appellate jurisdiction of this court over those courts." *Simms*, 175 U.S. at 167-68. After reviewing the relevant statutes, the Court concluded that "the original jurisdiction of suits for divorce is vested in the district courts of the Territory" and that the Supreme Court had appellate jurisdiction over the orders of the district court. *Id.* at 168. The Court went on to hold that it had no jurisdiction to review the divorce decree because it involved "a matter the value of which could not be estimated in money." *Id.* at 168-69. It is important to note, however, that although the *Simms* Court cited *Barber*, the Court did not rest its holding on the domestic relations exception.

In *De La Rama*, the Court characterized the domestic relations exception as a "long established rule," but offered reasons different from those advanced by the *Barber* dissent:

> [T]he courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value.

De La Rama, 201 U.S. at 307.

173. *See supra* note 172 and accompanying text.

majority admitted that, in the years since *Barber*, "the Court has dealt only occasionally with the domestic relations limitation on federal-court jurisdiction, and it has *never addressed the basis for such a limitation.*"[174]

The absence of a clear, coherent foundation for the exception is further demonstrated by the various ways in which lower federal courts have explained and applied the exception. Some courts have characterized the domestic relations exception as a question of power,[175] while other federal courts have claimed that the exception is a discretionary surrender of jurisdiction in favor of state courts.[176] As a result, it is difficult to fathom that in 1948 Congress "understood" the basis of the exception to lie in the diversity statute, and "accepted" that rationale, when federal courts since then have not consistently reached that conclusion.[177]

Furthermore, notwithstanding the accuracy or inaccuracy of the *Ankenbrandt* Court's interpretation of *Barber*, Justice Blackmun pointed out that the Court's "extention of any domestic relations 'exception' to the diversity statute for child custody matters is not warranted by any known principles of statutory construction."[178] In fact, the Court in *Burrus*,[179] upon which the *Ankenbrandt* majority relied,[180] specifically reserved judgment on the appropriateness of federal jurisdiction in domestic relations cases where jurisdiction was based on diverse citizenship.[181] In addition, the often quoted statement in *Burrus*,[182] which many lower federal courts have relied on as authority for the

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174. Ankenbrandt v. Richards, 112 S. Ct. 2206, 2210 (1992) (emphasis added).

175. *See, e.g.*, Williamson v. Williamson, 306 F. Supp. 516, 518 (W.D. Okla. 1969) ("Subject matter jurisdiction . . . is wholly lacking in a federal court in spite of the fact that" the jurisdictional requirements of 28 U.S.C. § 1332 have been satisfied); *see also* Solomon v. Solomon, 516 F.2d 1018, 1024 (3d Cir. 1975) ("Federal courts do not have jurisdiction in domestic relations suits").

176. *See, e.g.*, Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981) ("federal courts traditionally have refrained from exercising jurisdiction over cases which in essence are domestic relations disputes"); *see also* Crouch v. Crouch, 566 F.2d 486, 487-88 (5th Cir. 1978) (applicability of domestic relations exception is determined in light of policy considerations); Kilduff v. Kilduff, 473 F. Supp. 873 (S.D.N.Y. 1979) (federal court may decline jurisdiction even in tort action if tortious conduct arose from marital relationship).

177. *See supra* notes 175-76 and accompanying text.

178. *Ankenbrandt*, 112 S. Ct. at 2220 (Blackmun, J., concurring); *see infra* notes 202-05 and accompanying text.

179. *In re* Burrus, 136 U.S. 586 (1890).

180. *Ankenbrandt*, 112 S. Ct. at 2214.

181. *Burrus*, 136 U.S. at 596-97. *See supra* note 85.

182. The often quoted statement made by the *Burrus* Court was that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Burrus*, 136 U.S. at 593-94. *See supra* notes 82-84 and accompanying text.

existence of a domestic relations exception in child custody matters,[183] clearly referred only to the substantive law to be applied in such cases and not to federal court jurisdiction.[184]

Thus, despite lower federal court reliance on the *Burrus* Court statement when disclaiming jurisdiction over child custody matters, the *Ankenbrandt* Court is without any support for presuming Congress to be aware of, and having accepted, judicial interpretation of the diversity statute if that statute was not even at issue in *Burrus*.[185] The Court's view that this was only a "technical[ity]"[186] was not lost on Justice Blackmun who stated: "I find it germaine, because, to the best of my knowledge, a court is not at liberty to craft exceptions to statutes that are not at issue in a case."[187]

Given the weaknesses of the majority's rationale, it is likely that the Court adopted it only because alternatives rationales were less satisfying. One alternative rationale for the exception, offered by Justice Blackmun[188] and other commentators,[189] was the doctrine of abstention. The *Ankenbrandt* majority, however, rejected relying on abstention principles as a basis for the domestic relations exception.[190]

D. *Why The Abstention Doctrine Was Rejected*

Justice Blackmun suggested that the common concern reflected in these earlier cases disclaiming jurisdiction over domestic relations matters was "in modern terms, abstentional–and not jurisdictional–in nature."[191] That is, that the basic premise underlying these cases was based more on a recognition that the states had "virtually exclusive primacy at that time . . . in the regulation of domestic relations" than on any historical jurisdictional limitation of the English courts.[192] This premise, he claimed, can be found in *Simms* and *De La Rama* because the Court "justified its exercise of jurisdiction over actions for divorce and alimony . . . by reference to the absence of any interest of States in appeals from courts in territories controlled by the National Govern-

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183. *See supra* note 86.

184. The Supreme Court has made clear that the federal courts, in diversity cases, are required to apply state substantive law in adjudicating those disputes. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

185. Ankenbrandt v. Richards, 112 S. Ct. 2206, 2220 (1992) (Blackmun, J., concurring).

186. *Id.* at 2214 (Blackmun, J., concurring).

187. *Id.* at 2220 (Blackmun, J., concurring).

188. *Id.* (Blackmun, J., concurring).

189. *See infra* note 199 and accompanying text.

190. *Ankenbrandt*, 112 S. Ct. at 2216; *see supra* notes 94-97 and accompanying text.

191. *Ankenbrandt*, 112 S. Ct. at 2220 (Blackmun, J., concurring); *see supra* note 94 and accompanying text.

192. *Id.* (Blackmun, J., concurring).

ment."[193] But, Justice Blackmun pointed out, "whether the interest of States remains a sufficient justification today for abstention is uncertain in view of the expansion in recent years of federal law in the domestic relations area."[194]

The majority opinion in *Ankenbrandt* recognized that it was possible for the *Burford*-type abstention[195] to be proper in certain domestic relations cases[196] but criticized Justice Blackmun's suggestion that the earlier cases could be reinterpreted to support a special abstention doctrine. [197] Justice Blackmun's primary point, however, was that *whatever* the past basis for the exception is, modern principles of abstention offer a "more principled basis" for *continuing* to recognize the exception rather than the Court "invent[ing] statutory exceptions that are simply not there."[198] Notably, many commentators have also suggested the use of abstention principles as a better basis for federal courts to avoid certain domestic relations cases.[199]

The primary argument against the use of abstention principles as a basis for declining jurisdiction over domestic relations cases is that it is a discretionary doctrine. It is this discretionary feature which most likely prompted the Court to refrain from relying on abstention principles and to go to such great lengths in interpreting the pre-1948 cases, which disclaimed jurisdiction over domestic relations matters, as being based on judicial interpretation of the diversity statute.

There is nothing in the federal diversity statute which allows federal courts to have any measure of discretion in allowing diverse citizens meeting the amount in controversy requirement to have access to the

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193. *Id.* (Blackmun, J., concurring).

194. *Id.* at 2221 (Blackmun, J., concurring). *See, e.g.,* Victims of Child Abuse Act of 1990, 42 U.S.C. § 13001 *et seq.*; Family Violence Prevention and Services Act, 42 U.S.C. § 10401 *et seq.*; Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A; Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 620-628, 670-679a; Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 42 U.S.C. § 5111 *et seq.*; Child Abuse Prevention and Treatment Act, 42 U.S.C. § 1501 *et seq.*; Uniform Child Custody Jurisdiction Act § 1-28, 9 U.L.A. 116 (1979).

195. *See supra* notes 94-100 and accompanying text.

196. *Ankenbrandt,* 112 S. Ct. at 2216. The Court stated that "[s]uch might well be the case if a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties." *Id.*

197. *Id.* at 2216 n.8.

198. *Id.* at 2221 (Blackmun, J., concurring).

199. *See, e.g.,* Barbara A. Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction,* 35 HASTINGS L.J. 571, 575 (1984) ("[T]he various abstention doctrines provide a principled basis for dismissing certain kinds of domestic relations claims"); *see Swenson, supra* note 71, at 1096 ("[T]he standards employed in the abstention doctrines should also be applied to domestic relations actions").

federal forum.[200] If federal jurisdiction exists, a litigant has an absolute right to be heard in the federal forum.[201] The doctrine of abstention contradicts this notion of an absolute right to a federal forum. Consequently, by claiming an absolute lack of power to hear divorce, alimony, or child custody cases, the Court has effectively narrowed their jurisdictional power and avoided the possible numerous litigations associated with discretionary-type doctrines. At the same time, the Court has given clear notice to Congress that the diversity statute contains a domestic relations exception. It is now up to Congress to either accept this questionable judicial construction of the diversity statute, or, perhaps, to create by statute a special basis for federal jurisdiction in domestic relations disputes.

V. CONCLUSION

The United States Supreme Court rooted its decision in *Ankenbrandt* on a judicial construction of the federal diversity statute. This rationale, however, cannot be supported by any established principles of statutory construction. The Court's holding, that there exists a domestic relations exception as a matter of statutory construction, was not based on the "plain language" of the statute principle;[202] or on stare decisis;[203] or even on legislative history.[204] Instead, the *Ankenbrandt* Court relied on legislative silence; a principle which the Court has long since held to be meaningless.[205]

The Supreme Court could have decided *Ankenbrandt* very narrowly, or could even have relied upon abstention principles. Yet, neither of these choices would have accomplished the Court's obvious goal–to settle a murky area of the law. Neither a narrow disposition of the case, nor abstention, would have established the "exception" clearly and make way for even-handed rulings in the domestic relations area. The Court's policy goals are laudable, but they were reached at the expense of distorting important principles of statutory construction.

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200. *See supra* note 3.

201. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

202. *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 485 (1917); *see generally* 2A SUTHERLAND STAT. CONST. § 46.01 (5th ed. 1992).

203. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989). Although the majority mentioned stare decisis briefly, *supra* note 73, it did not ultimately rely on the principle to reach its decision.

204. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979); *see generally* 2A Sutherland Stat. Const. § 48.01 (5th ed. 1992).

205. *See, e.g.*, Boys Mkt. Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241-42 (1970); *see also infra* notes 160-64 and accompanying text.

In the words of Justice Stevens, "[a]n easy case is especially likely to make bad law when it is unnecessarily transformed into a hard case."[206] Moreover, "when the Court goes beyond what is necessary to decide the case before it, it only encourages the perception that it is pursuing its own notions of social policy, rather than adhering to its judicial role."[207] Any alterations in the jurisdiction of federal courts must be made by Congress and not by a result-oriented judiciary.

*Maryellen Murphy**

206. Ankenbrandt v. Richards, 112 S. Ct. 2206, 2222 n.* (1992) (Stevens, J., concurring).

207. United States v. Leon, 468 U.S. 897 (1984) (Stevens, J., dissenting).

* This article is dedicated to my daughter, Dawna, and to my parents, for their endless love and support.

Battered Women Who Act Under Duress

Beth I.Z. Boland*

I. INTRODUCTION

In the past decade, violence against women has been increasingly recognized as one of the most significant social problems within the United States. Some estimates indicate that as many as four million women are battered every year.[1] Violence is the leading cause of injuries to women ages fifteen to forty-four years;[2] more American women are injured by their male partners than by car accidents, muggings, and rape combined.[3] More than thirty percent of the women murdered in the United States are killed by their male partners.[4]

Fortunately, increased awareness of both the level and the impropriety of violence against women has helped to reshape long-held societal attitudes which had previously ignored–if not condoned–such violence. In the wake of this shift in social mores, many courts have reassessed established legal doctrines to accommodate newly-accepted ways of viewing domestic violence. The most significant of these legal reforms

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1. *See Women and Violence: Hearings Before the Senate Committee on the Judiciary*, 101st Cong., 2d Sess. 109, 116-17 (1990) (statement of Angela Browne, Professor, Dept. of Psychiatry, U. Mass. Med. Sch.) (explaining that fear of reporting and aspects of poverty or incapacity cause survey underestimates); Erich D. Andersen & Anne Read-Andersen, *Constitutional Dimensions of the Battered Woman Syndrome*, 53 OHIO ST. L.J. 363, 366 & n.15 (1992) (citing research indicating that between 1,600,000 and 4,000,000 women are abused annually).

2. *See* Jeane A. Grisso et al., *A Population-based Study of Injuries in Inner-City Women*, 134 AM. J. EPIDEMIOLOGY 59, 59 (1991); Antonia C. Novello, M.D. et al., *From the Surgeon General, U.S. Public Health Service*, 267 JAMA 3132, 3132 (1992).

3. *See* Nancy Gibbs, *'Til Death Do Us Part*, TIME, Jan. 18, 1993, at 38, 41.

4. *See* SUPREME JUDICIAL COURT, COMMONWEALTH OF MASSACHUSETTS, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 79 (1989) (citing 1986 United States Bureau of Justice Statistics).

recognizes the admissibility of evidence relating to the effects of past physical, sexual and/or psychological abuse, sometimes referred to as the "battered person syndrome,"[5] upon a defendant to support an affirmative claim of self-defense in instances where the defendant is accused of unlawfully striking back against her batterer.

Specifically, courts are becoming increasingly cognizant of the admissibility of evidence of past abuse suffered by a defendant. Courts now allow the defendant to explain, for example, how such abuse may affect the defendant's perception of the danger posed to her by her batterer and the reasonableness of her response in reaction to such perceived danger.[6] Moreover, the legislatures in at least eight states

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5. "Battered person syndrome" is not a separately-recognized psychological "syndrome" but rather a subclass of Post-Traumatic Stress Disorder (PTSD). *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III-R) § 309.89 (3d ed. 1987) (identifying essential feature of PTSD as development of characteristic symptoms following psychologically distressing event outside range of usual human experience); 1 UNITED STATES NATIONAL CENTER FOR HEALTH STATISTICS, INTERNATIONAL CLASSIFICATION OF DISEASES, 9TH REVISION, CLINICAL MODIFICATION (ICD-9-CM) 1111 (Ann. ed. 4th prtg. 1988) (including rape and assault, military combat, and disasters as psychologically traumatic events from which PTSD symptoms may develop). As such, the syndrome is linked diagnostically with responses to prolonged exposure to various forms of abuse, particularly the experiences of prisoners of war and hostages, where the primary mental impact on the victim is accommodating behavior.

Although the syndrome is medically recognized, experts are careful to distinguish it from a mental disease or defect. Some have suggested using such alternative terms as "woman's self-defense" to replace "battered woman syndrome" in cases of self-defense. *See, e.g.*, Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 197-99 & n.9 (1986). In using such alternatives, however, one must be careful not to imply that the "syndrome" is actually a separate defense, rather than merely a tool by which to interpret evidence presented in support of such traditional defenses as self-defense. The labeling of the condition as a specific defense also threatens to promote further stereotyping of the abused woman as one who must exhibit certain behavioral characteristics to establish her ability to introduce expert evidence in the first place. *See id.* at 199-200 n.18 and cases cited therein (generally noting stereotype of battered women as suffering from mental "disease"); *see also* Griffin v. State, 749 P.2d 246, 248 (Wyo. 1988) (noting that battered woman must be an "emotional cripple" to merit self-defense claim).

To avoid such confusion and unnecessary labeling, I will use the phrase "evidence of past abuse" wherever possible, while sustaining references to the "syndrome" in instances where it is used by various authorities. In addition, because it is usually (although not always) women who are the victims of domestic violence at the hands of their male partners, the defendant may be referred to by using the feminine gender.

6. *See infra* note 72 and accompanying text (identifying decisions where courts throughout the United States have admitted evidence of past abuse).

have enacted statutes mandating the admission of such evidence in cases where self-defense is claimed by the defendant.[7]

More recently, and perhaps more controversially, courts have been asked to recognize that evidence concerning the effects of exposure to prolonged abuse may also be admissible to support a battered woman's claims that she committed criminal acts under duress or coercion from her batterer. Such attempts have not been met with universal acceptance. Most recently, in the case of *Neelley v. State*,[8] the Alabama Court of Criminal Appeals upheld the imposition of a death sentence upon defendant Neelley for the kidnapping and murder of a thirteen year old girl at the behest of her husband.[9]

The facts of *Neelley* can only be described as horrifying. According to the trial testimony, Neelley's husband brutally and repeatedly forced her to engage in "putrid, pornographic, degrading, [and] disgusting" acts of sex.[10] Through such physical and sexual abuse, Neelley's husband

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7. *See* CAL. EVID. CODE § 1107 (Deering Supp. 1993) (establishing admissibility in all criminal actions of expert testimony regarding effects of violence on defendant's "beliefs, perceptions, or behavior"); GA. CODE ANN. § 16-3-21 (Supp. 1993) (allowing expert testimony on defendant's mental state including family violence as justification for self-defense); LA. CODE EVID. ANN. art. 404 (West 1989) (making expert testimony on effects of victim's violence toward accused admissible to prove the victim's character where self-defense raised); MD. CODE ANN. CTS. & JUD. PROC. § 10-916(b) (Supp. 1992) (allowing evidence of Battered Spouse Syndrome or victim's past abuse to explain mental state of defendant charged with homicide); MO. ANN. STAT. § 563.033 (Vernon Supp. 1993) (providing for admission of Battered Spouse Syndrome evidence on question of self-defense or defense of another); OHIO REV. CODE ANN. § 2901.06 (Baldwin 1992) (allowing expert testimony on Battered Woman Syndrome where defendant raises claim of self-defense); OKLA. STAT. ANN. tit. 22, § 40.7 (West 1992) (allowing evidence of domestic abuse and expert testimony regarding effects on victim's "beliefs, behavior and perception" in civil or criminal action); TEX. PENAL CODE ANN. § 19.06 (West Supp. 1993) (permitting expert testimony on effects of "family violence" upon state of mind of defendant raising issue of self-defense or defense of another).

In January 1994, Massachusetts enacted legislation which provides for the admission of evidence (including expert testimony) of past abuse to establish "the reasonableness of the defendant's apprehension that death or serious bodily injury was imminent, the reasonableness of the defendant's belief that he or she had availed him- or herself of all available means to avoid physical contact, and/or the reasonableness of a defendant's perception of the amount of force necessary to deal with the perceived threat." 1994 Mass. Adv. Legis. Serv. ch. 477 (West) *to be codified at* MASS. GEN. L. ANN. ch. 233, § 23E (West Supp. 1994). Importantly, the Massachusetts statute not only provides for the introduction of such evidence in cases of self-defense, but also in cases where duress or accidental harm are asserted as defenses. *Id.*

8. Neelley v. State, No. CR-91-1036, 1993 WL 271873 (Ala. Crim. App. June 18, 1993).

9. *Id.* at * 17.

10. Neelley v. State, 494 So. 2d 669, 676-78 (Ala. Crim. App. 1985), *aff'd*, 494 So. 2d 691 (Ala. 1986).

"trained her like an animal" to engage in a series of criminal acts—beginning with robbery, firebombing, and forgery, and culminating in the procurement of "young girls with 'small sex organs'"—on his behalf.[11] Ultimately, Neelley shot and killed two girls whom she had procured for her husband, after he had raped and sexually abused them.[12]

Although the *Neelley* Court permitted extensive testimony regarding the physical and sexual abuse inflicted upon Neelley by her husband, Neelley's trial attorney did not present any expert testimony regarding the "battered woman syndrome" or the effect of past abuse upon Neelley's state of mind.[13] At various post-trial hearings, however, Dr. Lenore Walker and others opined that Neelley "was a severely battered woman, that she was acting out her husband's wishes, and that her criminal acts were committed as a way of coping with that abuse and protecting herself."[14]

Nevertheless, the trial court denied Neelley's motion for a new trial and for resentencing based upon the omission of such evidence, noting:

> "Studies by Dr. Walker and others show that an alarming number of women in our society are victims of spousal abuse, and that many of them react in ways consistent with the battered woman syndrome. In a growing number of cases, the law has recognized the battered woman syndrome in judging the culpability of women who kill their batterers. Such recognition is entirely consistent with legal concepts of self-defense and self-protection. *A major distinguishing fact, however, between these cases and the one before the court is that the [defendant] did not choose to kill her batterer. She chose, instead, to kill an innocent third party, a choice which falls outside any acceptable notion of self-protection. The battered woman syndrome offers no plausible explanation for that choice, and the court is unconvinced that the battered woman syndrome provides any reason for mitigating [Neelley's] sentence.*"[15]

Aside from its shocking factual setting, *Neelley* raises a number of questions regarding the admissibility of evidence of past abuse on behalf of battered women claiming duress. Notwithstanding the *Neelley* Court's conclusion to the contrary, *is* the relevance of past abuse to a self-defense claim different from that of duress? And even if it is not, what role, if any, should evidence of past abuse play to support a defense of duress?

To put the discussion into context, this article will address the background of the admissibility of evidence of past abuse in the context of a self-defense claim, and examine how the standards used to admit the

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11. *Id.* at 676.
12. *Id.* at 678.
13. Neelley v. State, No. CR-91-1036, 1993 WL 271873, at *15 (Ala. Crim. App. June 18, 1993).
14. *Id.*
15. *Id.* (emphasis added) (quoting trial court opinion with approval).

evidence are applicable in the context of duress or coercion. Underlying this discussion is the issue of whether a defendant should be able to present evidence justifying her criminal activities by claiming that she was forced to commit them under fear of suffering abuse at the hands of her batterer.

A review of the case law and literature suggests that the introduction of evidence of past abuse to support defenses outside of the relatively well-established parameters of self-defense, and specifically to claims of duress, is in some respects novel, and in other respects not novel at all. In many ways the elements of the defense of duress are virtually identical to those of self-defense. Theoretically, then, such evidence should enjoy equal applicability in the context of both defense and duress–and, in fact, at least one court has reasoned precisely that it does.[16]

Yet, on a practical level, the admission of evidence of past abuse to support a claim of duress differs from evidence used to show self-defense. The fundamental "proportionality of force" principle, which lies at the heart of a self-defense claim to a charge of homicide–i.e., that the defendant used deadly force against her batterer only in response to the fear of deadly force being used against her–does not apply to claims of duress. Unlike the battered woman who fights back against her batterer, the defendant who claims she acted under duress in fact "fights back" against innocent third parties who played no role in inducing her to act as she did. In addition, the defendant who employs a defense of duress does not react to the threat of force with an "equal and opposite" use of force, but rather with an entirely different type of activity–whether it consists of check forging, drug dealing, or other criminal activity–than that threatened against her.

The existence of such differences, however, should not (as it did in *Neelley*) detract from the fact that the admission of evidence of past abuse may still guide the jury in assessing the viability of a claim of duress in the same way that it provides guidance in evaluating a claim of self-defense. As such, the evidence should be admissible to support the defendant's claim that she honestly and reasonably believed she was in imminent danger of physical injury, after taking into account the effect of past abuse upon her belief. Because the reasons for which the courts have admitted such evidence in connection with claims of self-defense are identical to those for which it would be admitted in connection with claims of duress, there should be little difference in the acceptance of such evidence in both contexts. This article will explore both sides of the issue with these thoughts in mind.

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16. *See* People v. Romero, 10 Cal. App. 4th 11150 (omitted pending review), 13 Cal. Rptr. 2d 332, 338 (1992) (finding evidence of past abuse *a fortiori* relevant where woman participated in robberies at batterer's insistence); *see infra* notes 85-87 and accompanying text.

II. BACKGROUND

A. *Defining the Victim of Past Abuse*

Through her ground-breaking book, *The Battered Woman*,[17] Dr. Lenore E. Walker is responsible for developing the most widely-accepted definition of a battered woman and a model of the battered woman's relationship with her batterer.[18] According to Dr. Walker, a battered woman is one "who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights."[19]

Most instructive in this definition is the emphasis on the *psychological* aspect of the abuse. In her extensive interviews of forty-five battered women who fought back against their batterers to the point of killing them, Dr. Walker found that each and every woman suffered extreme psychological abuse first and foremost, which was accompanied by ever-increasing physical abuse.[20] In fact, each woman reported having been subjected to the eight forms of "psychological torture" as defined by Amnesty International: (1) social isolation; (2) exhaustion stemming from deprivation of food and sleep; (3) monopolization of perception manifested in obsessive or possessive behavior; (4) threats (including threats of death) against the woman, her relatives, and friends; (5) humiliation, denial of power, and name calling; (6) administration of drugs and alcohol; (7) induction of altered states of consciousness; and (8) "indulgences" which maintained the woman's hope that the abuse would cease.[21]

In other words, the battering relationship is one which uses physical and/or sexual abuse as a means to achieve psychological domination and control as its ultimate end. Dr. Walker's model of the battering

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17. LENORE E. WALKER, THE BATTERED WOMAN (1979).

18. *See* CHARLES P. EWING, BATTERED WOMEN WHO KILL 9 (1987).

19. WALKER, *supra* note 17, at xv.

20. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME, 27-28 (1984).

21. *Id.* Similarly, Dr. Angela Browne found the following hallmarks of a typical battering relationship: (1) intrusion, often involving stalking and a constant need to know the victim's whereabouts; (2) isolation from friends and family; (3) a sense of "possession" by the man of the woman; (4) overwhelming jealousy, including irrational accusations of infidelity; (5) secrecy surrounding the batterer's past; and (6) the batterer's tendency toward quick and heated anger. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 42-46 (1987). The characteristics described by Dr. Walker and Dr. Browne also bear striking resemblance to the "brainwashing" techniques of coercive persuasion found by Professor Richard Delgado which, in combination, "can produce behavioral and attitudinal change in even the most strongly resistant individual[s]"—let alone a battered woman. *See* Richard Delgado, *Ascription of Criminal States of Mind: Toward A Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1, 2-3 (1978).

relationship also reflects this dynamic. Under her paradigm, the relationship consists of three cyclical phases: the "tension-building" phase, during which the batterer primarily tortures the woman psychologically;[22] the "acute battering" phase, during which the batterer releases all of his built-up tension through physical and often sexual abuse of the woman;[23] and the reconciliation phase, during which the batterer recognizes his wrong and temporarily convinces himself and the woman that the violence will not reoccur.[24] The cycle of violence then begins to repeat, with shorter periods between the batterings.[25]

Battered women usually blame themselves for allowing the violence to occur and, consequently, are sensitive to the changes in the cycle of violence. According to Dr. Walker's model, battered women develop an ability to know when their batterer is ready to attack, and they know how to distinguish between ordinary and extraordinary violence.[26] They often attempt to change and mold their behaviors to avert the next battering incident or to cease the battering altogether.[27] As part of this

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22. *See* WALKER, *supra* note 17, at 55-70 (discussing characteristics of psychological torture leading up to acute battering). The psychological torture often consists of insults and criticisms, as well as direct threats to the safety and health of the woman or her children. *See id.* at 57 (explaining intensification that results when woman responds with "passive acceptance" of batterer's abusive behavior).

23. *See id.* at 59-65 (describing precipitating factors and results of abuse). Some women accelerate the arrival of the acute battering incident in order to relieve their anxiety when they anticipate the onset of violence. *See id.* at 54-55, 102.

24. *See id.* at 65-70 (discussing battered woman's need to believe that abuse will not recur). Dr. Walker has suggested that batterers evidence a dual personality, with the capacity for being kind and gentle at times, then violent and cruel at others. *See id.* at 37. *See generally* Jeffrey Robinson, Note, *Defense Strategies for Battered Women Who Assault Their Mates*: State v. Curry, 4 HARV. WOMEN'S L.J. 161, 162-63 (1981) (discussing need for sound understanding of battering behavior in preparation of defense strategy).

Dr. Angela Browne, in her seminal study of battered women who kill their batterers, found that over time, many batterers ceased apologizing for the abuse, or apologized but blamed the women for the attack. BROWNE, *supra* note 21, at 64. Eventually, the women lost hope in their batterers' ability or desire to change, even if contrition continued: "For many of the women, the mere *cessation* of violence—the calm after the storm—was a positive occurrence." *Id.*

25. *See* BROWNE, *supra* note 21, at 68 (discussing research indicating that frequency as well as severity of abusive incidents increased over time).

26. *See* WALKER, *supra* note 20, at 102; *see also* Elaine Hilberman & Kit Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460, 464 (1978) (describing increased vigilance and agitation after "[a]ny symbolic or actual sign of potential danger").

27. *See* WALKER, *supra* note 17, at 42-54 (discussing factors that limit woman's ability to influence battering behavior). Dr. Walker labels the woman's inability to influence the behaviors of the batterer as a condition of "learned helplessness." *Id.* One commentator has taken issue with this classification, finding the tone of "helplessness" inaccurate to describe battered defendants who act reasonably in light of their unique circumstances. *See* Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1433 (1990) (reviewing CYNTHIA GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED

process, battered women maintain a highly-developed ability to know when their batterers are ready to attack, and they know how to distinguish between ordinary and extraordinary violence. Thus, for example, an otherwise routine incident–perhaps as insignificant as the batterer's arriving home from a visit with his mother–may signal to the battered woman that a particularly violent beating is imminent.[28]

Perhaps most striking–and certainly the most counterintuitive–aspect of the battering dynamic is the entrapment which the woman begins to feel over time. Rather than fleeing the relationship as it becomes more violent, the severely battered woman increasingly feels unable to take such "common-sensical" actions as leaving her batterer, or calling the police.[29]

This inability to flee or take other corrective action may stem from a variety of sources. The woman, especially if she has children, may be so dependant financially upon her batterer that she is not in a position to strike out on her own. As a result of the social isolation enforced upon virtually all battered women by their abusers, she may not have a safe place–whether it be a relative's home, a battered woman's shelter, or other location–to stay.[30] She may think no one will believe that she

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WOMEN, SELF-DEFENSE AND THE LAW (1989)) (disagreeing with author that battered woman must kill because she is helpless to defend herself). Estrich instead maintains that the aggressive battered woman is an exception and the passivity, which is "the hallmark of the syndrome," makes the battered woman far more like the rest of us than not. *Id.* at 1439; *see id.* at 1433 (arguing that expert testimony and evidence of past batterings may encourage appropriate jury empathy).

28. *See* Lentz v. State, 604 So. 2d 243, 245 (Miss. 1992) (when batterer's facial expression changed and "his eyes turned black," woman knew it was time to get away); WALKER, *supra* note 17, at 73.

29. *See* CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE AND THE LAW 147-48 (1989) (exploring reasons why battered women do not leave battering relationships); WALKER, *supra* note 17, at 62, 65-70. In their survey of sixty battered women, Elaine Hilberman and Kit Munson found the majority reduced to "overwhelming passivity and [an] inability to act on their own behalf," while a minority of women reacted more aggressively, becoming "frankly homicidal" and "suicidal." Hilberman & Munson, *supra* note 26, at 465-66. All women surveyed, however, were subject to a "paralysis" of action which prevented them from saving the relationship: the passivity experienced by some was seen as "the last desperate defense against homicidal rage." *Id.* at 466-67.

30. The enforcement of a sense of imprisonment and isolation is central to the battering relationship. *See* ANN JONES, WOMEN WHO KILL 298 (1980) ("[Batterers] are cool or rude to family and friends, gradually cutting their wives off from social contacts. Some keep the car keys; some permanently sabotage their wives' cars. Others make sure their wives never have enough cash to go out. . . . Some make their wives literal prisoners. . . . [One batterer] never let his wife, Eileen, out of his sight except for some 'monitored trips to the bathroom.'"); Hilberman & Munson, *supra* note 26, at 461-62 ("Leaving the house for any reason invariably resulted in accusations of infidelity which culminated in assault. . . . Many husbands refused to allow their wives to work. When the women did work, efforts were made to ensure

has been abused, or, if they do, that they will simply advise her to be a "better" wife.[31] She may fear her batterer will stalk her if she leaves, and, if he catches her, the batterings will worsen: not surprisingly, a battered woman is most apt to be killed by her batterer at the point when she tries to take control of the relationship by leaving him.[32] The woman may hope that the cycle of violence will end, and may truly believe her batterer's promises that he will change.[33] She may develop a "traumatic bond" with her batterer through his use of alternating punishment for "disobedient" behavior with rewards for "obedience."[34] Because of past abuse at the hands of her batterer or others, the woman may believe that a cycle of violence is normal.[35] Or, she may accept traditional sex role stereotypes which dictate that the man has the right to control her, the exercise of which may involve physical abuse whenever the woman purportedly acts in a way to "displease" him.[36] Finally, the deterioration of her self-esteem–aided, of course, by her batterer's domination and abuse of her–may be so complete that she simply believes she cannot survive on her own, without her batterer.[37]

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that both spouses worked at the same place so that activities and friends could be monitored.").

31. *See* State v. Felton, 329 N.W.2d 161, 163 (Wis. 1983) (defendant received counseling from a clergyman and was told that she should be a better wife).

32. *See* BROWNE, *supra* note 21, at 115-19 (linking woman's increased danger to batterer's sensing loss of control). Most battered women find that when they do leave, their batterers follow their movements relentlessly, to the point of stalking them wherever they go. *See id.* at 120-21 (illustrating cases of repeated harassment and attempted assault after separation from batterer). In light of this fact, several states, including Massachusetts, have now adopted statutes which criminalize such stalking. *See* MASS. GEN. L. ch. 265, § 3 (1992) (making stalking a crime punishable by not more than five years in state prison).

33. *See* GILLESPIE, *supra* note 29, at 147-48 (explaining battered woman's desire to preserve the best aspects of a close personal relationship).

34. *See* Don Dutton & Susan L. Painter, *Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse*, 6 *Victimology* 139 (1981); *see also* EWING, *supra* note 18, at 19. Social scientists Dutton and Painter have observed that in many relationships involving periodic but persistent abuse by one in a position of control over another–such as those involving a battered woman and her batterer, a hostage and his captor, and cult followers and their leader–a "traumatic bond" may develop. Dutton & Painter, *supra*, at 146. In such relationships the victim depends upon, and may even identify with, his or her abuser such that the victim becomes "more negative in their self-appraisal, more incapable of fending for themselves, and thus more in need of the high power person." *Id.* at 147. When this dependency and identification is reinforced by consistently "alternating aversive and pleasant" conditions, the victim ultimately may develop a "strong affective bond" to the abuser. *Id.* at 147-48.

35. *See* State v. Kelly, 478 A.2d 364, 372 (N.J. 1984).

36. *See* EWING, *supra* note 18, at 17-18.

37. *See id.* at 9-10; WALKER, *supra* note 17, at 45-51 (battered woman typically is rendered psychologically unable to take action).

The medical community recognizes the effects of abuse as a "syndrome," or a series of common psychological and behavioral characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives.[38] Not all battered women, however, will exhibit the same traits, and some may not exhibit any behavioral traits typically associated with prolonged exposure to an abusive relationship.[39] Nevertheless, even without observable traits, battered women may be considered affected by the prolonged abuse and, as some would define it, the "battered person syndrome."[40]

B. *The Admission of Evidence of Past Abuse to Support a Claim of Self-Defense*

In most jurisdictions, a person is justified in using deadly force in self-defense only in response to an imminent threat of death or serious bodily harm, if the actor reasonably believes that the force is necessary.[41] In general, self-defense requires proof of three basic elements: (1) the defendant must honestly and reasonably have believed that she

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38. *See supra* note 5 and accompanying text (discussing syndrome as sub-category of Post-Traumatic Stress Disorder); *see also* United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992) (accepting expert's description of syndrome as a post-traumatic stress disorder rather than mental disease or defect); Arcoren v. United States, 929 F.2d 1235, 1239 (8th Cir.) (noting expert's view that abuse creates psychological syndrome), *cert. denied*, 112 S. Ct. 312 (1991).

The expert testifying in *Arcoren* explained that the syndrome's general characteristics include the woman's belief that the abuse is her fault, a persistent fear for her life and the lives of her children, and an irrational belief that the abuser is omnipresent. *Id.* at 1239. As a result, the woman develops certain coping mechanisms to deal with the ever-present violence, one aspect of which is a belief that by doing just one more thing she can stop the violence. *See Arcoren*, 929 F.2d at 1239 (reviewing basis for battered woman's assuming responsibility for violence of abuser). Similarly, the *Johnson* Court heard an expert explain that the psychological effects are often similar to the effects of imprisonment on kidnap victims and prisoners of war, where repeated beatings diminish the battered woman's motivation to respond. *See Johnson*, 956 F.2d at 899 (distinguishing battered woman's coping mechanisms from evidence of weak character or mental defect).

39. *See* McMaugh v. State, 612 A.2d 725, 733 (R.I. 1992) (recognizing various manifestations of battered woman syndrome). The *McMaugh* Court concluded that the defendant convicted of manslaughter was entitled to a new trial based, in part, on the trial judge's erroneously concluding that she did not look or act like a battered woman. *See id.* (accepting expert testimony that abused woman may appear normal while still being affected by abuse).

40. *See id.* at 731 (acknowledging that stereotypical personality traits need not be present to demonstrate mental affect of battering); *see also* Dyer v. Commonwealth, 816 S.W.2d 647, 654 (Ky. 1991) (emphasizing that syndrome, as recognized scientific phenomenon, requires expert to create link with accused's mental state).

41. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 457 nn.22-23 (2d ed. 1986).

was in imminent danger of death or serious bodily harm, from which she could save herself only by using deadly force; (2) the defendant must have availed herself of all proper means to avoid physical combat before resorting to the use of deadly force; and (3) the defendant must have used no more force than was reasonably necessary under the circumstances.[42] In most jurisdictions, the prosecution maintains the burden of disproving a defendant's claim of self-defense once raised, while in some the defendant bears the burden to prove she acted in self-defense.[43]

As the above discussion implies, other jurisdictions require that the defendant asserting a claim of self-defense maintain both a subjective, honest apprehension of imminent harm, and also that such apprehension be reasonable.[44] While a history of past abuse by itself does not justify the killing of an abuser, that history may be relevant if it forms the basis for the woman's subjective and/or objective perception of imminent danger of severe bodily harm or death at the hands of her

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42. Some states, including Massachusetts, also require the defendant to retreat rather than fight back, provided there is a means of escaping with reasonable safety. *See* MASS. GEN. L. ch. 278, § 8A (1992) (requiring occupant to retreat only from person lawfully in dwelling); *see also* Commonwealth v. Lapointe, 402 Mass. 321, 328, 522 N.E.2d 937, 941 (1988) (self-defense not justified until person uses all reasonable and proper means to avoid combat); Commonwealth v. Shaffer, 367 Mass. 508, 510, 326 N.E.2d 880, 883 (1975) (applying to one's dwelling the requirement that one must avail himself of all proper means to avoid combat). At least one state has also recognized an exception for a victim of prolonged abuse, whose attacker was lawfully in the defendant's home. *See* State v. Leidholm, 334 N.W.2d 811, 820-21 (N.D. 1983) (defendant need not retreat from cohabitant where she honestly and reasonably believes she cannot retreat in safety).

43. *See* Jeffrey F. Ghent, Annotation, *Homicide: Modern Status of Rules as to Burden and Quantum of Proof to Show Self-Defense*, 43 A.L.R. 3D 221 (1972 & Supp. 1993).

44. The legal test for self-defense varies from jurisdiction to jurisdiction. Most states, including Massachusetts, require both proof that the defendant subjectively believed that she was in imminent danger of serious injury and that such belief was reasonable. *See, e.g.*, Commonwealth v. Harrington, 379 Mass. 446, 450, 399 N.E.2d 475, 479 (1980) (considering sufficiency of evidence to raise question of self-defense). Other states require only proof that the defendant held an honest, subjective belief of such danger or that she held an objectively-reasonable belief of the same. *See* LAFAVE & SCOTT, *supra* note 41, at 457-58 and cases cited therein.

As a practical matter, the objective and subjective tests tend to coalesce at the jury level: rare is the juror who will conclude that the defendant reasonably perceived an imminent danger if the defendant did not also maintain a subjective belief of the danger, or that the defendant maintained an honest, subjective belief which was not in any way also reasonable. Hence it is quite common for jurors in an "objective belief jurisdiction" to take into account the defendant's specific characteristics (i.e., to evaluate the evidence from the standpoint of a "reasonable battered woman") in reaching their verdict. *See, e.g.*, Commonwealth v. Watson, 431 A.2d 949, 952 (Pa. 1981). Thus, even in those jurisdictions that purportedly apply only an "objective" standard to evaluate the defendant's actions, evidence of the defendant's particular history of victimization should still be relevant and admissible.

partner.[45] Even in cases that do not involve defendants in abusive relationships, the jury may consider the deceased's prior acts of violence against the defendant to determine the reasonableness and the honesty of the defendant's belief.[46]

Where the defendant is a battered woman, the need for testimony regarding her mental state is particularly vital. As Elizabeth Schneider, an attorney with extensive experience in the area, notes:

> A woman who kills her husband is viewed as inherently unreasonable because she is violating the norm of appropriate behavior for women. A battered woman who kills her batterer has to overcome special myths and misconceptions about battered women. She must particularly explain why she stayed in the relationship and did not leave her home; why she did not call the police or get other assistance before acting; and why she believed that at the time she responded the danger she was facing was imminent, posed a threat to her life, and was therefore different and more serious than other times when she had been beaten, had not acted, and survived.[47]

As Schneider suggests, evidence of past abuse is critical on several levels. First, the evidence may support the woman's claim that she subjectively apprehended a heightened degree of danger than that which may be perceived by one outside of the battering relationship, and that her apprehension was reasonable. Because the defendant, as a battered woman, may be acutely sensitive to the "warning signs" exhibited by her batterer prior to a particularly vicious attack–which signs may not be discernible to a jury–evidence of past abuse by her batterer (and the events leading up to such abusive incidents) is crucial to her defense.[48]

Second, evidence of past abuse suffered by the defendant is also relevant to a determination of the imminence of the danger perceived by the defendant. While there has been a tremendous amount of controversy surrounding the interpretation and application of this element in cases where the defendant is a battered woman claiming self-defense,[49] the fact remains that evidence of past abuse, interpreted

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45. *See* People v. Aris, 215 Cal. App. 3d 1178, 1197, 264 Cal. Rptr. 167, 179-80 (1989) (expert opinion on woman's actual, subjective perception of danger highly relevant in self-defense claims); State v. Kelly, 478 A.2d 364, 377 (N.J. 1984) (pattern of serious abuse, if believed, at heart of self-defense).

46. *See, e.g.*, Commonwealth v. Fontes, 396 Mass. 733, 735-36, 488 N.E.2d 760, 762 (1986); State v. Leidholm, 334 N.W.2d 811, 817-18 (N.D. 1983); State v. Dunning, 506 P.2d 321, 322 (Wash. Ct. App. 1973).

47. Schneider, *supra* note 5, at 201.

48. *See id.* at 211 ("[t]he jury needs expert testimony on reasonableness precisely because the jury may not understand that the battered woman's prediction of the likely extent and immediacy of the violence is particularly acute and accurate").

49. Many scholars have taken issue with the imminency requirement, considering it an impediment–rather than a guarantee–that justice will be achieved in a particular case. *See, e.g.*, 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(c)(1)

through an expert, helps to reveal how battered women may view the imminence of their danger reasonably, but differently, than persons who are not battered: how else can jurors even begin to understand why a battered woman may feel that her only recourse is to strike back against her batterer while, say, he is asleep? Even if the jury ultimately does not accept the woman's explanation of the perceived imminency of the danger posed by her batterer,[50] the admission of evidence of past abuse at least provides a framework by which the jury may evaluate the defendant's *mens rea.*

Third, evidence of past abuse is relevant to a determination of the reasonableness of force used by the defendant in response to the danger posed to her. Again, such evidence is critical to the jury's understanding as to why the defendant chose to use force against the deceased, rather than simply leave the relationship or call the police. Without admission of the evidence (and expert testimony to explain its significance), the jury may never fully consider the defendant's belief that she could not

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(1984) ("[i]f the concern of the [imminency] limitation is to exclude threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be 'necessary.'"); Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 404-07 (1993) (proposing that imminence requirement be modified to allow jury to acquit if the defendant reasonably believed the killing was "necessary" even though the danger was not "imminent"). The reasoning behind this approach is explained by Cynthia Gillespie as follows:

> The battered woman learns from her experience that there is nothing, literally nothing, she can do to stop a beating after it has begun and that struggling or fighting back will likely only make his assault more furious. Helpless, her only option is to take what measures she can to minimize the damage and endure the beating until her assailant decides to stop. It is small wonder that such a woman, knowing that another beating is inevitable and that she will be helpless to defend herself against it once it has begun, may seek, or seize, an opportunity to defend herself that will have some chance of success.

GILLESPIE, *supra* note 29, at 69.

Other commentators, however, advocate retaining the requirement of imminence, defined strictly, in order to reduce the possibility of unnecessary killings. *See, e.g.*, Cathryn J. Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11, 31 (1986).

50. Importantly, the admission of evidence of past abuse does not in any way guarantee an acquittal. Out of twenty-six cases in which such evidence was admitted in support of a battered woman's claim of self-defense, Charles Ewing found that in seventeen of twenty-six—or nearly two-thirds—of the cases the jury voted to convict the defendant. EWING, *supra* note 18, at 55. *But see* Regina A. Schuller, *The Impact of Battered Woman Syndrome Testimony on Jury Decision Making: Lavallee v. R. Considered*, 10 WINDSOR Y.B. OF ACCESS TO JUST. 105, 119-20 (1990) (citing survey showing that expert testimony on effects of past abuse rendered jurors more likely to believe woman feared for her life, was in danger, believed the force she used was necessary, was unable to leave or escape the situation, and had less control over her actions).

leave because, for example, she believed her batterer would kill her if she tried to do so, or simply that she could not survive on her own, without the batterer.

Finally, such evidence implicitly bears upon the defendant's credibility. If the jurors cannot understand how the defendant could possibly believe, for instance, that she could not leave the relationship rather than fight back, the remainder of her testimony inevitably will also be thrown into question. Similarly, if the defendant had been subjected to prior threats or abuse which did not result in death, the jurors may not understand how subtle differences in the threats or how the pattern of escalation over time could signal to the woman a much more serious threat than experienced before.[51] Another problem arises when the jurors question how a woman who was supposedly so "passive" that she was unable to leave the relationship would find the wherewithal to rise up and kill her batterer. Although such doubts may never be erased fully even if the defendant's testimony is placed into context by an expert, the evidence is invaluable in at least helping to minimize the almost certain damage to the defendant's credibility created by these perceived inconsistencies.

At this point it is important to note that it is now relatively well-accepted that the admission of evidence of past abuse does not create a separate defense to a charge of homicide, but rather serves merely as a tool by which to interpret evidence presented in support of such traditional defenses as self-defense.[52] Similarly, most battered women do not use insanity as a defense to a charge of homicide, not only because it is rarely accepted by a jury, but also because the defendant is usually quite sane—and arguably quite rational—when she decides to fight back against her batterer.[53]

As the above discussion suggests, the defendant's testimony of past abuse alone, unaccompanied by expert testimony designed to place such evidence in context, cannot educate the jurors adequately regarding the effects of such abuse upon the defendant's apprehension of danger and the reasonableness of her response. So long as the testimony meets the traditional criteria of expert testimony—i.e., that it is relevant, it relates

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51. *See* Commonwealth v. Stonehouse, 555 A.2d 772, 784 (Pa. 1989) (expert testimony allowed to show that defendant perceived final incident to be "more severe and more life-threatening than prior incidents").

52. *See* Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 396 (1988); Schneider, *supra* note 5, at 199; Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 J. CRIM. DEF. 141, 143 (1978); *cf.* James R. Acker & Hans Toch, *Battered Women, Straw Men, and Expert Testimony: A Comment on* State v. Kelly, 21 CRIM. L. BULL. 125, 125 (1985) (describing "battered wife syndrome" as a "new defense").

53. Schneider, *supra* note 5, at 203-04; Schneider & Jordan, *supra* note 52, at 143-44, 153-60.

to issues which are "beyond the ken" of the average juror, it is supported by a valid basis within the medical community, and is proffered by a qualified witness[54]—it can and should be admissible.

Of particular concern is the danger that, without the guidance of expert testimony, jurors in domestic violence cases in particular may believe that they can draw on their own experience to interpret the defendant's testimony. The perniciousness of this danger is illustrated by the discussion in the case of *State v. Griffiths*.[55] In *Griffiths*, Idaho's highest court affirmed the exclusion of evidence concerning the defendant's past abuse at the hands of her batterer, concluding that such testimony was indeed "within the ken" of the average juror:

> Fear is a common human emotion within the understanding of a jury and hence expert psychiatric explanation is not necessary. A jury is as capable as a psychiatrist in determining the ultimate fact in this case—whether appellant acted under fear when she shot her husband. Regardless of the training of a psychiatrist, his expertise does not qualify him to determine whether the defendant killed under fear any more than it qualifies him to testify as to whether the defendant "intended" to kill.[56]

Other court decisions, however—and particularly those of more recent vintage—reflect a truer understanding of the pervasiveness of misconceptions regarding the effects of past abuse. In her study of the impact of "battered woman syndrome" testimony on jurors' beliefs, Professor Regina Schuller found that the general public indeed holds views which differ markedly from those of experts in the field. Schuler cited to a study by Dodge and Greene which showed that lay persons were less likely to ascribe feelings of anxiety, depression, and dependency to battered women, were less likely to believe a battered woman's claim that her batterer might kill her, and were more likely to believe that battered women are emotionally disturbed, masochistic, and could leave the

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54. According to the traditional formulation enunciated in *Dyas v. United States*, expert testimony is admissible if (1) the subject matter is "so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman," (2) the expert witness has "sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth," and (3) "the state of the pertinent art or scientific knowledge [must permit] a reasonable opinion to be asserted by . . . an expert." Dyas v. United States, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977). Rule 702 of the Federal Rules of Evidence provides a broader standard, allowing testimony by the defendant "if scientific, technical or other specialized knowledge will assist a trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702.

55. 610 P.2d 522 (Idaho 1980).

56. *Id.* at 524; *see also* EWING, *supra* note 18, at 53-54 nn.17-18 and cases cited therein.

relationship without fear of future harm if they wanted to.[57] One of the seminal decisions addressing this issue was that of the New Jersey Supreme Court in *State v. Kelly*.[58]

In *Kelly*, the defendant and her husband had a scuffle on the street which drew public attention. After the scuffle, Kelly left the scene to find her daughter and encountered her husband, who "[ran] toward her with hands raised."[59] Thinking that her husband had returned to kill her, Kelly removed a pair of scissors from her pocketbook and fatally stabbed him.[60] The state charged Kelly with murder.

To support her claim that she acted in self-defense, Kelly sought to have expert testimony of battered woman syndrome admitted at trial. Specifically, she sought to include evidence of the nature of the "syndrome" and of the seven years of periodic attacks she had faced at the hands of the deceased.[61] After *voir dire*, however, the trial court refused to admit the expert testimony, ruling that the evidence was irrelevant.[62]

The state appellate court affirmed, and the Supreme Court of New Jersey granted certiorari and reversed the decision.[63] According to the *Kelly* Court, expert testimony regarding the effect of defendant's past abuse was relevant to each element of Kelly's claim of self-defense–in particular to the honesty and reasonableness of her belief that she was in imminent danger of death or serious bodily injury–and was sufficiently "beyond the ken" of the average juror to require the assistance of expert testimony.[64] In so concluding, the Supreme Court of New Jersey noted:

> The difficulty with the expert's testimony is that it *sounds* as if an expert is giving knowledge to a jury about something the jury knows as well as anyone else, namely, the reasonableness of a person's fear of imminent danger. That is not at all, however, what this testimony is *directly* aimed at. It is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard

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57. *See* Schuller, *supra* note 50, at 116-17 (citing M. Dodge & E. Greene, Assessing Jurors' Conceptions and Misconceptions of Battered Women, (unpublished manuscript on file with the University of Colorado)). These findings are echoed in other juror studies. *See* Karen M. Gentemann, *Wife Beating: Attitude of a Non-Clinical Population*, 9 VICTIMOLOGY 109, 114 (1984); E. Greene et al., *Jurors' Knowledge of Battered Women*, 4 J. FAM. VIOLENCE 105, 118, 120 (1989).

58. 478 A.2d 364 (N.J. 1984).

59. *Id.* at 369.

60. *Id.*

61. *Id.* at 368-69.

62. *Id.* at 381.

63. 478 A.2d 364 (N.J. 1984).

64. *Id.* at 378.

> their prior conclusions as being common myths rather than common knowledge. After hearing the expert, instead of saying [defendant] Kelly could not have been beaten up so badly for if she had, she certainly would have left, the jury could conclude that her failure to leave was very much part and parcel of her life as a battered wife. The jury could conclude that instead of casting doubt on the accuracy of her testimony about the severity and frequency of prior beatings, her failure to leave actually reinforced her credibility.[65]

As such, the court concluded that exclusion of such expert evidence denied Kelly a fair trial, and consequently remanded the case for a new trial.

Similarly, in *Ibn-Tamas v. United States*,[66] defendant Ibn-Tamas fatally shot her husband and was convicted of second-degree murder. Her appeal challenged the trial court's exclusion of testimony on "battered woman syndrome" by Dr. Walker to support Ibn-Tamas's claim of self-defense.[67] The highest court in the District of Columbia overturned the trial court's ruling that the evidence was inadmissible on grounds that it would "invade the province of the jury" and that its probative value was outweighed by its prejudicial impact.[68]

On appeal to the District of Columbia Court of Appeals, the appellate court first considered whether the testimony satisfied the traditional test for admissibility of expert testimony at the time (i.e., whether the testimony would aid the trier of fact in understanding the evidence, whether it was accepted within the relevant scientific community, and whether the witness was qualified as an expert), and then reviewed whether the evidence was more probative than prejudicial.[69] Although the court held that the record was inadequate to

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65. *Id.*; *see also* McMaugh v. State, 612 A.2d 725, 733 (R.I. 1992) (recognizing that jurors are particularly prone to overestimating their understanding of battering relationships).

66. 407 A.2d 626 (D.C. 1979).

67. Ibn-Tamas sought to have Dr. Walker's testimony admitted for two purposes: "to describe the phenomenon of 'wife battering,' and to give her opinion of the extent to which appellant's personality and behavior corresponded to those of the . . . battered women Dr. Walker had studied." *Ibn-Tamas*, 407 A.2d at 631. The role in which defendant's counsel sought to cast Dr. Walker is typical of the role which experts on battered women play in modern trials.

68. *Id.* at 631-32.

69. *Id.* at 632-33. The *Ibn-Tamas* Court applied the so-called *Frye* standard, which requires that the scientific principle or methodology in question, "be sufficiently established to have gained general acceptance by the particular field to which it belongs." Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1910). Recently, however, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court retreated from the *Frye* test to hold that widespread acceptance by the scientific community "can be an important factor" in determining whether expert testimony is admissible;it is not a necessary precondition to its admissibility. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2796, 2797 (1993) (quoting United States v.

determine whether the testimony ultimately was admissible, it did hold as a matter of law "that the probative value of this expert testimony would outweigh the risk of 'engender[ing] vindictive passions within the jury or . . . confus[ing] the issues.'"[70] The court also noted that since the "testimony was central to the defense theory of the case, [the court could not] conclude, as a matter of law, that the trial court's exclusion of testimony, if ultimately in error, was harmless."[71]

As the decisions in *Kelly* and *Ibn-Tamas* highlight, evidence of past physical, sexual, and psychological abuse, including expert testimony interpreting such evidence, is crucial to proving a claim of self-defense when asserted by a battered woman fighting back against her batterer. Not only does such evidence shed light on the reasonableness and sincerity of the defendant's belief that she was in imminent danger of serious physical harm, but it also helps to explain the reasonableness of the force used by the defendant in response to such a threat. Most importantly, it addresses questions that jurors cannot answer based upon their own experience, such as why the defendant did not leave or call the police before attacking her batterer. Accordingly, numerous courts have admitted evidence of past abuse to help the trier of fact understand one or more of the elements of the defendant's claim of self-defense–so many that virtually all states that have confronted the issue allow the admission of such evidence.[72]

Downing, 753 F.2d 1124, 1238 (3d Cir. 1985)).

70. *Ibn-Tamas*, 407 A.2d at 639 (quoting United States v. Green, 548 F.2d 1261, 1268 (6th Cir. 1977)).

71. *Id.* at 640. As another court has noted:

> The danger of not presenting expert testimony in these cases is that the jury may well be predisposed to judge the actions and reactions of a woman in a position that they cannot hope to comprehend . . . . [M]any jurors who know nothing about battered women simply find the tales of abuse too incredible to believe and thus, refuse to keep an open mind about the rest of the evidence, being convinced that "no one would have put up with such abuse therefore it must not be true." The testimony of the expert is intended to refute some of the common prejudices against battered women, thus permitting the jury to have a better ability to judge the evidence rationally, rather than judge it on the basis of an erroneous prejudice.

Commonwealth v. Dillon, 598 A.2d 963, 970-71 (Pa. 1991) (Cappy, J., concurring).

72. *See Ex parte* Hill, 507 So. 2d 558, 558 (Ala. 1987) (per curiam) (agreeing that expert opinion testimony on syndrome may be admitted with proper predicate and foundation); People v. Aris, 215 Cal. App. 3d 1178, 264 Cal. Rptr. 2d 167 (1989); Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979); Terry v. State, 467 So. 2d 761, 764 (Fla. Dist. Ct. App. 1985) (finding expert opinion on syndrome admissible to show reasonableness of defendant's belief in necessity of self-defense); Smith v. State, 277 S.E.2d 678 (Ga. 1981); People v. Minnis, 455 N.E.2d 209 (Ill. App. Ct. 1983); State v. Stewart, 763 P.2d 572 (Kan. 1988); State v. Hodges, 716 P.2d 563 (Kan. 1986); Dyer v. Commonwealth, 816 S.W.2d 647, 654 (Ky. 1991) (acknowledging relevance of expert testimony on syndrome and defendant's mental condition at time of offense); State v. Murphy, 600 So. 2d 769 (La. Ct. App. 1992); State v. Anaya, 438

A.2d 892, 894 (Me. 1981) (finding expert evidence on syndrome admissible since it has bearing on defendant's perceptions and behavior); People v. Wilson, 487 N.W.2d 822, 824-25 (Mich. Ct. App. 1992) (limiting admissibility to background information on syndrome and symptoms); State v. Hennum, 441 N.W.2d 793, 798-99 (Minn. 1989) (admitting expert opinion to aid jury's understanding of syndrome generally but not as to particular defendant's condition); State v. Williams, 787 S.W.2d 308, 313 (Mo. Ct. App. 1990) (concluding syndrome evidence was necessary to explain defendant's perception that no escape was possible); State v. Baker, 424 A.2d 171, 173 (N.H. 1980) (admitting syndrome evidence to rebut insanity plea by abuser with alternative explanation for assault); State v. Kelly, 478 A.2d 364, 377 (N.J. 1984) (finding expert testimony relevant to reasonableness of defendant's belief in imminent danger); State v. Gallegos, 719 P.2d 1268 (N.M. Ct. App. 1986); People v. Torres, 488 N.Y.S.2d 358 (1985); State v. Norman, 378 S.E.2d 8 (N.C. 1989); State v. Leidholm, 334 N.W.2d 811, 819 (N.D. 1983) (accepting expert testimony on syndrome to explain psychological effects of prolonged battering relationship); State v. Koss, 551 N.E.2d 970, 974-75 (Ohio 1990) (accepting expert testimony on syndrome to assist trier of fact in determining question of self-defense); Bechtel v. State, 840 P.2d 1 (Okla. Crim. App. 1992); Commonwealth v. Kacsmar, 617 A.2d 725, 731 (Pa. Super. Ct. 1992) (expert evidence relevant and admissible where male defendant claimed self-defense in murder of abusive brother); State v. McMaugh, 612 A.2d 725, 733 (R.I. 1992); State v. Hill, 339 S.E.2d 121, 122 (S.C. 1986) (holding battered woman syndrome evidence proper subject for expert testimony on defendant's state of mind); Fielder v. State, 756 S.W.2d 309, 320 (Tex. Crim. App. 1988) (accepting expert evidence to show reasonableness of abused woman's fear of deceased); State v. Allery, 682 P.2d 312, 316 (Wash. 1984) (en banc) (holding expert testimony on syndrome admissible to show defendant's fear of imminent danger); State v. Steele, 359 S.E.2d 558, 564 (W. Va. 1987) (affirming relevance and admissibility of evidence on question of reasonable belief in imminent harm).

Likewise, several circuit courts of the United States Court of Appeals have admitted evidence of past abuse and expert testimony on its effects where women subjected to such abuse were accused of criminal activity other than killing. *See* Dunn v. Roberts, 963 F.2d 308, 313 (10th Cir. 1992) (finding expert evidence relevant to requisite mental state for aiding and abetting abuser's crimes); United States v. Johnson, 956 F.2d 894, 900 (9th Cir. 1992) (accepting expert testimony on psychological syndrome as particularly relevant in defense of duress); Arcoren v. United States, 929 F.2d 1235, 1240 (8th Cir.) (accepting expert testimony on syndrome to explain woman's recantation of earlier statements regarding abuser's crimes), *cert. denied*, 112 S. Ct. 312 (1991). *But cf.* United States v. Gordon, 812 F.2d 965 (5th Cir.) (rejecting contention that syndrome made defendant so vulnerable that agents could coerce cooperation), *cert. denied*, 483 U.S. 1009 (1987).

Even the courts in several states that had formerly rejected the admission of expert testimony have now left open the possibility that such testimony may be admissible under the proper circumstances. *See* Lentz v. State, 604 So. 2d 243, 246-47 (Miss. 1992) (distinguishing circumstances where expert testimony would not have aided jury in understanding objective reasonableness of killing); Griffin v. State, 749 P.2d 246, 248-49 (Wyo. 1988) (distinguishing defendant as one who separated from victim and did not fit battered woman definition).

This is not, however, to suggest that all states which admit evidence of past abuse do so to the same degree. For example, some states have limited the testimony of experts to a description of the "battered person syndrome" and do not allow testimony as to whether a particular defendant suffers from the "syndrome." *See, e.g.*, State v. Hennum, 441 N.W.2d 793, 799 (Minn. 1989). Conversely, other states allow

So well recognized is the propriety of the admission of evidence of past abuse in some jurisdictions that a number of courts have held that a defense counsel's failure to proffer such evidence in support of a battered woman's claim of self-defense constitutes inadequate representation under the Sixth Amendment.[73] The question, then, becomes whether the same principles underlying the admission of evidence in cases of self-defense translate into other arenas, such as when the battered woman defendant raises a claim of duress.[74]

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testimony as to whether the defendant "honestly believed her life was in eminent [sic] danger" at the time of the killing. *See, e.g.*, Pugh v. State, 401 S.E.2d 270, 271-72 (Ga. 1991). For a thorough discussion of the various judicial approaches to the admissibility of evidence of past abuse among the states, see Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PENN. L. REV. 379, 429-31 & nn.181-84 (1991).

73. *See, e.g.*, People v. Day, 2 Cal. App. 4th 405 (1992); Commonwealth v. Stonehouse, 555 A.2d 772 (Pa. 1989). The admission of evidence of past abuse, however, is not conclusively settled in two of the states that have addressed it, and courts in approximately eighteen states have not yet ruled on the issue. *See supra* note 72 (reviewing state court decisions).

74. Massachusetts courts, although familiar with evidence of "battered women syndrome," have not ruled on whether evidence of past abuse comports with evidentiary standards for the Commonwealth. In Commonwealth v. Grimshaw, 412 Mass. 505, 590 N.E.2d 681 (1992), for example, defendant Grimshaw lured her husband to a secluded area where two of her friends beat him to death with baseball bats. *Id.* at 506, 590 N.E.2d at 682. At trial, Grimshaw claimed that she acted in self-defense and sought to admit evidence that she had been battered. *Id.* The trial court admitted the evidence, but by the time the case reached the state's highest court, the Supreme Judicial Court, the court had narrowed the focus of the appeal so as not to include the issue of whether the trial judge properly allowed the admission of expert testimony on battered woman syndrome. *Id.* at 506 n.1, 590 N.E.2d at 682 n.1. The court assumed, without deciding, that the evidence was properly admitted in the case.

Courts in Massachusetts have also seen evidence of past abuse arise in contexts other than self-defense, but those cases have not produced any ruling on its admissibility. For example, in Commonwealth v. Lazarovich, the defendant was convicted of having committed mayhem and assault and battery on her daughter. 410 Mass. 466, 466, 574 N.E.2d 340, 340 (1991). To negate the Commonwealth's *prima facie* case, the defendant sought to admit evidence of past abuse to show she did not have either the specific intent to commit the mayhem without the assistance of her husband or to participate in a joint venture of abuse. *Id.* at 467, 574 N.E.2d at 341. On appeal, she claimed the trial judge erred in limiting the jury's consideration of the evidence to the "joint venture" theory. *Id.* at 467, 473, 574 N.E.2d at 341, 344 (assuming without deciding that evidence of battered woman syndrome was properly admitted). The Supreme Judicial Court upheld the conviction, concluding that even if the evidence were probative of the defendant's specific intent, there was no substantial miscarriage of justice where she had not raised and advanced that theory at trial. *See id.* at 475-76, 574 N.E.2d at 345 (distinguishing between unsuccessful trial tactics and judicial error).

Lazarovich suggests that the Supreme Judicial Court may be ready to expand the use of evidence of past abuse to situations beyond those of self-defense. Although

III. THE ADMISSION OF EVIDENCE OF PAST ABUSE TO SUPPORT A CLAIM OF DURESS

For many of the same reasons that evidence of past abuse is now widely accepted in the context of a claim of self-defense, so, too, should such evidence be admitted to support a battered woman's claim of duress. As is shown below, the elements to which such evidence may relate in the context of a claim of duress are in many respects virtually identical to those in the context of a claim of self-defense.

A. *Similarities in the Theoretical Underpinnings of Duress and Self-Defense*

To establish a *prima facie* defense of duress under the common law, the defendant charged with a crime other than murder[75] must introduce evidence sufficient to prove that she reasonably believed the only way to avoid imminent death or serious bodily injury to herself or another person was to engage in criminal conduct, and that the unlawful threat legally "caused" her to engage in that conduct.[76] As in claims of

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the Supreme Judicial Court specifically avoided ruling on the admissibility of the evidence in this case, the court's assumption that the evidence "was properly admitted" suggests that the court is comfortable with admitting the evidence when it helps the trier of fact understand the full circumstances of the case. Notably, the court made no reference to self-defense–the normal milieu for evidence of past abuse.

75. The use of the defense stops short of murder in nearly all jurisdictions, based on the principle that trading off one life for another is never socially acceptable. *See* LAFAVE & SCOTT, *supra* note 41, at 433 (explaining that avoidance of greater harm is basis for excusing voluntary criminal act). In this way duress closely resembles the defense of necessity, which exonerates criminal activity where "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged." MODEL PENAL CODE § 3.02(1)(a) (1985). Under the *Model Penal Code*, however, all crimes are brought within the range of duress. *See* MODEL PENAL CODE § 2.09 cmt.5 (reasoning that person deprived of free will cannot be deterred by prospect of future punishment).

76. *See* LAFAVE & SCOTT, *supra* note 41, at 432-33 (defining elements of duress defense). Put another way, a defendant may be excused from criminal conduct if he or she had a well-grounded belief in a threat of imminent death or serious injury from which there was no escape except through compliance with the demands of the threatener. *See* Herbert Fingarette, *Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape*, 42 WASH. & LEE L. REV. 65, 67 n.9 (1985).

Although the common law presumed that a woman acting on the command (and in the presence) of her husband was coerced into doing so, the *Model Penal Code* has abolished that view in favor of requiring that the woman must establish the elements of duress regardless of the identity of her coercer. *See* MODEL PENAL CODE § 2.09(3) & Explanatory Note (1985) (explaining abolition of special rule presuming effect of marriage as automatic basis for coercion claim); *cf.* Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935) (acknowledging conflict of opinion on whether wife's criminal act in presence of husband is presumptively coerced).

self-defense, duress at common law requires a "present, immediate and impending threat" of such a nature as to induce a well-founded fear of death or serious bodily injury.[77] Similarly, a claim of duress requires that the circumstances be such that the actor has no reasonable chance of escape.[78]

A significant minority of states[79] have adopted in whole or in substantial part the Model Penal Code (MPC) definition of duress, which applies to a defendant who committed a crime "because he was coerced to do so by the use of, or a threat to use, unlawful force . . . that a person of reasonable firmness in his situation would have been unable to resist."[80] The MPC differs from the common-law rule in several key respects: (1) it eliminates the requirement of imminency; (2) it eliminates the requirement of deadly force; (3) it is available as a defense even to homicide; and (4) it covers cases where the defendant was "brainwashed" upon the coercer's *prior* use of force.[81]

Scholars have also debated whether duress acts as an excuse or as a justification for otherwise criminal activity.[82] If considered a justifica-

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77. *See, e.g.*, Rhode Island Recreation Ctr., Inc. v. Aetna Casualty & Surety Co., 177 F.2d 603, 605 (1st Cir. 1949) (recognizing basis for excuse of "compulsion"); Commonwealth v. Robinson, 382 Mass. 189, 199-200, 415 N.E.2d 805, 812 (1981) (discussing background of duress defense); State v. Toscano, 378 A.2d 755, 760 (N.J. 1977) (stating common law standard).

78. *See Rhode Island Recreation Ctr.*, 177 F.2d at 605 (reasoning that opportunity to avoid act without danger negates coercion since threat is not immediate); *but see* State v. Ciskie, 751 P.2d 1165, 1171 (Wash. 1988) (Battered Woman Syndrome may explain why battered woman may not be able to escape).

79. *See* ALASKA STAT. § 11.81.440 (1983); ARK. CODE ANN. § 5-2-208 (Michie 1987); COLO. REV. STAT. § 18-1-708 (1986); CONN. GEN. STAT. ANN. § 53a-14 (West 1985); DEL. CODE ANN. tit. 11, § 431 (1987); HAW. REV. STAT. § 702-231 (1985); KY. REV. STAT. ANN. § 501.090 (Michie/Bobbs-Merrill 1985); MO. ANN. STAT. § 562.071 (Vernon 1979); N.J. STAT. ANN. § 2c:2-9 (West 1982); N.Y. PENAL LAW § 40.00 (McKinney 1987); 18 PA. CONS. STAT. ANN. § 309 (1983); S.D. CODIFIED LAWS ANN. § 22-5-1 (1988); UTAH CODE ANN. § 76-2-302 (1978).

80. MODEL PENAL CODE § 2.09(1). The *Model Penal Code* provides that the duress defense is unavailable if the defendant recklessly, or in some cases even negligently, placed himself in a situation in which it was "probable" that he would be subjected to duress. *Id.* § 209(2).

81. *See* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Limits*, 62 S. CAL. L. REV. 1331, 1344-45 (1989). Dressler also argues that the MPC, unlike the common law, requires the jury to "make a moral judgment about the degree of moral firmness that can be expected of persons in the actor's circumstances," rather than simply determining whether the threat was deadly, unlawful, and imminent. *Id.* at 1345. Under either the MPC or common-law definitions of duress, however, the jury must make a moral judgment regarding the defendant's culpability. *See supra* text accompanying notes 49-53 (discussing significance of abuse evidence in jurors' understanding).

82. *Compare* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 830, 831 (1978) (duress is "a paradigmatic example of an excuse") *with* LAFAVE & SCOTT, *supra* note 41, at 433 (treating duress defense as justification).

tion, the defense's success depends upon whether the harm avoided (i.e., the harm threatened by the batterer) is greater than the harm committed (i.e., the criminal activity).[83] If seen as an excuse, the defendant ostensibly need only show that her free will was overcome such that she was not acting voluntarily, regardless of the heinousness of the crime committed while under duress.[84]

Whether utilizing the common law or the MPC standard, or whether viewing duress as an excuse or as a justification, in each case the defendant's credibility and her state of mind–including whether she honestly and reasonably believed she was in imminent danger from her batterer–will be placed directly before the jury. In addition, the jurors must also make a moral judgment regarding the defendant's blameworthiness, whether in the context of determining that the threats "caused" the criminal activity (under the common law), or whether the defendant maintained "reasonable firmness" in the face of the threats (under the MPC).

In any event, evidence of past abuse should be relevant and admissible on the issues of the defendant's state of mind and her credibility in order to allow the jury to make a reasoned and informed decision about the defendant's culpability. In fact, the inquiry into the defendant's apprehension of danger in the context of a duress claim is virtually identical to that used for self-defense.[85] A woman who views her circumstances through the eyes of one who has already suffered abuse at the hands of the coercer may see imminent danger even though some time may pass between the threat and her subsequent criminal act, and even though others may see no serious threat at all. There is no reason why the defendant's perception, altered through a cycle of battering, of the imminence of the threat should be any less informative in a case of coerced conduct than where the defendant acted in

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83. *See* LAFAVE & SCOTT, *supra* note 41, at 433 ("The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant, faced with a choice of evils, choose to do the lesser evil . . . in order to avoid the greater evil threatened by the other person."). Thus, the "no-homicide" rule is explained by the theory that a person threatened with death "ought rather to die himself, than escape by the murder of an innocent." 4 WILLIAM BLACKSTONE, COMMENTARIES *30.

84. *See* People v. Graham, 129 Cal. Rptr. 31, 32 (1976) (concluding defendant needed only raise reasonable doubt he acted in exercise of free will to prove duress); State v. Ciskie, 751 P.2d 1165, 1171 (Wash. 1988) (recognizing syndrome as explanation to counter assumption of voluntariness in failure to leave battering relationship). *See generally* Dressler, *supra* note 81, at 1356-60.

85. *See* People v. Romero, 10 Cal. App. 4th 1150 (omitted pending review), 13 Cal. Rptr. 2d 332, 338 (1992) (both duress and self-defense question defendant's reasonable and honest belief in imminent danger); LAFAVE & SCOTT, *supra* note 41, at 433 & n.6.

self-defense.[86] And, in the same way that evidence of past abuse may affect the jury's perception of the defendant's credibility in cases of self-defense, so, too, does it apply in duress cases.[87]

Finally, evidence of past abuse is relevant in assessing the blameworthiness of the defendant's decision to engage in criminal activity rather than to risk the physical abuse she faces.[88] As noted above, the defendant's precise mental state at the hands of her coercer can be viewed in one of two ways: either the defendant's free will was overcome by the threat of harm to her, so that she had no criminal intent, or she voluntarily acted to avoid what she perceived to be the lesser of two evils (i.e., committing the unlawful act versus being beaten), so that she should be excused from criminal culpability. In either event, the relevance of evidence of past abuse seems clear.

In the former inquiry, the strength of the defendant's will in the face of her batterer's threats is in large part a function of the level of abuse—and particularly the level of physical and psychological abuse—that she suffered in the past. Expert testimony regarding the effect of a seemingly minimal level of threats upon a woman who has been "beaten down" over long periods of time would undoubtedly go far in educating the jury as to the point at which the defendant's will may be overcome.[89] Thus, to the extent the defendant can show, through her own testimony and/or that of an expert, that her ability to resist the batterer

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86. Indeed, because the threat in duress cases is characteristically not "immediate," some courts have begun to interpret the imminence requirement more elastically, on the theory that long and lasting pressure may break down the defendant's resistance just as effectively as a threat of immediate harm. *See* State v. Toscano, 378 A.2d 755, 765 (N.J. 1977) (adopting Model Penal Code view); *cf.* Rhode Island Recreation Ctr., Inc. v. Aetna Casualty & Surety Co., 177 F.2d 603, 605 (1st Cir. 1949) (acknowledging that standard should be relaxed in cases where defendant could not have walked away). The *Toscano* Court concluded that a rule based on immediacy of injury may exclude valid claims of duress by persons for whom resistance to threats or resort to official protection was not realistic. *Compare Toscano*, 378 A.2d at 764 (concluding that *per se* rule based on "gun to the head" is unwise and question should go to jury) *with Rhode Island Recreation Ctr., Inc.*, 177 F.2d at 606 (fear of reprisal unavailing in face of adequate police protection). Thus, a battered woman should in some respects have even less difficulty admitting evidence of past abuse to explain her act as a product of duress than in self-defense, where imminence is an important, if not the central, issue to be resolved.

87. *See Romero*, 13 Cal. Rptr. 2d at 338 (evidence admissible to rehabilitate credibility where prosecutor urges failure to flee is inconsistent with defense).

88. *See id.* at 338-39 (concluding that evidence of syndrome would have assisted jury in assessing duress claim). *See generally* Walter H. Hitchler, *Duress as a Defense in Criminal Cases*, 4 VA. L. REV. 519, 536-37 (1917) (opining that subjective assessment of reasonable belief needed absent "portrait of reasonable man").

89. *See* United States v. Johnson, 956 F.2d 894, 900 (9th Cir. 1992) (recognizing expert testimony on effects of battering may explain special vulnerability to fear).

was precipitously low to begin with, the greater the chances are that the jury will conclude that it was overcome by the particular threats at issue.

Evidence of past abuse also relates directly to the reasonableness of the defendant's choice between being beaten and committing the criminal activity. In exploring the nature of this choice, legal theorists have suggested that juries undertake a kind of balancing test and an assessment of how much sacrifice an individual should be expected to make before "giving in" to the threat.[90] Notably, this balancing test is similar to the test utilized by the jury in determining whether the force used by the defendant against her batterer was reasonable when weighed against the force threatened by her batterer against her. The introduction of evidence concerning past abuse inflicted upon the defendant does not suggest that the defendant was fundamentally incapable of recognizing the wrongness of her acts, but asks the jury to believe that she made a reasonable choice in favor of self-preservation, given the alternatives posed to her by the coercer.[91] Even where the jury is asked to apply solely an objective, rather than a subjective, standard, evidence of past abuse may nevertheless be informative on the totality of the circumstances in which the defendant finds herself when faced with such a choice.[92]

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90. *See* LAFAVE & SCOTT, *supra* note 41, at 438 (public policy favors commission of lesser harm, but trading one life for another cannot be justified). The *Model Penal Code*, however, would go further than a mere choice of values and forgive murder if the jury were to determine that a person of reasonable firmness in the circumstances would have been unable to resist the threat. *See id.* at 438 & nn.37, 40 (comparing the two positions).

91. *See* LAFAVE & SCOTT, *supra* note 41, at 434 (reasoning that balance of harms does not apply where threat of punishment will not deter act); Hitchler, *supra* note 88, at 523 (duress should be defense whenever it creates motives to crime not countervailed by fear of penalty); Lawrence Newman & Lawrence Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. CAL. L. REV. 313, 313 (1957) (punishment is misdirected and futile if actor was under duress). Under the *Model Penal Code's* objective test, however, one should not be released from blame simply because one was not deterred by threat of punishment. *See* LAFAVE & SCOTT, *supra* note 41, at 434 (recognizing that deterrence is "too subjective" under test of whether person of reasonable firmness could resist).

92. *See* United States v. Johnson, 956 F.2d 894, 898-99 (9th Cir. 1992) (defendant's reasonableness based in special vulnerability to fear); State v. Toscano, 378 A.2d 755, 759 (N.J. 1977) (recognizing lack of imminence may not matter against subjective estimate of danger). Although a jury had convicted the defendant in spite of her duress defense and battered woman syndrome evidence, the *Johnson* Court, on appeal, permitted re-consideration of the evidence under a theory of "incomplete duress" so that the sentencing court could assess her subjective vulnerability. *See Johnson*, 956 F.2d at 899 (allowing that sentencing court may properly consider individual before it). While the test of well-groundedness is objective, the court recognized that "[f]ear which would be irrational in one set of circumstances may be well-grounded if the experience of the defendant with those applying the threat is such that the defendant can reasonably anticipate being harmed on failure to

In large part for these reasons, some courts have rejected the approach taken in *Neelley*,[93] and concluded instead that evidence of past abuse should indeed be admissible to support a claim of duress.[94] The opinion in one case, *People v. Romero*,[95] is particularly instructive on this point. In *Romero*, the California Court of Appeals granted a writ of habeas corpus and vacated the lower court's robbery conviction of a battered woman after determining that the defense attorney's failure to introduce evidence of battered woman syndrome constituted ineffective assistance of counsel.[96] Debra Romero admitted the crimes with which she was charged, but claimed that she participated in the robbery because of fear that her partner, Terrance Romero, would kill her otherwise.[97] From the start of their relationship in March 1989, Terrance had ordered Debra to get money on a daily basis to support his cocaine habit, engaging in threats and violent behavior toward her if she failed or if she tried to leave him.[98] Debra claimed that Terrance instigated a series of robberies and attempted robberies in which Debra posed in various roles to gain the sympathy of an innocent party.[99] In one failed robbery attempt, for example, Debra posed as a prostitute and instructed her client to drive into an alley, whereupon Terrance blocked the entrance with his car and Debra pleaded for money so that Terrance would not hurt her.[100] Both Debra and Terrance were charged with one count of robbery and four counts of attempted robbery, and Debra was convicted of all five charges.[101]

Considering the pattern of psychological and behavioral symptoms resulting from the cycle of violence in a battering relationship, the

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comply." *Id.* at 898.

93. *See supra* notes 8-15 and accompanying text.

94. *See Johnson*, 956 F.2d at 899-900 (permitting sentencing court to expand duress definition to include particular vulnerability to fear based on expert testimony). The first federal court admitting expert testimony on the syndrome reasoned that there was not reason to limit such evidence to cases in which it is offered to bolster a claim of self-defense. *See* Arcoren v. United States, 929 F.2d 1235, 1241 (8th Cir.), *cert. denied*, 112 S. Ct. 312 (1991) (recognizing value of evidence to assist trier in understanding behavior, regardless of which party introduces it).

95. 10 Cal. App. 4th 1150 (omitted pending review), 13 Cal. Rptr. 2d 332, 338 (1992), *review granted*, 846 P.2d 702, 17 Cal. Rptr. 2d 120 (1993) (limited to question of whether writ of habeas corpus should issue).

96. *See Romero*, 13 Cal. Rptr. 2d at 340 (recognizing that expert testimony about syndrome would have bolstered credibility and persuaded jury of duress defense).

97. *Id.* at 333.

98. *Id.* at 334.

99. *Id.* at 334-35.

100. *Id.* at 334.

101. People v. Romero, 10 Cal. App. 4th 1150 (omitted pending review), 13 Cal. Rptr. 2d 332, 333, 335 (1992), *review granted*, 846 P.2d 702, 17 Cal. Rptr. 2d 120 (1993) (limited to question of whether writ of habeas corpus should issue).

Romero Court recognized that a battered woman might not be able to leave the abuser, even when it would appear to outsiders that she could do so safely.[102] Specifically, the court emphasized the relevance of such evidence upon the defendant's credibility in rebutting the suggestion that her behavior toward her batterer is inconsistent with her status as a battered woman, and noted: "[i]f BWS testimony is relevant to credibility when a woman kills her batterer, it is *a fortiori* relevant to her credibility when she participates in robberies at her batterer's insistence."[103]

In addition, the court readily concluded that a rule permitting expert testimony about the effects of past abuse upon the defendant's belief in a self-defense case must necessarily permit it in a case where duress is claimed.[104]

B. *Variances Between Self-Defense and Duress: A Problem of "Proportionality" and Fault*

It has been said that all criminal defenses revolve around three fundamental principles: necessity, proportionality, and fault.[105] Both self-defense and duress require the jury essentially to perform a balancing test among these three principles: the jurors must decide whether the defendant acted out of necessity–and therefore should not be blamed–for her decision to engage in otherwise criminal activity in light of the threat she believed she was subject to if she did not so act.

Yet the balancing process is somewhat different when the defendant claims she acted under duress rather than in self-defense. Although her perception of the threat posed by her batterer does not change from one context to the other, the decisions she makes in response to that threat do. For example, how should the jury deal with the fact that a duress defense generally involves criminal activity directed at a wholly innocent third party, whereas self-defense involves violence directed against the person who initiated the violence? And how exactly should the jury balance the harm inflicted upon the third party against the harm threatened against the defendant by her batterer? Finally, does the fact that a claim of duress more closely resembles a claim of mental

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102. *Romero*, 13 Cal. Rptr. 2d at 336.

103. *See id.* at 337-38 (citing People v. Day, 2 Cal. App. 4th 405, 415, 2 Cal. Rptr. 2d 916, 922 (1992)). The *Romero* Court also noted that accepting expert testimony on the syndrome in a claim of duress was consistent with legislation passed subsequent to Romero's trial. *Id.* at 338 n.9. *See* CAL. EVID. CODE § 1107 (Deering Supp. 1993) (permitting expert testimony on syndrome in any criminal action). The court reasoned that there is nothing in the language of the statute suggesting a legislative intent to limit the application to cases involving a self-defense claim. *See Romero*, 13 Cal. Rptr. 2d at 338 n.9 (assessing breadth of statutory language).

104. *Romero*, 13 Cal. Rptr. 2d at 339.

105. *See* ROBINSON, *supra* note 49, § 131(a).

impairment or insanity than it does a claim of self-defense affect the admissibility of evidence of past abuse? Although ultimately none of these factors dictates that evidence of past abuse should not be admitted in cases of duress, they do require consideration before blindly concluding that such evidence be equally admissible for duress claims as for claims of self-defense.

1. Necessity—Alternatives to Fighting Back

As discussed above, to the extent that the defendant seeks to argue she acted out of "necessity" because of the threat imposed upon her by her batterer, evidence of past abuse should be admissible to support a claim of duress in the same way it is admissible to support a claim of self-defense. This part of the inquiry focuses entirely upon the defendant's perception of the threat, and whether her perception was reasonable and/or sincere. In this sense, then, the *Romero* Court was right on target: since the standards are identical for all intents and purposes, then evidence of past abuse should be equally admissible in the one case as in the other.

To the extent, however, that the defendant then argues that the only way she could stop the perceived threat from materializing was by committing the crime her batterer "ordered" her to commit, the analysis becomes more complicated. Under Dr. Walker's model, the battered woman initially reacts to the cycle of violence by believing that each round is triggered by something she said or did: "if only I hadn't burned dinner, he wouldn't have hit me."[106] At some point, however, she finally realizes that nothing will ever be enough to appease her batterer, and that her only recourse is to leave (if she can) or to kill him.

If, as is bound to happen, the woman suffers continued abuse despite complying with her batterer's demand to commit a crime, or if the prosecution can show that she had complied with similar demands in the past without any decrease in the violence, how does the jury evaluate her claim that the "only" way to stop the abuse was to comply with his demand? When can it be said that she was truly acting out of "necessity"—when it becomes clear that the violence will resume, albeit only at a later date? At what point do we require her simply to kill her batterer rather than commit crimes against third parties?

The answer, if there is one, is that the morality of the defendant's choice is ultimately a jury question. Testimony regarding the effects of past abuse cannot decide the moral issues which, in the end, are only the jury's to make. Yet no matter how the jurors ultimately resolve such issues, it seems imperative that they be given some context in which to

106. *See* BROWNE, *supra* note 21, at 39-40 (describing incident where batterer claimed that if woman had remembered to remind him to buy her a Christmas present, he would not have beaten her).

judge the defendant's state of mind at the time she acceded to her batterer's demands. Without expert testimony, the jury will almost certainly misread the level of necessity perceived by the defendant, and thereby disrupt the entire process of determining whether the threats "caused" her to act as she did (under the common law) or whether she possessed the requisite "moral firmness" (under the MPC).

2. Proportionality and Fault—The Lack of an "In-Kind" Response to the Batterer's Threats, and the "Innocent Victim" Problem

In the case of self-defense, proportionality is maintained by the requirement that lethal force can only be used when one is threatened with like force, and only against the person initially making such a threat. When translated to the defense of duress, however, the equation changes dramatically: not only is the threat of physical force not always met with physical force in return, but the defendant's activities are directed away from the batterer and onto an innocent third party. The question then becomes whether the admission of evidence of past abuse to support a claim of duress unfairly shifts the balance on behalf of the defendant further than is desirable.

The beauty and simplicity of a self-defense claim lies in the apparent symmetry with which the defendant responds to the threat presented to her: the defendant is threatened by her batterer with physical force and responds directly in kind against her batterer with physical force. As such, self-defense appears to maintain the boundaries of communication and interaction within the relationship: the woman injures her batterer, and her response travels in the same medium and in the same direction as the threat.

By contrast, a defendant claiming duress requests forgiveness for an act (which may or may not involve physical violence) against an innocent third party—an act that is, by definition, not "striking back" but a response to a threat from her batterer to perform a criminal act which is different than that with which she is threatened. If the jury accepts the reasonableness of the defendant's trade-off, it must also conclude that it was reasonable for her to put her self-interest ahead of that of an innocent third party, and to do so in a way that bears little direct relation to the threat she perceives to herself. Thus, duress on the surface raises far more troubling questions of proportionality and fault for the jury than does self-defense, where the battered woman's response to threats was directed toward the threatening party.

a. Proportionality

The first "hurdle of proportionality" the defendant must overcome is when the crime which she commits does not involve physical force at all, or at least not of the same type with which she is threatened. Once one scratches slightly below the surface, however, some of the purported

distinctions in the "proportionality" of a claim of self-defense versus that of duress begin to evaporate. Even claims of "purely physical" self-defense, like those of duress, are not altogether "proportional." The type of force used is virtually always different from that which faces the defendant, if only due to differences in sheer physical size and weight between the defendant and her attacker. For example, a petite woman (whether involved in a battering relationship with her attacker or not) may need to use a gun to avert a threat of less than lethal proportions if made by a man who is physically far larger and stronger than she.[107]

Moreover, the defendant's "non-physical" response to a threat of physical injury is not unique to a claim of duress as asserted by a battered woman, and in fact may actually be less of a hindrance in such cases than in those involving more "traditional" defendants. As is discussed above, even those authorities, such as LaFave and Scott, who view duress as a justification rather than an excuse, still characterize duress as a defense which depends upon the effect of the batterer's threats on the defendant's mind.[108]

Whether her response to a perceived threat is one of self-defense or an act committed under duress, the battered woman's act is explained by the nature of a threat, which is *both* physical *and* mental in nature. In fact, in some instances in which the defendant asserts a claim of self-defense, the batterer may not have physically attacked the defendant immediately prior to her killing him; rather, the batterer may simply have issued a very credible threat to do so, or may have actually been asleep at the time. This has led some commentators to suggest that the physical threat to the woman is only incidental to the (more serious) threat to her psychological well-being.[109]

Hence self-defense and duress both involve a certain lack of proportionality in the degree and the type of response required from the defendant. Once the threat *as it is perceived by the defendant* is fully explained to the jury (by expert testimony or otherwise), presumably the jury can judge for itself whether the defendant's response to the threat was reasonable. What is important for purposes of the discussion here is that the lack of proportionality in the defendant's response does not *detract* from the usefulness of evidence of past abuse to interpret other

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107. *See* Commonwealth v. Shaffer, 367 Mass. 508, 512, 326 N.E.2d 880, 883-84 (1975) (noting that the jury should consider relative physical capabilities of combatants in assessing reasonableness of force); *see also* State v. Stewart, 763 P.2d 572, 577 (Kan. 1988) (recognizing that size differences in batterer and victim may permit self-defense in lull rather than during attack); State v. Hundley, 693 P.2d 475, 480 (Kan. 1985) (acknowledging that woman's perception of options is influenced by size differences). *See generally* Maguigan, *supra* note 72, at 418-19 nn.133-35.

108. *See* LAFAVE & SCOTT, *supra* note 41, at 433.

109. *See* EWING, *supra* note 18, at 77-94 (arguing that battered women fight back as a means of "psychological self-defense").

aspects of the balancing equation, such as the reasonableness of the defendant's perception of danger.

b. Fault

Underlying the above discussion is the question of whether it is fair and just that we punish a defendant who acts not out of criminal malice, but out of fear of abuse. When presented with a claim of self-defense, the jury essentially faces a "two-dimensional" apportionment of fault: as between the batterer and the defendant, who is more to blame for the defendant's decision to fight back? When presented with a claim of duress, however, the decision is complicated by the presence of an additional party: the wholly innocent victim of the defendant's criminal acts. In such cases, the jury must decide how much burden to place on each of the three parties in order to reach a fair and equitable result for all.[110]

It is clear from the start that a large measure of fault should lay against the batterer for his threats against the defendant; whether or not a defendant successfully invokes a claim of duress, the batterer can still be held liable for aiding and abetting or for conspiracy to commit the crime.[111] It is equally clear that, unlike in instances of self-defense, no fault lies with the victim of the defendant's crime. The real question, then, is the extent to which any fault should lie with the defendant herself, and the extent to which the innocent victim must forsake retribution against the defendant in favor of punishment of the defendant's batterer.

Perhaps the nub of any potential reluctance to admit evidence of past abuse in cases of duress may lie in the fear that the evidence will be used to achieve acquittal from crimes which severely victimize an innocent third party merely by painting the defendant in a more sympathetic light—i.e., that the prejudicial value of the evidence would outweigh its probative value. Some states have thus tipped the balance to prohibit introduction of a defense of duress against a charge of homicide, even

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110. Although this article does not address the issue, it is important to distinguish further between the admission of evidence of past abuse committed by the deceased/coercer versus that committed by others. To the extent the defendant relies upon past abuse committed by unrelated third parties to support a claim of duress or self-defense, the defense may resemble more a claim of insanity or mental incapacity—which are notoriously unsuccessful precisely because they try to pass blame off onto persons other than the immediate parties to the crime.

111. In addition to the battered woman defendant, the coercer may also be prosecuted for the crime, since criminal intent remains with the coercer; in fact, the battered woman may be seen merely as the "means" to accomplishing the coercer's criminal designs. *See* LAFAVE & SCOTT, *supra* note 41, at 440 (acknowledging that even if duressed defendant is not guilty, coercer is guilty of committing crime through innocent agent).

though the principles of proportionality and necessity are satisfied by the defendant's reasonable fear that she would otherwise be killed.[112]

This sentiment is also echoed in some of the modern commentary. Susan Estrich, in her review of Cynthia Gillespie's treatise on battered women, argues that evidence of the deceased's past abuse of the defendant is not always admitted simply to establish, *inter alia*, the reasonableness of the defendant's perception of danger.[113] Rather, she suggests that such evidence is introduced in large part as a matter of equity, to show that the batterer was perhaps less worthy of the jury's sympathy than another, more virtuous, victim: the defendant.[114] Under this model, the defendant's decision to strike back against her batterer rings more of Bernhard Goetz-like vigilantism, rather than that of a cold-blooded murderer.[115]

Yet the problem of undue sympathy is always present whenever a defendant–and in particular a battered woman defendant–raises a claim of self-defense. This alone, however, has not prevented the admissibility of evidence of past abuse to support such a claim.[116] Moreover, this alone has not prevented juries from convicting battered women who actually present evidence of the effects of past abuse.[117]

Moreover, it is not necessarily such a bad thing to admit such evidence, precisely because it enables the jury to more equitably apportion blame as among the three parties before it. As Estrich acknowledges, equity has always maintained an "essential and inevitable" role in the assessment of criminal liability.[118] After all, the mere existence of self-defense as a defense implies that the life of an aggressor is "worth" less than that of the "victim"/defendant. And, to the extent a jury may mistakenly rush to place blame upon a battered woman defendant based upon unfounded misconceptions regarding, for example, her ability to flee from her batterer rather than comply with his demands, expert testimony is entirely appropriate to dispel such misconceptions to achieve a just result.

IV. CONCLUSION

In the past decade, the introduction of evidence of physical, sexual, and/or psychological abuse to support a battered woman's claim that she struck back against her batterer in self-defense has become widely

112. *See supra* note 75 and accompanying text.
113. Estrich, *supra* note 27, at 1437.
114. *Id.*
115. *Id.* Notably, Estrich does not argue that the use of such evidence in this way is improper, but merely that its true relevance be recognized as such. *Id.* at 1439.
116. *See supra* note 72 and accompanying text.
117. *See supra* note 50
118. Estrich, *supra* note 27, at 1438.

accepted by the legal system. In such cases, the courts have recognized that such evidence may be critical to support a battered woman's claim that she honestly and reasonably believed that serious physical injury would be inflicted upon her should she fail to fight back, that such injury would be imminent, and that she used reasonable force in response to the threat of such injury.

More recently, battered women have attempted to apply the same evidentiary concepts to their claims that they committed otherwise criminal activity while under duress from their batterers. The issue has thus arisen as to whether evidence of past abuse, including expert testimony interpreting the potential effects of prolonged cycles of abuse, should be admissible in support of a battered woman's claim of duress. As the above discussion demonstrates, there appears to be little reason to reject the admission of such evidence (including expert testimony) to show duress, given that the elements of duress to which the evidence would relate are virtually identical to those at issue in self-defense cases. This is especially true in the area of domestic violence, where jurors may mistakenly believe that they can interpret the facts by using their own background and experience.

Notwithstanding the substantial overlap between the two claims, certain differences do exist which arguably should mitigate against the admissibility of such evidence to show duress. First, unlike self-defense claims, duress claims do not generally involve women who counter the physical force of their batterer with physical force of their own. Rather, a claim of duress generally results in the battered woman engaging in non-physical activity against wholly unrelated third parties. In addition, a claim of duress theoretically focuses the evidence on the psychological effects of the batterer's threats upon the defendant's state of mind, rather than focusing it upon the actual physical threat posed by the batterer. The existence of such differences, however, does not detract from the fact that the admission of evidence of past abuse may still guide the jury in assessing the defendant's credibility, as well as the honesty and reasonableness of her belief that she was in imminent danger of physical injury.

Hopefully, as awareness of domestic violence increases and the public recognizes the substantial effects of prolonged abuse upon a battered woman's mental state, the specialized need for the admission of evidence of past abuse will decrease. Until that time comes, however, its admissibility is essential to providing justice to battered women who stand accused of fighting back against their batterers, and who assert claims of self-defense or duress.

A Clash of Titans: The First Amendment Right To Petition vs. The Antitrust Laws

James S. Wrona*

I. INTRODUCTION

The right to petition the government is essential in a democracy.[1] The framers of the Constitution recognized this important interest by mandating that each citizen be entitled to redress grievances by petitioning the government.[2] However, another important policy may, at times, conflict with this interest.[3] The United States' economy is

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1. One author states that, "[i]n a representative democracy, citizens must have the right to express opinions, make suggestions, and voice grievances to their government. The First Amendment expressly prohibits legislative encroachment on free speech and on petitions for redress of grievances." James D. Hurwitz, *Abuse of Government Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 66 (1985). *See also* Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 499 F. Supp. 553 (D. Del. 1980). "The objective of the 'right to petition' clause is not merely to guarantee the opportunity for seeking redress." *Id.* at 556. This clause "shares with other First Amendment rights a focus on the importance of maintaining a free flow of ideas" in a representative government. *Id.* (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785-89 (2d ed. 1988); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); JOHN S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1882). *Cf.* Virginia Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748, 765 (1976) (discussing the importance of the dissemination of ideas and the consumers' need for access to information in the market place).

2. The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

3. For instance, Judge Bork states that: "Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition." ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 347 (1978). *See also* Hurwitz, *supra* note 1, at 69.

premised on the capitalist model of free enterprise.[4] The efficient allocation of resources, and indeed the success of such an economic system, depends, in large part, on maintaining competition[5] in the marketplace.[6] Both economists and the Supreme Court have suggested that competition policy is so significant that it rises to a level of constitutional importance in a democracy.[7]

"Predatory invocation of governmental processes undermines the competition policy goals of maximizing consumer welfare and enhancing regulatory efficiency." *Id.*

4. See RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981), for an in-depth analysis of the justifications of a free-market system.

5. It is important to understand at the outset that the term "competition," as that term is used in this article and in relation to the antitrust laws, is not the economists' version of "pure competition." Rather, it embraces the concept of "workable competition." *See* RUSSELL G. WARREN, ANTITRUST IN THEORY AND PRACTICE 32-40 (1975). As Warren describes, the term workable competition "does not mean purely competitive but instead, some degree of competition which is reasonably attainable and which can be expected to satisfy the needs of the consumer reasonably well." *Id.* at 32. *See also* JERROLD G. VAN CISE, THE FEDERAL ANTITRUST LAWS 20 (2d rev. ed. 1967). "The objective of [the antitrust laws] has been declared to be workable competition, as distinguished from some utopia of perfect competition." *Id.* (citing United States v. Aluminum Co. of Am., 91 F. Supp. 333 (S.D.N.Y. 1950)).

6. PHILIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 8 (4th ed. 1988). "Competitive forces generate efficiency in two ways. Productive efficiency occurs as low cost producers undersell and thereby displace the less efficient. Allocative efficiency occurs as exchanges in the marketplace direct production away from goods and services that consumers value less and toward those they value more." *Id. See* Hurwitz, *supra* note 1, at 69. Anti-competitive conduct "may lead to dead-weight welfare loss arising from reduced output, higher prices, and the dissipation of additional resources to maintain ill-gained market power. . . . In addition, anti-competitive petitioning may impair or corrupt the operations of government and, if successful, may invite additional predatory efforts by others." *Id. See also* E. THOMAS SULLIVAN, THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS 276 (1991) ("Efficiency frequently corresponds directly with promotion of the competition process and with developed antitrust case law."); VAN CISE, *supra* note 5, at 2 (Antitrust laws "are generally acknowledged to be necessary in order to protect industry, on the one hand, from the private restraints of antisocial business action and, on the other, from the alternative public restraints of anti-business socialists.") (citations omitted); Brent S. Kinkade, Note, *Municipal Antitrust Immunity After* City of Columbia v. Omni Outdoor Advertising, Inc., 67 WASH. L. REV. 479, 484 (1992) (noting that primary goal of antitrust laws is to ensure economic efficiency in the capitalist system).

7. *See* Hurwitz, *supra* note 1, at 120. "Competition policy, while not constitutional in origin, has a bearing that is only slightly less eminent." *Id.* (citing United States v. Topco Assoc., Inc., 405 U.S. 596 (1972)). The Supreme Court in *Topco* stated that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972). *See also* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) (noting the almost equivalent importance of Sherman Act). *Cf.* SULLIVAN,

For instance, a leading antitrust economist has stated that "one of the most critical foundations of a strong democracy is a strong economy—one that enhances consumer welfare and preserves opportunities to compete—and competition has been designated as the protecting and guiding force for the economy."[8] Recognizing the significance of this aspect of capitalism, Congress enacted a number of antitrust laws[9] to dissuade anti-competitive behavior.[10] The question becomes, however, which policy takes precedence when these interests—the right to petition the government and the need to insure competition in the marketplace—collide.

As the courts have noted, "[i]n a representative democracy, individuals must have the ability to 'freely inform the government of

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supra note 6, at 6. The author suggests that the roots of the antitrust laws, and their importance in our democracy, emerged from both political and economic origin. *Id.* "The fear of a single power center, whether economic or political, was profoundly frightening. Democratic government itself was threatened when power was centralized. Indeed, a combination of trusts could be more powerful than the government and the governed." *Id.*

8. Hurwitz, *supra* note 1, at 120. The author cites to the Supreme Court decision in NCAA v. Board of Regents, 468 U.S. 85 (1984), to support his position. Hurwitz, *supra* note 1, at 120. In that case the Court observed that:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the Several States."

Id. (quoting NCAA v. Board of Regents, 468 U.S. 85, 104 n.27 (1984) (quoting Northern Pacific R.R. Co. v. United States, 356 U.S. 1, 4-5 (1958))). *See also* VAN CISE, *supra* note 5, at 21 ("Congress drafted the various antitrust laws in part because of its political conviction that a competitive economy would best promote a democratic society.").

9. *See generally* Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1988)); Clayton Act, ch. 323, § 1, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1988)); Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717 (1938) (current version at 15 U.S.C. §§ 41-58 (1988)).

10. *See* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 1 (1985). "An important goal—perhaps the only goal—of antitrust law is to ensure that markets are competitive." *Id.* *See also* AREEDA & KAPLOW, *supra* note 6, at 5 (recognizing that the focus of antitrust laws is the protection of competition); VAN CISE, *supra* note 5, at 5 ("The first basic principle of these laws is that their general objective is to prohibit private restraints which may operate to deny to our nation a competitive economy") (citing United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 599 (1944)); WARREN, *supra* note 5, at 13 ("the primary purpose of the antitrust laws is to promote competition").

their wishes' . . . ."[11] However, the unlimited right to petition the government, unquestionably an important part of our political system, may diminish the effectiveness of our pro-competition policy, which is equally important to our economic system.[12] For example, which interest is paramount when a number of companies agree to lobby the government for legislation that has an anti-competitive effect or when a suit is brought that burdens competitors?[13] These questions and the courts' attempt to balance the various policy considerations are the focus of this article. Additionally, this article will analyze the extent to which the outcome turns on the perceived severity of the anti-competitive effect of the petitioning.

II. THE UNITED STATES SUPREME COURT'S RESPONSE

The antagonism between the First Amendment's right to petition and antitrust laws led to the judicially created *Noerr-Pennington* immunity doctrine.[14] This doctrine is the culmination of three Supreme Court cases.[15] *Eastern Railroads Presidents Conference v. Noerr Motor Freight,*

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11. Sandy River Nursing Care v. Aetna Casualty, 985 F.2d 1138, 1142 (1st Cir.) (quoting Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961)), *cert. denied*, 114 S. Ct. 70 (1993).

12. Hurwitz, *supra* note 1, at 66.

13. At this point an example of how such petitioning can tend to lessen competition may be helpful. For instance, what effect does the filing of repetitive claims against a rival or possible entrant into the market have on competition?

> Such claims are best characterized as mechanisms for raising a rival's costs disproportionately to those of the incumbent. Assume that litigation costs the same amount for both parties–perhaps $100,000 per year. The established incumbent who files the action has an output of 100,000 units per year, while the recent entrant who is the defendant has an output of 10,000 units per year. In this case the litigation costs the established firm $1.00 per unit, and the new entrant $10.00 per unit. If the new entrant has not yet begun to produce, the costs will be felt even more strongly. The costs of litigation in this instance must be considered as fixed costs–that is, they do not vary with the output of either firm. The difference between $1.00 in additional costs per unit and $10.00 in additional costs could easily be the difference between profit and loss selling.

HOVENKAMP, *supra* note 10, at 158 (citations omitted).

14. *See* Hurwitz, *supra* note 1, at 66. "In essence, the exercise of rights that are fundamental to our political system may undermine the competitive process that is fundamental to our economic system. The *Noerr*, or *Noerr-Pennington*, doctrine is the legal system's effort to ease this tension." *Id.* *See also* Osborn v. Pennsylvania-Delaware Serv. Station Dealers Ass'n, 499 F. Supp. 553 (D. Del. 1980). The court noted that the *Noerr-Pennington* doctrine was an attempt at "resolution of conflicts between society's interest in nurturing competition and its interest in assuring effective communication between the citizenry and their government." *Id.* at 556.

15. *See* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). *See also*

Inc.,[16] was the first of the trilogy of cases that make up the doctrine. In *Noerr*, a number of truck operators sued a railroad presidents' association alleging violations of the first and second sections of the Sherman Antitrust Act.[17] The truckers claimed that the railroads violated the antitrust laws by engaging in a publicity campaign aimed at destroying the truckers' goodwill and seeking to influence legislation unfavorable to the trucking industry.[18] The Court held that the Sherman Act was not violated by the railroad association's actions.[19]

The Supreme Court appeared to rest its holding on both statutory and constitutional grounds.[20] The Court stated that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[21] Thus, the Court implied that the Act itself did not regulate such activity.[22] However, the Court did not end its rationale

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Hurwitz, *supra* note 1, at 78 ("The *Noerr-Pennington* doctrine arose from a trilogy of Supreme Court cases"); Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 907, 913 (1990) (recognizing these cases as foundation for *Noerr-Pennington* doctrine); Thomas A. Waldman, Comment, *Slapp Suits: Weaknesses in First Amendment Law in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979 (1992) ("These three cases have provided the bare bones of [*Noerr-Pennington*] doctrine").

16. 365 U.S. 127 (1961).

17. *Id.* at 129. Section 1 of the Sherman Act states in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988). Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1988).

18. *Easton R.R.*, 365 U.S. at 129-30. "The campaign so conducted was described in the complaint as 'vicious, corrupt, and fraudulent'. . . ." *Id.* at 129. For an in-depth look at the controversy between the truckers and the railroads prior to the *Noerr* decision, see *The Railroad-Trucker Brawl*, FORTUNE, June 1953, at 137.

19. *Noerr*, 365 U.S. at 138.

20. *See* McGuire Oil Co. v. Mapco, Inc., 958 F.2d 1552, 1559 (11th Cir. 1992) (noting that the source of the *Noerr-Pennington* doctrine is mixed between constitutional and statutory concerns). *See also* Hurwitz, *supra* note 1, at 79. "The Court left unclear whether the immunity it established was mandated by First Amendment considerations, a construction of the Sherman Act, or both." *Id.*

21. *Noerr*, 365 U.S. at 136. The Court opined that the type of activity involved in the case was not of that character usually held violative of the Sherman Act. *Id.*

22. *Id.* Further, the Court stated:

> To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

based on this interpretation. In addition, the Court found that a contrary construction of the Act would raise serious constitutional questions.[23] The Court stated that "[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot . . . lightly impute to Congress an intent to invade these freedoms."[24] The Court found that the association's conduct was aimed at seeking favorable government action. As such, the action did not violate the Sherman Act. The Court, therefore, reversed the lower courts' contrary holdings.[25]

The Court further extended the scope of the petitioning immunity in *United Mine Workers of America v. Pennington*.[26] This case is an important component of the *Noerr* immunity doctrine for two reasons. First, the *Pennington* decision extended the *Noerr* holding to include lobbying efforts to influence executive officials who exercise commercial functions.[27] Second, the Court further broadened the scope of the

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Id. at 137 (citing Parker v. Brown, 317 U.S. 341, 352 (1943)).

23. *Noerr*, 365 U.S. at 137-38.

24. *Id.* at 138. The Court refused to distinguish between those who do and those who do not have a financial interest in the outcome of the legislation. *Id.* at 139. The Court stated:

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.

Id.

25. *Id.* at 145.

26. 381 U.S. 657 (1965). In *Pennington*, a suit was brought by the trustees of the United Mine Workers of America Welfare and Retirement Fund (UMW) against Phillips Brothers Coal Company seeking to recover royalty payments that were allegedly due. *Id.* at 659. Phillips filed a cross-claim alleging that the UMW and various "large coal operators had conspired to restrain and to monopolize interstate commerce in violation of §§ 1 and 2 of the Sherman Antitrust Act." *Id.* (citation omitted). Part of the antitrust violation centered on the UMW's petitioning of the Secretary of Labor in order to obtain higher minimum wage standards for the coal industry, allegedly in order to drive out smaller companies who could not afford to pay such wages and remain competitive with the larger companies. *Id.* at 660. The Supreme Court found that the lower courts had misinterpreted its holding in *Noerr* in its instructions to the jury. *Id.* at 670. Finding that the lower court's instructions could not be considered harmless error, the Court remanded the case. *Id.*

27. *Id.* at 670. In *Pennington*, the antitrust allegations centered on the petitioning of the Secretary of Labor. *Id.* The Court stated that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.*

One author described this decision as significant in light of the fact that "the *Pennington* result conflicts with the distinction Justice Black [author of the *Noerr* opinion] drew between agreements to lobby for legislation and agreements traditionally condemned by the Sherman Act." Minda, *supra* note 15, at 926 (citing *Noerr*, 365 U.S. at 136). The author cited Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), to support his proposition. *Id.* In *Continental*

Noerr immunity by holding that the intent of the actor was irrelevant.[28] The Court stated, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."[29]

The final case associated with the *Noerr-Pennington* doctrine is *California Motor Transport Co. v. Trucking Unlimited.*[30] In *California Transport,* the plaintiff alleged that the defendant had "conspired to monopolize trade and commerce in the transportation of goods."[31] The complaint asserted that the defendant had instituted a number of administrative proceedings "to resist and defeat" the plaintiff's applications for operating rights in the relevant market.[32] The Supreme Court concluded that it would be "destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use . . . state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors."[33] Thus, the Court extended the *Noerr-Pennington* immunity to the petitioning of courts and agencies. In addition, Justice Douglas, writing for the majority, used language suggesting that the *Noerr-Pennington* immunity was constitutionally required.[34]

Ore, the Court did not allow *Noerr* immunity because the action concerned "private commercial activity, *no element of which involved seeking to procure the passage or enforcement of laws.*" *Id.* at 707 (emphasis added). "In following the Court's *Continental Ore* decision, a number of lower federal courts have found a 'commercial exception' to the *Noerr-Pennington* doctrine, holding that attempts to influence government officials are not immunized from antitrust liability when government officials are found to be acting in a commercial capacity." Minda, *supra* note 15, at 926 n.74 (citing George R. Whitten, Jr., Inc. v. Paddock Pool Builders, 424 F.2d 25 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970)). However, in *Continental Ore,* the argument that the party was attempting to influence government action was tenuous. In contrast, in *Pennington,* the lobbying was clearly an attempt to influence government action, albeit the Secretary of Labor rather than the legislature.

Further, while a decision by the Secretary of Labor to raise minimum wage standards for an industry may be construed as a "commercial function" of the government (in the sense that it affects commerce), it is not a situation in which government officials are acting in a commercial capacity. The *Pennington* decision merely clarified that an exclusion from immunity of any effort to obtain from government an action that will affect commerce was not warranted.

28. *Pennington,* 381 U.S. at 670.

29. *Id.*

30. 404 U.S. 508 (1972).

31. *Id.* at 509.

32. *Id.*

33. *Id.* at 510-11.

34. *Id.* at 513. Justice Douglas stated that, "[p]etitioners, of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right . . . is part of the right of petition protected by the First Amendment." *Id.*; *see* Minda, *supra* note 15, at 928 ("Justice Douglas suggested, without actually deciding, that *Noerr-Pennington* was constitutionally

The Court in *California Transport* held, however, that the First Amendment does not shield petitioning that is a mere "sham" for antitrust behavior.[35] That is, if the petitioning is a vehicle used "to harass and deter their competitors from having 'free and unlimited access' to the agencies and courts," then a violation of the antitrust laws will be found.[36] Because the litigation reached the Supreme Court on a motion to dismiss, the Court remanded the case for trial.[37] Legal counsel should note, however, that the "sham" exception is now broader than that enunciated in *California Transport*.[38]

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required").

35. *California Transport*, 404 U.S. at 516. The Court stated that "[i]nsofar as the administrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id.* at 513. It is not surprising that the "sham exception" was formally recognized by the Supreme Court, as it had been discussed in dicta in the *Noerr* opinion. In *Noerr* the Court stated: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Noerr*, 365 U.S. at 144. The *California Transport* holding, however, made clear that the "sham" exception would apply to petitioning cases.

It is now well settled that certain First Amendment rights may be abridged by sufficient governmental interests. *See* Wright v. DeArmond, 977 F.2d 339 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1945 (1993). "Like other aspects of freedom of expression, [petitioning] never has been considered an absolute right but, rather, has been considered subject to reasonable limitations in the face of very important government interests." *Id.* at 346 (alteration added).

36. *California Transport*, 404 U.S. at 515.

37. *Id.* at 516.

38. The sham exception is now applied in various petitioning situations that involve alleged antitrust violations. *See* PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 19 (Supp. 1992). The sham exception applies when "[t]he injury to the rival springs directly from the antitrust defendant's action rather than from a government decision." *Id.* Areeda and Hovenkamp list various situations where courts have found petitioning to be a sham. Areeda and Hovenkamp state:

> Recent court decisions have noted a variety of "shams." These include opposing administrative agency approval of some new device or process with no realistic hope of success; opposing agency action in order to delay competitive entry; . . . initiating administrative actions against a competitor, knowing that the agencies involved lack jurisdiction over the dispute; filing tariffs that effectively force a competitor to litigate in 49 different forums in order to establish its rights; . . . taking up the time of federal and state regulatory processes to such an extent as to deny competitors access to the same agencies; instituting judicial proceedings "without probable cause and in complete disregard of the law in order to interfere with the business relationships of a competitor. . . ."; imposing heavy legal costs on the competitor in the hope of deterring it and other firms from entry; sending copies of a judicial complaint to the competitor's customers.

Id. at 20-21 (citations omitted). *See also* City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991) ("The 'sham' exception to *Noerr*

In summation, the *Noerr-Pennington* doctrine attempts to strike a balance between the competing interests of the First Amendment and antitrust laws when certain types of petitioning are involved.[39] Under the doctrine, a genuine attempt to influence government action is immune from the antitrust laws.[40] Further, *Noerr-Pennington* immunity extends to petitioning brought in a number of different forums.[41] Action amounting to a "sham," however, falls outside the *Noerr-Pennington* safe harbor.[42]

Although these principles appear clear on their face, courts have had difficulty determining when the *Noerr-Pennington* doctrine and the "sham" exception apply.[43] A review of the case law in this area of

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encompasses situations in which persons use the governmental *process*–as opposed to the *outcome* of that process–as an anticompetitive weapon"); Barton's Disposal Serv., Inc. v. Tiger Corp., 886 F.2d 1430, 1435 (5th Cir. 1989) ("It is illegal to advocate policies under color of *Noerr-Pennington* that are actually nothing more than attempts to interfere directly with the business of a competitor."); Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1082 (5th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989) ("The 'sham' exception comes into play when the party petitioning the government is not at all serious about the object of that petition, but engages in the petitioning activity merely to inconvenience its competitor."); Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568, 579 (6th Cir. 1986) (quoting MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1156 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983)) ("[T]he requisite motive for the sham exception is the intent to harm one's competitors not by the result of the litigation but by the simple fact of the institution of litigation").

39. *See generally* Matthew E. Johnson, Comment, *Meritorious Litigation as a Section 2 Violation*–In re Burlington Northern, Inc. *Broadens Noerr-Pennington's Sham*, 74 IOWA L. REV. 271 (1988).

40. *See* Barton's Disposal Service, Inc. v. Tiger Corp., 886 F.2d 1430 (5th Cir. 1989). The principle emerging from *Noerr-Pennington* is that "genuine efforts to influence governmental decisionmaking are to be encouraged, not penalized through the application of the antitrust laws." *Id.* at 1436 (citing *In re* Burlington Northern, Inc., 822 F.2d 518, 524 (5th Cir. 1987)).

41. *See* Hurwitz, *supra* note 1, at 78. The author states that *Noerr-Pennington* immunity may arise "in various forums, including courtrooms, legislative halls, private chambers, newspapers, or, in the case of politically motivated boycotts, the marketplace itself. The petitioners' targets may be legislators, administrators, judges, or arguably even private quasilegislative organizations whose decisions on industry standards and professional conduct tend to receive government approval." *Id. See also* Smith v. Combustion Eng'g, Inc., 856 F.2d 196 (6th Cir. 1988) (opinion published in 1988 WL 87703) (WESTLAW, Allfeds file) ("The *Noerr-Pennington* doctrine immunizes from antitrust liability attempts to influence the legislative process, administrative agencies or the courts").

42. *See* Campbell v. City of Chicago, 823 F.2d 1182 (7th Cir. 1987). "If the injury flows directly from the 'petitioning'–if the injury occurs no matter how the government responds to the request for aid–then we have an antitrust case." *Id.* at 1186 (quoting Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc., 814 F.2d 358, 376 (7th Cir. 1987)).

43. The Court in *California Transport* noted that it may be difficult to determine whether petitioning in a given case is a mere sham. California Motor Transp. Co.

antitrust jurisprudence suggests that the outcome of these cases often turns on whether traditional anti-competitive concerns are present. If they are, the perceived ill effects of the petitioning on competition often outweigh the sometimes countervailing First Amendment values.[44]

III. *NOERR-PENNINGTON* AND THE PERCEIVED EFFECTS OF PETITIONING

Whether petitioning legitimately seeks favorable government action, thereby rendering it protected by the *Noerr-Pennington* immunity, is often a difficult question to answer. Cases that appear very similar may receive different treatment by the courts for reasons that are hard to discern. One explanation for this result may lie not with the immunity doctrine itself, but rather with the perceived anti-competitive effect of the petitioning. If the petitioning raises traditional antitrust concerns, courts are likely to hold the *Noerr-Pennington* immunity inapplicable.

For example, if a number of companies entered into a horizontal agreement to have an industry board set rates in the hopes of having

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v. Trucking Unlimited, 404 U.S. 508, 513 (1972). *See* Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1082 (5th Cir. 1988) ("There is much debate about how a court can tell when a petition is not genuine"); *In re* Burlington Northern, Inc., 822 F.2d 518, 528 (5th Cir. 1987) ("To be sure, '[d]etermining what efforts are not bona fide petitions to the government . . . is a difficult task'") (alterations in original) (quoting Greenwood Util. Comm'n v. Mississippi Power Co., 751 F.2d 1484, 1498 (5th Cir. 1985)). *See also* 1 PHILIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 44 (1978). "Identifying such situations is difficult–least difficult for judicial processes, more difficult for administrative adjudication, much more difficult for executive or administrative action generally, and most difficult for legislative processes where it is virtually impossible to identify the 'sham.'" *Id. See also* Michael J. Shockro et al., *Monopolization and Tying Cases in the 90's*, 695 ALI-ABA 233 (1991) (difficult to discern when the line separating conduct that is covered by *Noerr-Pennington* immunity and that which is subject to the antitrust laws is crossed); Waldman, *supra* note 15 (noting difficulty of identifying whether a sham exists); Keith E. Moxon, Comment, *Municipal and Private Petitioner Immunity from Antitrust Liability: A Declaration of Independence to Preserve the Parker and Noerr-Pennington Doctrines*, 65 NEB. L. REV. 330, 355 ("Determining whether particular petitioning conduct falls outside the protection of the *Noerr* political protection doctrine has been the source of considerable difficulty for lower courts"); William L. Monts, Note, Allied Tube & Conduit Corp. v. Indian Head, Inc.: *An Emerging Conceptual Framework For Claims of Noerr Immunity?*, 41 S.C. L. REV. 633, 658 (1990) ("requires the lower courts to draw fine distinctions between different but admittedly genuine attempts to influence governmental action").

44. Viewing the courts' treatment of the *Noerr-Pennington* immunity and the "sham" exception as being effect-driven is somewhat analogous to the Supreme Court's analysis of the *per se* rules in other areas of antitrust litigation. For example, in Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, the Court stated: "The *per se* rules also reflect a long standing judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" 493 U.S. 411, 433 (1990) (quoting Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984)).

those rates adopted by the government, the courts would be hesitant to grant antitrust immunity. This type of action–private businesses entering into a horizontal price-fixing agreement–could potentially be devastating to the market and is the very type of action that the Sherman Act was enacted to protect against,[45] notwithstanding the legitimate petitioning of a political body.[46]

In such cases, the action would be deemed too closely aligned with behavior that has the potential for weakening antitrust policy. Another way of looking at this rationale is that the effect on competition due to the market behavior of the parties, rather than core petitioning, is implicated.[47] For instance, using the above example, if an interest group representing an industry successfully lobbies the government to

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45. Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1 (1988). *See* VAN CISE, *supra* note 5, at 33. The author states that, when interpreting the antitrust laws, "the courts have repeatedly held that competitors may not agree upon the prices at which they collectively will buy or sell, the territories in which they will do business, or the persons with whom each will deal." *Id.* (citing United States v. Sealy, Inc., 388 U.S. 350 (1967); Radovich v. National Football League, 352 U.S. 445 (1957); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)).

46. *See* Sandy River Nursing Care v. Aetna Casualty, 985 F.2d 1138 (1st Cir. 1993). The First Circuit stated that the Supreme Court "has made it clear that certain 'combinations normally held violative of the Sherman Act,' including price-fixing agreements and boycotts, are not 'outside the coverage of the . . . Act simply because [their] objective was the enactment of favorable legislation.'" *Id.* at 1142 (alteration in original) (quoting FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990)). *See also* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503-04 (1988); *Noerr*, 365 U.S. at 136.

47. Professor Einer Elhauge of the University of California School of Law states, "no immunity should apply to the restraint resulting from private decisionmaking. The nature of the activity intended to influence governmental action–a coercive privately set restraint–makes immunity inapplicable." Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 CAL. L. REV. 1177, 1207 (1992) (citing FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 421-25 (1990); United States v. North Dakota Hosp. Ass'n, 640 F. Supp. 1028, 1040-43 (D.N.D. 1986); Michigan State Medical Soc'y, 101 F.T.C. 191, 204-07, 314 (1983)). Professor Elhauge suggests that it is the type of activity along with who actually imposes the restraint–private participants who have an objective financial interest, rather than a politically accountable institution–that dictates whether immunity should be awarded. *Id.* at 1180. Although the outcome of many of these cases would be similar under the hypothesis of this article, the reasoning differs slightly from that of Professor Elhauge. This article argues that it is the perceived fears of the effect of allowing traditional non-competitive behavior–such as horizontal price agreements, tying arrangements, and boycotts–to go unchecked which determines the outcome. There may be some situations in which immunity would apply using this analysis, although the restraint derived, at least in part, from coercive private action. For instance, immunity might be appropriate in a case where vertical private actors arrange territorial restrictions which are proposed and adopted by the government.

set rates, rather than a number of companies setting prices on their own in the hope of persuading the government to adopt those prices, *Noerr-Pennington* immunity would most likely apply.[48]

The Supreme Court's decision in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*[49] is illustrative of cases where perceived traditional anti-competitive effects dissuade the courts from applying the immunity doctrine. In *Indian Head*, the plaintiff, a manufacturer of plastic conduits,[50] initiated a proposal to have the National Fire Protection Association (Association) approve plastic conduits in the Association's 1981 Code.[51] Fearing the entry of plaintiff's product into the market, defendant, the largest producer of steel conduits, planned to pack the Association with members who would vote against the plaintiff's proposal.[52] The Association was a private organization that published product standards related to fire protection for the design of wiring systems.[53] These standards were adopted by a number of state and local governments on a routine basis.[54] As a result of the defendant's actions, the plaintiff's proposal was rejected.[55]

Thereafter, the plaintiff brought suit alleging that the defendant had unreasonably restrained trade in the electrical conduit market in violation of antitrust laws.[56] In response, the defendant asserted that its efforts were immune from antitrust liability under the *Noerr-Pennington* doctrine.[57]

The Supreme Court declined to apply the *Noerr-Pennington* immunity to defendant's conduct, even though the petitioning sought to influence indirect government action.[58] The defendant had argued that all

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48. *See* Elhauge, *supra* note 47, at 1203-06. Professor Elhauge suggests "that whether or not one agrees with my conclusion that interest group theory does not justify more narrow antitrust immunity, the theory does not describe the current contours of antitrust petitioning immunity." *Id.* at 1206 (citations omitted).

49. 486 U.S. 492 (1988).

50. Electrical conduit is tubing that is used to carry electrical wires through the walls and floors of buildings. *Id.* at 496.

51. *Id.*

52. *Id.* The defendants recruited 230 members to join the Association and vote against the proposal. *Id.* at 496-97.

53. *Id.* at 495.

54. *Id.*

55. *Id.* at 497. The proposal was rejected by a narrow margin of 394 to 390. *Id.* The plaintiff's appeal to the Association's Board of Directors was denied. *Id.*

56. *Id.* at 497. The claim rested on a violation of section 1 of the Sherman Act. *Id. See* 15 U.S.C. § 1.

57. *Indian Head*, 486 U.S. at 495. The defendants claimed that the action was immune under *Noerr* because the Association's Code was adopted into law by various state and local governments. *Id.*

58. *Id.* at 503. It is important to note that in *Indian Head* the petitioning was directed toward a private organization. *Id.* However, the Association's standards were routinely adopted without change by many local governments. *Id.* Thus, like

petitioning seeking government action was immune. The Court's holding emphasized the severe anti-competitive consequences of allowing such an absolutist position.[59] The Court stated, "if all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports."[60] The Court held that the defendant's activities were too close to the type of conduct the antitrust laws had traditionally attempted to dissuade.[61]

The Court's language implied that allowing immunity for the defendant's petitioning would have serious anti-competitive consequences.[62] When the activity involves market behavior that has the potential to severely limit competition, *Noerr-Pennington* immunity will not be afforded.[63] That is, when the arrangement is formulated not by the political body, but rather by the interested market participants and the possible effect of the collusion raises traditional anti-trust concerns, competition policy is too likely to be compromised if immunity is allowed. As one author stated, "[w]here the defendants have reached some collective agreement on the market conduct, antitrust concerns

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the defendants' advertising campaign in *Noerr* itself, the action was "indirect" petitioning. *Id.*

59. *Id.*

60. *Id.* The Court gave another example of the problems that the defendant's position would create. The Court stated, "[h]orizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirator's terms." *Id.*

61. *Id.* at 505. The Court stated that, "[w]hat distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner's activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." *Id.* *See* Leonard T. Strand, Comment, *Antitrust Law–Noerr Immunity in the Private Standard-Setting Context*: Allied Tube & Conduit Corp. v. Indian Head, Inc., 14 J. CORP. L. 1033, 1034 (1989) (noting that immunity applies to petitioning of government, in part, when the action does not resemble types of action normally held violative of the antitrust laws). *See also* Minda, *supra* note 15, at 977. *Indian Head* is important because it was the first time the Court held that not all activity intended to influence government action is entitled to immunity. *Id.*

62. *See* AREEDA & HOVENKAMP, *supra* note 38, at 90. "The majority may have feared that requiring any additional impropriety would validate such conduct that ought to remain illegal even though it may be connected with 'petitioning' activity." *Id.*

63. *See* Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 CAL. L. REV. 757, 793 (1992) ("[T]he anticompetitive effect is what is central to the . . . case"). *See also* Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970). The court in *Whitten* refused to apply the *Noerr-Pennington* immunity because of the anti-competitive effect of the action. The court stated that "to hold otherwise might impair the effectiveness of competitive bidding." *Id.* at 33.

about the competitive process are paramount because such agreements directly interfere with free competition."[64]

Further, denial of antitrust immunity when classic restraints of trade are involved does not impede all forms of petitioning. For example, market participants may still engage in verbal informational input with political and product standard bodies.[65] They are only impeded from taking part in activity that is at the very core of anti-trust concerns, such as "combinations ordinarily characterized by an express or implied agreement . . . that the participants will jointly . . . help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements."[66]

The effect-driven outcome of the application of the *Noerr-Pennington* immunity is pronounced in cases where the petitioning activity involves a boycott. The effect of boycotts in the marketplace–like that of horizontal price fixing, division of markets, and tying agreements–has long been recognized as particularly destructive to competition.[67] As such, and outside the *Noerr-Pennington* context, economic boycotts have been reviewed using the so-called "*per se*" approach[68] rather than the usual "rule of reason" analysis.[69] That is, the mere formation of an

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64. Elhauge, *supra* note 47, at 1222.

65. *Id.* Professor Elhauge suggests that "any informational input provided by collective market behavior (such as the views expressed by a symbolic boycott or a product standard) can instead be provided through verbal communication." *Id.* (citing FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 426 (1990)).

66. *Noerr*, 365 U.S. at 136. *See also Indian Head*, 486 U.S. at 507.

67. *See* Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376, 1382 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981). The Ninth Circuit stated that, "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances." *Id.* (quoting Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)). *See also* Cincinnati Riverfront Coliseum, Inc. v. City of Cincinnati, 556 F. Supp. 664, 666-67 (S.D. Ohio 1983). *See generally* HOVENKAMP, *supra* note 10, at 124-34.

68. In its most basic form, the "*per se* rule says simply that once we know a certain amount about a practice [like boycotts] we can condemn it without further inquiry." HOVENKAMP, *supra* note 10, at 126 (alteration added).

69. *See* Joseph P. Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979) ("One form of activity that has been declared unreasonable per se is the group boycott, or concerted refusal to deal"). For the rationale behind the use of the "*per se*" analysis, see generally Anne G. McCormick, *Group Boycotts–Per Se or Not Per Se, That is the Question*, 7 SETON HALL L. REV. 703 (1976); Edward A. Woolley, *Is a Boycott a Per Se Violation of the Antitrust Laws?*, 27 RUTGERS L. REV. 773 (1974). *See also Ron Tonkin Gran Turismo*, 637 F.2d at 1382. The court stated that, "*[p]er se* treatment is warranted, in certain areas because 'there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise

economic boycott, for example, is viewed as presumptively illegal under the Sherman Act.

Economic boycotts organized by financially interested parties attempting to influence the government have been treated similarly because of the perceived pervasiveness of the anticompetitive effect of such classic restraints. As one court noted, "private actors who conduct an economic boycott violate the Sherman Act and may be held responsible for *direct marketplace injury* caused by the boycott, even if the boycotters' ultimate goal is to obtain favorable state action."[70] Indeed, the Supreme Court has mandated such treatment, notwithstanding the possible curtailment of this form of petitioning.

In *Superior Court Trial Lawyers Ass'n v. Federal Trade Commission*,[71] private criminal defense attorneys and their trade association agreed not to represent criminal defendants in the District of Columbia unless the District increased the fees paid to the lawyers.[72] The Federal Trade Commission (FTC) initiated a proceeding alleging that the boycott amounted to an illegal conspiracy to fix prices.[73] The attorneys defended by claiming that their boycott had a political objective.[74]

The Supreme Court held that the boycott fell outside the petitioning immunity.[75] The Court opined that to allow immunity for the boycott merely because it had an "expressive component" would leave a "gaping hole in the fabric" of the antitrust laws.[76] Justice Stevens, writing for the

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harm they have caused or the business excuse for their use.'" *Id.* (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

70. Sandy River Nursing Care v. Aetna Casualty, 985 F.2d 1138, 1142 (1st Cir. 1993). The court went on to state plainly that, "[i]n other words, a classic economic restraint of trade is actionable even if its primary purpose is political." *Id.*

71. 493 U.S. 411 (1990).

72. *Id.* at 415. Ninety percent of the "regular" private defense attorneys refused to accept any new assignments after agreeing to boycott. *Id.* at 416.

73. *Id.* at 418. The FTC claimed that the boycott violated section 5 of the Federal Trade Commission Act. *Id.* at 418-19. Section 5 of the Act prohibits unfair methods of competition. *See* 15 U.S.C. § 5(a) (1988).

74. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 419 (1990). The political objective was to improve the quality of representation for their indigent clients. *Id.* Further, the attorneys claimed immunity under *Noerr* because they were seeking government action. *Id.*

75. *Id.* at 428. The Court held that the lawyers' antitrust immunity arguments were disposed of by the language in the *Indian Head* decision which stated that *Noerr* immunity is not applicable to "every concerted effort that is genuinely intended to influence governmental action." *Id.* at 425 (quoting *Indian Head*, 486 U.S. at 503). *See* Minda, *supra* note 15, at 993 ("concerted activity among competitors to restrain trade by use of a boycott cannot be defended on the claim that such activity was intended to communicate a 'political' message, even if the message may be relevant and necessary to governmental decisionmaking").

76. *Trial Lawyers*, 493 U.S. at 431-32. The Court distinguished *Claiborne Hardware*, in which the Court held that the boycott involved constitutionally protected activity. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). The

majority, characterized the boycott as a classic restraint of trade in violation of section 1 of the Sherman Act.[77] Thus, the anti-competitive effects of boycotts are viewed as so pervasive[78] that immunity will not be allowed in cases where the party has an economic interest in the boycott even if its purpose is to induce government action.[79] In such instances, financially interested members of a boycott "render[] the decisionmaking process producing the challenged restraint the sort that must be subject[] to a competitive process policed by antitrust ground rules."[80]

Similarly, in *Osborn v. Pennsylvania-Delaware Service Station Dealers Association*,[81] a number of gasoline dealers organized a boycott in order to bring pressure on the United States Department of Energy to raise the maximum price at which gasoline could be sold.[82] An antitrust action was subsequently brought against the dealers participating in the boycott.[83] The dealers claimed that their activities were immune from the antitrust laws under the *Noerr-Pennington* doctrine.[84]

The district court first rejected the defendants' argument that all petitioning aimed at influencing government action was immune under

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Court in *Trial Lawyers* distinguished *Claiborne Hardware* by stating that First Amendment protection was "not applicable to a boycott conducted by business competitors who 'stand to profit financially from a lessening of competition in the boycotted market.'" *Trial Lawyers*, 493 U.S. at 427 (quoting *Indian Head*, 486 U.S. at 508). *See also* Oregon Natural Resources Council v. Mohla, 944 F.2d 531 (9th Cir. 1991). The Ninth Circuit noted that there is less of an anti-competitive concern when the party has no economic interest in the action. The court stated, "where the petitioner's goals are political rather than economic, protection is particularly appropriate." *Id.* at 535 n.3.

77. *Trial Lawyers*, 493 U.S. at 433.

78. Discussing the ill effects of economic boycotts, the Court in *Trial Lawyers* stated, "[e]very such horizontal arrangement among competitors poses some threat to the free market." *Id.* at 434.

79. *See In re* Superior Court Trial Lawyers Ass'n, 107 F.T.C. 562 (1988). At the administrative hearing, the FTC stated that "[t]he mere fact that the government, as the only purchaser of [attorney] services, was the target does not protect their boycott from regulation." *Id.* at 599. The Supreme Court found that the boycott had caused substantial anticompetitive harm and stated that, "[t]he restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted." *Trial Lawyers*, 493 U.S. at 425.

80. Elhauge, *supra* note 47, at 1208.

81. 499 F. Supp. 553 (D. Del. 1980).

82. *Id.* at 554-55. In fact, the Department of Energy did raise the maximum retail price of gasoline shortly after the boycott had begun. *Id.* at 555.

83. *Id.* at 554-55. The plaintiff alleged that the dealers' activities violated sections one and two of the Sherman Act and sections three, four, and fifteen of the Clayton Act. *Id.* at 555 (citing 15 U.S.C. §§ 1, 2, 14, 15, & 25).

84. *Id.* at 556.

Noerr-Pennington.[85] The court then held that the defendants' action was not immune, even though clearly intended to influence governmental action.[86] The court reasoned that boycotts "possess great anti-competitive potential"[87] that should be regulated by the antitrust laws notwithstanding some abridgment of First Amendment values.[88]

Thus, the antitrust potential in cases involving boycotts where members have an economic interest in the outcome appear to be far too significant to allow the *Noerr-Pennington* immunity.[89] This conclusion reinforces the perceived effect-driven outcome of these cases. Only when the petitioning itself, as opposed to the result of the petitioning, is minimally intrusive to antitrust principles will the courts find in favor of First Amendment rights.

IV. THE "SHAM" EXCEPTION AND THE PERCEIVED ANTI-COMPETITIVE EFFECT

As with the issue of whether to allow *Noerr-Pennington* immunity, the question of whether to apply the "sham" exception often turns on whether traditional concerns over anti-competitive behavior are

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85. *Id.* The district court stated:

> Defendants apparently read *Noerr* and *Pennington* as conferring an exemption from antitrust liability upon all activities that are aimed at influencing governmental action. This reading has the virtue of simplicity, but its adoption would require courts to sanction conduct that *severely restricts competition* even when there is a minimal threat to First Amendment values.

Id. (emphasis added). *See Indian Head*, 486 U.S. at 503 ("We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action.").

86. *Osborn*, 499 F. Supp. at 557.

87. *Id.* at 558.

88. *Id.* The court stated that, "[i]f a boycott designed to influence governmental action has produced an anti-competitive effect of the kind [the Sherman and Clayton Acts] were intended to guard against, it seems to me that relief can ordinarily be granted with little threat to First Amendment values." *Id. See* AREEDA & HOVENKAMP, *supra* note 38, at 76 (agreeing with the approach taken by *Osborn*). *See also* Durie & Lemley, *supra* note 63, at 793. The outcome turns "on whether their competitive effect or their political effect predominates." *Id. But see* Crown Cent. Petroleum Corp. v. Waldman, 486 F. Supp. 759, 769 (M.D. Pa.), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980) (court took contrary position, holding that the joint agreement was immune under *Noerr* because political speech component outweighed the antitrust interest). *Cf.* Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075, 1083 (5th Cir. 1988) (noting that when First Amendment rights are seriously infringed upon by the antitrust laws, the First Amendment wins).

89. *See generally* Note, *Protest Boycotts Under the Sherman Act*, 128 U. PA. L. REV. 1131, 1144-48 (1980); Note, *Political Boycott Activity and the First Amendment*, 91 HARV. L. REV. 659, 683-87 (1978).

involved.[90] If the restraints on competition spring not from the action taken by the government, but rather from the petitioning itself, these traditional concerns and the likelihood that the "sham" exception will apply are great.[91]

For instance, in *Litton Systems, Inc. v. American Telephone and Telegraph Co.*,[92] AT&T had petitioned the Federal Communications Commission in order to maintain its position in the market.[93] The Second Circuit Court of Appeals held that AT&T's action was an abuse of the administrative process and a "sham" because the petitioning itself had the effect of barring competitors from access to the telephone network systems.[94] The court found that the petitioning was "not undertaken in the hope of influencing governmental action, but in the hope of delaying it."[95] Thus, the petitioning itself, rather than any favorable government action which may have resulted from AT&T's efforts, enabled AT&T to maintain its position in the market.

A similar result is evinced in the holding in *United States v. Otter Tail Power Company*.[96] In *Otter Tail*, a public utility had allegedly refused to deal with various municipalities desiring to create their own electric systems.[97] The government further claimed that Otter Tail's participation in local political campaigns and sponsorship of court litigation were intended to impede the development of the municipal electric systems.[98] Because a "no-litigation certificate" was imperative for the sale

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90. *See* AREEDA & TURNER, *supra* note 43, at 52. Authors suggest that courts should look in part to "the severity of the danger to competition." *Id.*

91. *See, e.g.*, City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380 (1991) (sham exception applies when the process, rather than the outcome of the process, has an anti-competitive effect).

92. 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

93. *Id.* at 811.

94. *Id. See* Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952). The court in *Kobe* allowed the antitrust action after finding sufficient support that "although Kobe believed some of its patents were infringed, the real purpose of the infringement action and the incidental activities of Kobe's representatives was to further the existing monopoly and to eliminate Dempsey as a competitor." *Id.* at 425. *See also In re* Burlington Northern, Inc., 822 F.2d 518, 528 (5th Cir. 1987) (allowing discovery where suit claimed that party's conduct was a sham seeking to delay "the project to the point it became so expensive to be infeasible as a competitive enterprise"); City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1181 (8th Cir. 1982), *cert. denied*, 459 U.S. 170 (1983) ("The *Noerr-Pennington* doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results"); Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc., 814 F.2d 358, 376 (7th Cir. 1987) ("The first amendment does not protect efforts to enforce private cartels, in court or out").

95. *Litton Systems*, 700 F.2d at 812.

96. 331 F. Supp. 54 (D. Minn. 1971).

97. *Id.* at 56.

98. *Id.* at 58.

of municipal bonds, the court found that the litigation induced by Otter Tail effectively prevented competitors from entering the market.[99] The court held that the litigation by Otter Tail was a "sham" that helped to maintain the company's position in the market. Thus, the anti-competitive effect sprang directly from the initiation of the litigation rather than the final outcome of the case.

The effect-driven result is also illustrated by cases finding the "sham" exception inapplicable. The outcomes of these cases have primarily turned on the courts' findings that the petitioning caused insignificant harm to competition. For instance, in *Razorback Ready Mix Concrete Co. v. Weaver*,[100] the plaintiff alleged that the defendant had filed a "sham" lawsuit in order to eliminate the plaintiff as a competitor.[101] The injury averred to was that the plaintiff had not received benefits that it otherwise would have if the litigation initiated by the defendant and the subsequent delay in receiving revenue bonds had not occurred.[102] The Eighth Circuit held that the lawsuit was not a "sham."[103] The type of action complained of did not raise traditional anti-trust concerns. The defendant's actions did not themselves bar the plaintiff from entering, or drive the plaintiff out of, the relevant market. The court dismissed the claim stating that "Razorback failed to allege . . . that defendant's conduct had any adverse effect on competition."[104]

Similarly, in *Omni Resource Development Corp. v. Conoco, Inc.*,[105] the Ninth Circuit found the "sham" exception inapplicable because of a lack of anti-competitive effect.[106] As opposed to the *Litton Systems* and *Otter*

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99. *Id.* at 62.
100. 761 F.2d 484 (8th Cir. 1985).
101. *Id.* at 488.
102. *Id.*
103. *Id.* at 488.
104. *Id.* Further, the court stated:

> The antitrust laws exist for "the protection of *competition*, not *competitors*". . . . To maintain a private antitrust action, a party must do more than claim improper motive and some causal connection between its injury and the defendants' activity . . . . Rather, the party must demonstrate that it has suffered the type of injury Congress intended to "redress in providing a private remedy for violations of the antitrust laws."

Id. (quoting Henke Enter., Inc. v. Hy-Vee Food Stores, Inc., 749 F.2d 488, 489 (8th Cir. 1984) (citations omitted) (quoting Blue Shield of Va. v. McCready, 457 U.S. 465, 483 (1982)). *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977). *See also* AREEDA & HOVENKAMP, *supra* note 38, at 60 ("Adverse effects on a single competitor, without more, are not enough").
105. 739 F.2d 1412 (9th Cir. 1984).
106. *Id.* at 1414. The Court stated that, "[t]he filing of the state court suit did not in itself cause an anti-competitive effect. Further, there were no anti-competitive effects or wrongful acts external to the litigation or to the result reached in the litigation." *Id.* (citations omitted). *See also* Boulware v. Nevada, 960 F.2d 793, 800 (9th Cir. 1992) ("This is not a case where the antitrust defendant could have used the

Tail cases where the "sham" exception applied, the petitioning in *Omni Resource* did not in itself produce a restraint on competition. Rather, the claim was that the cost of litigation would produce such a result.[107] However, that type of possible anti-competitive behavior is not a traditional concern of anti-trust policy and its perceived effect on competition is de minimus in comparison to First Amendment values.

These cases highlight the unwillingness of the judiciary to abridge First Amendment rights unless the petitioning itself has the potential to create severe adverse effects on competition. Considering the Supreme Court's language when first applying the "sham" exception, this approach appears to be correct. The Court in *California Transport* stated, "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils'. . . ."[108] Merely petitioning the government or initiating a lawsuit is certainly not such a "substantive evil." Only when the anti-competitive consequences are a direct result of the petitioning, as opposed to the possible outcome, will the "sham" exception be applicable.

V. CONCLUSION

When analyzing antitrust cases involving petitioning to the government, courts focus on whether the activity's effect would seriously offend traditional antitrust policies. If the answer is in the affirmative, then the scales may well be tipped in favor of antitrust liability. If the answer is in the negative, then competition must give way to the constitutional right to petition. This approach maintains a delicate balance between two important principles.

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lawsuit as a tool to impose costs and delay, to tarnish the reputation of a competitor, or to cripple its adversary's ability to obtain needed financing"); Oberndorf v. Denver, 900 F.2d 1434, 1440 (10th Cir.), *cert. denied*, 498 U.S. 845 (1990) (finding no sham where the claim was merely premised on *ex parte* deliberations between party to suit and city officials); Bright v. Moss Ambulance Serv., Inc., 824 F.2d 819, 824 (10th Cir. 1987) ("[w]hether a practice violates the antitrust laws is determined by its effect on competition, not its effect on an individual competitor"); Rickards v. Canine Eye Registration Found., 783 F.2d 1329, 1334 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986) (no sham where party did not possess market power and no anticompetitive effect was shown); Razorback Ready Mix Concrete Co., Inc. v. Weaver, 761 F.2d 484, 488 (8th Cir. 1985) ("[t]he antitrust laws exist for 'the protection of *competition*, not *competitors*'") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

107. *Omni Resource*, 739 F.2d at 1414.

108. California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515 (1972) (quoting NAACP v. Button, 371 U.S. 415, 444 (1963)).

Ideology, Prejudgment, and Process Values

John R. Allison*

TABLE OF CONTENTS

I. Legal Standards Demanding Decision-Maker Impartiality .. 662
A. Constitutional Standards 663
B. Nonconstitutional Sources 665
II. Process Values 671
A. Instrumental Values 671
1. Accuracy 671
2. Efficacy 676
3. Fairness 677
B. Noninstrumental Values 680
1. Individual Dignity 680
2. Heuristic Goals 681
3. Institutional Legitimacy 682
III. Decision-Making Forms and Functions 682
A. Decision-Making Forms: The Adjudicative-Legislative Distinction 683
1. Legal Significance of the Distinction 684
2. The Distinction's Relation to Process Values 685
B. Decisional Functions 686
1. Investigative Function 687
2. Advocatory Function 687
3. Judging Function 689
4. A Note on Decisional Functions in the Legislative Context 689
IV. A Process-Value Analysis of Ideology and Prejudgment 691
A. Decision-Maker Ideology 691
1. General World View 694
2. Conviction About Policy or Law 694
3. Organizational Empathy 699

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4. Lack of Necessary Qualifications 705
B. Prejudgment 707
1. Explicit Prejudgment of Policy or Law 708
2. Explicit Prejudgment of Fact 710
a. Ad Hoc Fact Prejudgment 711
b. Transitional Structural Conditions 720
c. Structural Fact Prejudgment 722
1. Reconsideration After Review With No Additional Factual or Legal Elements 722
2. Reconsideration After Review With the Addition of New Factual or Legal Elements 724
3. Sequential Preliminary Decisions Leading to Final Determination by Same Decision Maker 727
4. Initial Decision Makers Forming Part of Reviewing Body 732
3. Prejudgment of Adjudicative Facts Implicit in Decision Maker's Conduct 733
C. A Note on Combinations of Decision-Making Functions 738
V. Other Factors Effecting Potential Harm to Process Values .. 739
A. Cumulative Effects 739
B. Decision-Making Forms and Functions 739
C. Managerial Model 740
D. Volume and Relative Routineness of Decisions 740
VI. Corrective Measures 740
A. General Procedural Safeguards 740
B. Involvement of Other Minds 741
C. Communication 741
D. Choices 741
VII. Conclusion 742

There is no doubt that the ultimate product of a decision-making procedure is more important than the process itself. It is also true that designers and evaluators of decision systems should be ever cautious to avoid excessive proceduralization. Hyperprocedure is necessarily counterproductive. Moreover, designers, evaluators, and even users of decision systems must be vigilant not to permit the disingenuous use of procedural trappings to conceal unfair outcomes.[1]

Process is, however, both inevitable and vital. The processes by which decisions are made and disputes resolved serve many critical purposes. Process values, that is, the goals and positive contributions of good procedure, are of both the instrumental and the noninstrumental variety. Instrumental values are those associated with the quality of the decision that emerges from the process. Noninstrumental values are those inherent in the procedure itself. A well-designed procedure is one that optimizes both general kinds of process value.[2]

The idea of process values can be important in many disparate circumstances, including those in which decisions are made in intrafirm and interfirm business contexts, social interactions, and international sovereign relations. This article, however, is limited to the analysis of those kinds of decisions that are most commonly associated with the need for sound procedural design–those that affect the rights or obligations of others. Most such decisions are clearly recognizable as being of a fundamentally legal (or sometimes at least partly political) nature, taking place in courts, administrative agencies, legislative bodies, and other legal institutions. Some of these types of decisions, however, are made by nonlegal institutions such as professional associations or sports organizations. Certain nonlegal institutions may have the ability to affect the rights and obligations of particular individuals, even without having received any delegated governmental authority. This ability may arise from the economic, reputational, or other control these institutions have over others. Although most of the analysis in this article relates to legal decision systems in institutions deriving their power from government, those situations in which nonlegal institutions make decisions affecting the rights and obligations of others are treated as being within the same class.

It is commonly understood that sound procedural design in most such decisional contexts includes: (1) notice that is reasonably calculated

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1. *See* Craig Haney, *The Fourteenth Amendment and Symbolic Legality–Let Them Eat Due Process*, 15 LAW & HUM. BEHAV. 183 (1991) (arguing that due process has been used as a substitute for economic justice rather than as a guarantor of it).

2. *See, e.g.*, Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 475-91 (1986). Although conceptualizing process values in dichotomous terms is legitimate and helpful, many components of a sound procedural design often promote both categories of value.

to apprise affected parties of the nature of the proposed action and the avenues available for them to participate; (2) a hearing or other meaningful opportunity for affected parties to have a voice in the decision-making enterprise; and (3) a decision maker who is as fair and impartial as the circumstances permit.

Placing authority in the hands of a biased decision maker offends process values at least as surely as any other procedural shortcoming. The presence of a decision maker who is either unwilling or unable to suspend judgment and decide only on the merits undermines both instrumental and noninstrumental process values. Conversely, the presence of a truly unbiased decision maker can make up for other significant procedural inadequacies. Situations in which there are questions about the impartiality of a decision maker often go hand-in-hand with a number of other costly and time-consuming procedural safeguards intended to offset the effects of bias.[3]

In this article, the term "bias" describes a condition that causes a decision maker to decide on the basis of an *alien factor.* The alien factor does not have to be the sole basis for a decision, but must be a significant contributor. A factor is alien if it consists of anything other than evidence and arguments relevant to a policy, principle, or rule directly at issue. In addition, if the decision maker performs a judicial-like function, the definition of an alien factor expands to include anything other than relevant evidence and arguments that have been presented in such a fashion that all directly affected parties have an equal opportunity to either promote or challenge them. The latter portion of this definition is added for a judicial-type functionary to account for the psychological impact of an unbalanced presentation on a decision maker whose function places him or her in the middle of contested positions.[4] Finally, in defining bias as a condition leading to the introduction of an alien factor, the term "condition" includes both

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3. *See, e.g.*, Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279-80 (1975).

4. In psychological terms, the evidence or argument presented without adequate testing or rebuttal by the other side is likely to be more "salient," that is, apparently more real, concrete, relevant, and probative as a result of being unchallenged. Recall and weighting generally increase with the saliency of information; thus, there is a serious risk that such information will affect the decision disproportionately to its true probative value. *See, e.g.*, RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 8, 43-62 (1980) (people give greater weight to information according to its vividness, salience being one important contributor to vividness); Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction, in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 190, 192-94 (Daniel Kahneman et al. eds., 1982) (explaining greater effect of salient information as a type of "availability" bias; salient information is more available for retrieval from memory).

states of mind and particular decision-making structures that encourage these states of mind.[5]

After having defined decision-maker bias conceptually, its manifestations may be categorized according to many different theoretical schemes.[6] Bias may spring from decision-maker economic interests in particular outcomes, emotional stakes in decisions, class-based hostilities toward affected parties, distorted balancing of conflicting evidence and arguments because of ex parte communications,[7] unyielding ideological

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5. A note about transdisciplinary semantics may be helpful. In traditional legal usage, the term "bias" normally refers to prejudice or lack of impartiality. In cognitive psychology, the term refers to systematic errors in human reasoning, including departures from the laws of probability, cognitive illusions, clearly inappropriate weighting of information, and other instances of suboptimal ratiocination. *See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974). The term's usage in psychology obviously bears a rough conceptual resemblance to its customary usage in law, although the former is far more precise and well-established because of its development and utilization in experimental research. In inferential statistics, the term bias refers to a condition in which an estimator (such as a sample mean) systematically deviates from the parameter of interest (such as the population mean). *See, e.g.*, AMIR D. ACZEL, COMPLETE BUSINESS STATISTICS 167-68 (1989). Although obviously different, it also shows some kinship with usages in law and psychology.

As used in this article, the working definition of bias is reasonably close to the term's traditional legal connotation of prejudice or lack of impartiality. My use of the term, however, is somewhat broader than the more traditional legal usage, especially with respect to the variety of decision system structural conditions that are included; my usage is influenced significantly by the concept of bias in the psychology literature and even slightly by the statistical concept of bias.

6. Professor Davis has identified five types of bias, with a particular view toward administrative agency decision making: (1) "a prejudgment or point of view about a question of law or policy"; (2) "a prejudgment about legislative facts"; (3) "a prior commitment" on adjudicative facts; (4) "a personal bias or personal prejudice, that is, an attitude toward a person, as distinguished from an attitude about an issue"; and (5) "a financial conflict of interest." 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 19:1, at 371 (2d ed. 1978). In the context of administrative agency decision making, Davis observes that the law does not view the first two categories of bias as disqualifying, often does view the third as disqualifying, and treats the fourth as disqualifying if strong enough and the fifth if substantial. *Id.* at 372.

In the context of doctrinal due process analysis, Redish and Marshall distilled these into only three types: (1) financial stake, (2) personal bias, and (3) predisposition toward a position. Redish & Marshall, *supra* note 2, at 492.

If one wished to develop a thorough taxonomy of decision-maker bias, either Davis's or Redish and Marshall's categories could be broken into much finer components. Although a comprehensive and more precisely articulated taxonomy could be of great utility to designers and evaluators of dispute resolution and legal decision-making systems, the task is beyond the scope of this article.

7. As used here and in most other writings, "ex parte communications" are those containing relevant evidence or arguments made by an interested party to a decision maker under circumstances in which another affected party has either no opportunity or an insufficient opportunity to challenge the content of the

commitments, various forms of premature judgment, and other sources. The related classes of decision-maker ideology and premature judgment form the central theme of this article.

Using process values as the normative paradigm, the objective of this article is to develop a taxonomy for identifying and evaluating the many possible manifestations of decision-maker ideological predilection and prejudgment. A formal analytical framework based on a coherent normative theory may prove useful in either the design, evaluation, or effective use of decision-making and dispute resolution systems. It also can have utility in the evaluation of a particular decision produced by the system.

Although a given instance of prejudgment or other type of decision-maker bias may or may not have practical legal consequences, it is important initially to consider some of those consequences. Thus, in Part One, this article first identifies some of the many legal standards that support process values by proscribing decision-maker bias. Part Two outlines the basic components of instrumental and noninstrumental process values. The article then discusses, in Part Three, the importance of taking into account different kinds of decisional processes and decision-making functions when conducting a process-value analysis. Part Four presents the core of the article—a taxonomy of decision-maker ideology and premature judgment for use in designing, evaluating, and using legal decision-making systems from a process-value perspective. The article concludes with the identification and assessment of several other factors that may affect the degree to which this and other forms of decision-maker bias transgress process values, and a discussion of various bias-correcting measures that may be used in the design of legal or quasi-legal decision systems.

Although this article focuses on two closely related classes of biasing influence, many of the cases from which examples are drawn also involved other potential sources of bias. Isolation of particular sources of bias is necessary for close analysis; as will be pointed out at toward the end of the article, however, a final design or evaluation of a decision system must take into account the cumulative effects of multiple biasing influences.

I. LEGAL STANDARDS DEMANDING DECISION-MAKER IMPARTIALITY

Prejudgment and other forms of decision-maker bias range from the subtle to the striking, from the inevitable to the indefensible. Whatever its form, identification of such bias does not necessarily translate into practical legal consequences. There are at least three reasons for this.

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communications. *See, e.g.*, RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW & PROCESS 433 (2d ed. 1992).

First, there are situations in which bias is a natural incident of a given class of decisions or type of decision-making function. Second, even if not intrinsic to a particular decisional form or function, certain instances of bias sometimes may be legally and morally tolerable because of the need to promote other goals. Sometimes, for example, the use of a decision maker who is already intimately familiar with the circumstances leading to a dispute may be justified by efficiency concerns despite the potential for premature judgment. This is simply a matter of process-value optimization. Third, even if an occurrence of bias is neither intrinsic nor justifiable, the law does not always do an adequate job of purging or correcting the bias.

Although decision-maker bias does not, and cannot, always have practical legal consequences, there are many circumstances in which it does. The following is a nonexhaustive survey of some of the legal standards that prejudgment or other form of decision-maker bias may infringe upon.

A. *Constitutional Standards*

The three components of minimal process itemized earlier are readily recognizable as the core requirements of procedural due process under the Fifth and Fourteenth Amendments of the United States Constitution. It is axiomatic that, at a minimum, due process demands the provision of an effective notice, an opportunity to be heard that is meaningful under the circumstances, and an impartial tribunal.[8] Due process makes these demands whenever an adjudicative governmental action deprives a person of life, liberty, or property.[9]

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8. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976).

9. The adjudicative-legislative distinction is discussed *infra* at text accompanying notes 76-86. The definitions of "liberty" and "property," the private interests upon which almost all due process questions turn, are beyond the scope of this paper. The case law and literature on the subject are very substantial. *See, e.g.*, Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990); Zinermon v. Burch, 494 U.S. 113 (1990); Washington v. Harper, 494 U.S. 210 (1990); Michael H. v. Gerald D., 491 U.S. 110 (1989); Brock v. Roadway Express, Inc., 481 U.S. 252 (1987); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Daniels v. Williams, 474 U.S. 327 (1986); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Meachum v. Fano, 427 U.S. 215 (1976); Paul v. Davis, 424 U.S. 693 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972); Henry P. Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977); Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CAL. L. REV. 146 (1983); Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982); Timothy Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861 (1982); Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEG. STUD. 3 (1983).

Although due process is by far the most important constitutional embodiment of process values, the need for decision-maker impartiality sometimes plays a stated or unstated role in the analysis of other constitutional questions. For example, evidence showing any of several forms of decision-maker bias when a governmental unit or official restricts a fundamental right, such as free speech, can influence a court's analysis of the constitutional issue. Thus, a governmental actor's bias against the holder of a certain ideological position may lead to viewpoint discrimination. A content-based restriction on expression that discriminates between viewpoints is much more likely to violate the First Amendment than one that is viewpoint neutral.[10]

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10. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 811-13 (1985). Decision-maker bias may affect the analysis of other constitutional issues, as well. The sources of bias in these other situations, however, usually take the form of economic conflicts of interest or emotional ("personal") bias rather than the ideological bent and prejudgment problems dealt with in this article. For example, delegations of Article I legislative power to private decision makers historically have encountered difficulty, mainly when expansive discretion has been given to parties with an economic interest in the outcome of their decisions. *See, e.g.*, Fahey v. Mallonee, 332 U.S. 245 (1947); Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935); PPG Indus., Inc. v. Stauffer Chem. Co., 637 F. Supp. 85, 89 (D.D.C. 1986); Louis L. Jaffee, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650 (1975). Although the nondelegation doctrine is seldom important at the federal level today, an attempt by Congress to delegate a core legislative function without adequate standards may still offend the Constitution. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 363, 659-62 (2d ed. 1988). Further, the doctrine has maintained somewhat more vitality at the state level than at the federal. *See* DANIEL R. MANDELKER ET AL., STATE & LOCAL GOVERNMENT IN A FEDERAL SYSTEM 598 (2d ed. 1983); Lawrence, *supra* at 659-62. Furthermore, there has been significant scholarly argument in favor of revitalizing it. *See* PIERCE, *supra* note 7, at 54 & n.61 (discussing recent scholarly opinion urging revitalization of the nondelegation doctrine). Whatever the extent of the doctrine's current or future importance, the exercise of delegated power by an interested private party necessarily raises some fear of arbitrariness and oppression, and consequently increases the degree of constitutional alarm.

Other constitutional rights also can be imbued with a concern for process values, including decision-maker impartiality. Thus, a government prosecutor whose exercise of peremptory challenges during jury selection is infected with racial prejudice violates the Equal Protection Clause. Batson v. Kentucky, 476 U.S. 79 (1986), *modified*, 499 U.S. 400 (1991). Racial bias by a state or local government officer is prohibited by the Fourteenth Amendment's Equal Protection Clause; similar bias by a federal officer is prohibited by the Fifth Amendment's Due Process Clause, which incorporates the Fourteenth Amendment's Equal Protection standards. This ban on the racially motivated use of peremptory strikes also has been extended to defense attorneys in criminal cases, Georgia v. McCollum, 112 S. Ct. 2348 (1992), and to plaintiffs' or defendants' attorneys in civil cases, Edmonson v. Leesville Concrete Co., Inc., 111 S. Ct. 2077 (1991). Although the actual decisions about how to use peremptory challenges are made by nongovernmental actors in these latter

B. *Nonconstitutional Sources*

A decision-making procedure does not have to rise to the level of a constitutional violation to offend important process values. In the first place, constitutional standards apply only to certain kinds of governmental action. For example, procedural due process does not pertain at all to private action, and does not apply to many exercises of governmental decision making. Second, even if a constitutional standard such as procedural due process applies in a given situation, an infringement of process values must be rather serious to achieve constitutional dimensions. This is as it should be, for excessive constitutionalization tends to obscure and trivialize the truly vital concerns.

Constitutional dictates aside, process values are always important when decisions are made that significantly affect the rights or obligations of individuals or business entities. Recognition and promotion of process values emanate from many different nonconstitutional sources. Whatever the source of standards by which procedures are normatively evaluated, the same instrumental and noninstrumental goals should imbue these standards.

Decision-maker bias is a core concern in all of the nonconstitutional standards for evaluating procedures. Judges, for example, are typically subject to statutory disqualification for bias. In the federal system, several standards of disqualification for bias have been imposed by Congress.[11] In addition, the United States Supreme Court may review

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two situations, the degree of government involvement in the conduct of all aspects of civil or criminal litigation is sufficient to meet the government action requirement for applicability of equal protection standards.

11. The statutes speaking to disqualification of federal judges for bias are 28 U.S.C. §§ 47, 144, 455 (1988). *See* Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662 (1985) (analyzing federal judicial disqualification statutes and their interpretation, criticizing them for making it too easy to disqualify federal judges for even insubstantial financial interests but too difficult to disqualify them for other kinds of bias). Section 47 prohibits a federal judge from participating in the appellate review of his own earlier decision.

Section 144 deals only with "personal bias" on the part of federal district judges. In reality, disqualification of federal district judges for so-called "personal bias" has proved to be rather difficult. *See* Bloom, *supra*, at 666-70 (discussing cases applying section 144).

Section 455 is a far more comprehensive statute, applying to all federal judges and to many forms of actual and perceived bias. Section 455(a) states that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455(b) specifies a number of other circumstances and relationships that disqualify federal judges. Subsection (a) of section 455 is waivable by the parties, but subsection (b) is not. These waiver rules are found in section 455(e). *See* Bloom, *supra*, at 670-80 (discussing section 455 and its interpretation by federal courts, as

a lower federal judge's alleged bias without invoking constitutional or statutory standards by exercising its inherent supervisory authority over the administration of justice in the federal courts.[12]

Aside from codes of civil and criminal procedure for the courts, the federal Administrative Procedure Act (APA) and its state law counterparts represent the most generalized form of statutory procedural framework. The APA permits the disqualification of presiding officials in adjudication or rulemaking, and requires that the challenged agency make a formal determination in response to an affidavit alleging personal bias on the part of a presiding official.[13] The APA also deals extensively with the separation of functions within federal administrative agencies. Agency staff who engage in investigative or advocatory functions in connection with formal agency adjudications are precluded from either performing or supervising those who perform the judging function.[14] Similarly, many ex parte communications between investigative or advocatory staff and quasi-judicial decision makers are prohibited.[15]

The abuse of discretion standard in federal administrative law can also be used as a basis for reviewing a claim that an agency member's vote was impermissibly tainted by bias.[16] In addition, there are situations in which alleged instances of bias can be reviewed on the

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part of a criticism that it is too easy to disqualify federal judges for economic interests and too hard to disqualify them for many other reasons that may be more important in some circumstances).

12. *See, e.g.*, Offutt v. United States, 348 U.S. 11 (1954).

13. 5 U.S.C. § 556(b) (1988). A presiding officer (the APA says "presiding employee") may be an administrative law judge, a member of the agency, or the agency members as a group. *Id.*

14. 5 U.S.C. § 554(d) (1988). Some of the terms used in the text at this point, such as investigative, advocatory, and judging, will be explored in greater detail *infra* at text accompanying notes 87-90. The combination of functions ban does not apply to agency rulemaking. In the case of adjudications, there are certain exceptions to the prohibition. The separation of functions requirement does not apply to the agency members themselves, but just to staff. *Id.* § 554(d)(C). Also, the requirement does not apply to ratemaking and licensing proceedings. *Id.* § 554(d)(A)-(B).

15. 5 U.S.C. §§ 554(d), 557(d)(1) (1988). In formal adjudications, the same exceptions for agency members, ratemaking, and licensing apply to the ex parte prohibitions as to the combination of functions provisions.

The concept underlying the separation of functions and ex parte provisions is that one who has been closely involved in putting a case together, and who may have developed an adversarial posture toward an affected party, is not likely to possess sufficient psychological detachment to perform a judging function or provide unchallenged input into the exercise of that function.

16. *See, e.g.*, Center for Auto Safety v. FTC, 586 F. Supp. 1245 (D.D.C. 1984) (abuse-of-discretion standard used to review refusal by FTC chairman James Miller to recuse himself because of possible economic conflict of interest; finding of no such abuse under particular circumstances, although court opined that recusal would have been better practice).

grounds that a decision maker had overstepped his or her legal authority. Thus, when an administrative law judge (ALJ) for the National Labor Relations Board (NLRB) acted *sua sponte* in extracting two issues from the record that had not been raised by either the NLRB General Counsel or the respondent, and then took on something of a prosecutorial role in dealing with the issues, a court of appeals refused to enforce that part of the agency order relating to those two issues on the ground that the ALJ had "overstepped the permissible scope of his duties."[17]

Other nonconstitutional sources are too numerous to detail exhaustively. A few examples, however, should provide an idea of their diversity. The Federal Arbitration Act, which covers commercial (nonlabor) arbitration of disputes arising from transactions that affect interstate or foreign commerce,[18] includes a provision for disqualification of an arbitrator for lack of impartiality.[19] This provision has been strictly applied by the United States Supreme Court: an undisclosed fact creating even an appearance of significant bias may be grounds for vacating an arbitration award.[20]

The Landrum-Griffin Act, which is concerned primarily with intraorganizational governance of labor unions, requires a "full and fair hearing" before a union may discipline a member.[21] The courts have incorporated an impartial tribunal condition into the statutory hearing requirement.[22] Other statutes mandating hearings prior to government action have also been interpreted as including a prohibition against decision-maker bias. For example, in *Morgan v. United States* (*Morgan I*), the Supreme Court interpreted the "full hearing" requirement for rate setting under the Packers and Stockyards Act as prohibiting the Secretary of Agriculture from deciding without having reviewed the evidence.[23] A decision maker's failure to consider evidence suggests that the issue has been prejudged. Similarly, civil service statutes that require a hearing before the termination of a non-probationary government employee have been interpreted as mandating the fundamental elements of fairness, including an impartial tribunal.[24]

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17. NLRB v. Tamper, Inc., 522 F.2d 781, 790 (4th Cir. 1975).

18. 9 U.S.C. § 1 (1988). The act also applies to arbitration of disputes arising from maritime transactions. *Id.*

19. 9 U.S.C. § 10 (1988).

20. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 147-50 (1968).

21. 29 U.S.C. § 411(a)(5) (1988).

22. *See, e.g.*, Goodman v. Laborers' Int'l Union, 742 F.2d 780 (3d Cir. 1984).

23. 298 U.S. 468, 480-81 (1936), *overruled by* United States v. Morgan, 313 U.S. 409 (1991).

24. *See, e.g.*, Ryder v. United States, 585 F.2d 482 (Ct. Cl. 1978); Camero v. United States, 375 F.2d 777 (Ct. Cl. 1967) (in both cases, courts held that a requirement in Army regulations of an adversarial hearing implies a prohibition against ex parte communications).

Common-law fairness requirements also are used occasionally as a check on decision-maker bias. As a result of the Supreme Court's *Vermont Yankee* decision in 1978,[25] federal courts no longer have the authority to prescribe procedures for federal agencies beyond those required by statute or constitutional due process. At the state level, however, there is a common-law duty of disqualification on the part of a demonstrably biased administrative decision maker.[26] Today, this duty usually does not play an important role in promoting process values because administrative agencies in most states are subject to statutory procedural requirements that include disqualification-for-bias standards,[27] and due process protection is, therefore, available for egregious instances of bias.

A much more frequently employed common-law duty of procedural fairness is applicable to certain private associations when they make decisions to admit, discipline, or expel members, or when they deny access to some important facility.[28] This requirement normally exists when a private association plays a special role that affects the public interest or exercises substantial power over important interests of individuals.[29] The common-law duty of private associations to employ fair procedures includes the requirement of an impartial decision maker.[30] If the association's constitution or bylaws provides for certain procedures prior to the discipline or expulsion of a member, the association has a contractual obligation to follow those procedures.[31] A provision in the constitution or bylaws calling for a hearing will be judicially interpreted as requiring an unbiased tribunal.[32] Where a

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25. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

26. *See, e.g.*, Kachian v. Optometry Examining Bd., 170 N.W.2d 743 (Wis. 1969).

27. *See* MODEL STATE ADM. PROC. ACT (1981); Arthur Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297 (1986).

28. *See, e.g.*, Rutledge v. Gulian, 459 A.2d 680 (N.J. 1983); Gaston Bd. of Realtors, Inc. v. Harrison, 306 S.E.2d 809 (N.C. App. 1983), *rev'd and remanded on other grounds*, 316 S.E.2d 59 (N.C. 1984).

29. *See, e.g.*, California Dental Ass'n v. American Dental Ass'n, 590 P.2d 401 (Cal. 1979) (association with special role that affects public interest); Ezekial v. Winkley, 572 P.2d 32 (Cal. 1977) (association with power over important economic interests of individuals).

30. *See, e.g.*, Erving v. Virginia Squires Basketball Club, 349 F. Supp. 716 (E.D.N.Y.), *aff'd*, 468 F.2d 1064 (2d Cir. 1972); Hackenthal v. California Med. Ass'n, 187 Cal. Rptr. 811 (1982); Applebaum v. Board of Directors, 163 Cal. Rptr. 831 (1980); Van Daele v. Vinci, 282 N.E.2d 728 (Ill.), *cert. denied sub nom.* Certified Groceries of Illinois, Inc. v. Sparkle Food Center, Inc., 409 U.S. 1007 (1972); Rabinowitz v. Olewski, 473 N.Y.S.2d 232 (1984).

31. *See, e.g.*, Eidelson v. Archer, 645 P.2d 171 (Alaska 1982); Peterson v. Tucson Gen. Hosp., Inc., 559 P.2d 186 (Ariz. App. 1976); Bullard v. Austin Real Estate Bd., Inc., 376 S.W.2d 870 (Tex. Ct. App. 1964).

32. *See* cases cited *supra* note 31.

private association's action does not violate its constitution or bylaws, courts draw upon the concept of "natural justice" or adopt a "good faith" requirement to hold the association to a standard of fair procedure, including an impartial decision maker.[33]

The exhaustion of remedies doctrine provides a final example of the nonconstitutional legal significance of decision-maker bias. In broad terms, this doctrine provides that a party disputing an action of a federal or state administrative agency must exhaust all available remedial procedures within the agency prior to seeking judicial recourse.[34] The doctrine is, however, subject to several rather ill-defined exceptions.[35] One such exception exists when the complainant demonstrates that the available administrative remedies are inadequate, or, stated differently, that further pursuit of those remedies would be clearly futile.[36] It is possible for the "inadequacy" or "futility" exception to be based on evidence that the administrative decision maker is biased.[37] A speculative assertion of bias is insufficient to move a court to dispense with the exhaustion requirement;[38] there must be clear evidence of

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33. *See, e.g.*, Normali v. Cleveland Ass'n of Life Underwriters, 315 N.E.2d 482 (Ohio Ct. App. 1974); Milkie v. Academy of Medicine, 246 N.E.2d 598 (Ohio Ct. App. 1969).

34. *See, e.g.*, Heckler v. Ringer, 466 U.S. 602 (1984) (federal administrative agency); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) (federal administrative agency); Miss America Org. v. Mattel, Inc., 945 F.2d 536 (2d Cir. 1991) (federal administrative agency); Frutiger v. Hamilton Cent. School Dist., 928 F.2d 68 (2d Cir. 1991) (state administrative agency); Health Equity Resources Urbana, Inc. v. Sullivan, 927 F.2d 963 (7th Cir. 1991) (federal administrative agency); White Mountain Apache Tribe v. Hodel, 840 F.2d 675 (9th Cir. 1988) (federal administrative agency); Island Bay Utils., Inc. v. Alabama Dep't of Envtl. Mgmt., 587 So. 2d 1210 (Ala. Civ. App. 1991) (state administrative agency); Wright v. Woodard, 518 P.2d 718 (Wash. 1974) (state administrative agency).

35. For expositions on the nebulous character of the exhaustion of remedies doctrine and its exceptions, see WALTER GELLHORN ET AL., ADMINISTRATIVE LAW: CASES & COMMENTS 1082-97 (8th ed. 1987); LEONARD R. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424 (1965); PIERCE, *supra* note 7, at 174-79, 188-90; Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV 1 (1985); Robert C. Power, *Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV 547 (1987).

36. *See, e.g.*, Bowen v. City of New York, 476 U.S. 467 (1986); Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir.), *cert. denied*, 112 S. Ct. 192 (1991); Deltona Corp. v. Alexander, 682 F.2d 888 (11th Cir. 1982); Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496 (9th Cir. 1980); Von Hoffburg v. Alexander, 615 F.2d 633 (5th Cir. 1980); Orion Corp. v. State of Washington, 693 P.2d 1369 (Wash. 1985), *opinion after remand*, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988).

37. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973); White Mountain Apache Tribe v. Hodel, 840 F.2d 675 (9th Cir. 1988); Kelly v. Board of Educ., 159 F. Supp. 272 (M.D. Tenn. 1958); Mordhorst v. Egert, 223 N.W.2d 501 (S.D. 1975).

38. *See, e.g.*, White Mountain Apache Tribe v. Hodel, 840 F.2d 675 (9th Cir. 1988); United States v. Litton Indus., Inc., 462 F.2d 14 (9th Cir. 1972); SEC v. R.A.

prejudgment or other actual bias.[39] The exhaustion of remedies doctrine also has been applied to complaints about the action of private associations,[40] and, similarly, the inadequacy/futility exception for demonstrably biased tribunals likewise has been applied to these associations.[41]

One legal doctrine occasionally invoked by federal and state courts that seemingly runs against the grain of concern for decision-maker impartiality is the so-called "rule of necessity." Whether constitutional or nonconstitutional grounds are asserted as a basis for complaint, a court following this doctrine may refuse to disqualify the biased decision maker or vacate the tainted decision if such action would leave no entity with the legal authority to decide.[42] Although a study of the rule of necessity is beyond the scope of this article, the doctrine appears to stand on a flimsy foundation. It represents a degree of judicial deference to the political branches clearly exceeding reasonable separation-of-power demands. At least in the constitutional realm, taking the doctrine to its logical conclusion could produce a positivistic version of due process similar to that of the now-discredited plurality opinion in *Arnett v. Kennedy*.[43] Under this view, if a substantive right is accompanied by specific procedures for its vindication, these procedures place inherent limits on the scope of the substantive right and the Due Process

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Holman & Co., 323 F.2d 284 (D.C. Cir.), *cert. denied*, 375 U.S. 943 (1963).

39. *See, e.g.*, Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962); Kelly v. Board of Educ., 159 F. Supp. 272 (M.D. Tenn. 1958); Mordhorst v. Egert, 223 N.W.2d 501 (S.D. 1975). Even if there is a claim of specific, personal bias, a court often will not recognize an exception to the exhaustion requirement when the claim is relatively unsubstantiated factually, with additional fact-finding being necessary to illuminate the claim. *See* First Jersey Securities, Inc. v. Bergen, 605 F.2d 690 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

40. *See, e.g.*, Martin v. Local 480, International Bhd. of Teamsters, 946 F.2d 457 (6th Cir. 1991); Westlake Community Hosp. v. Superior Court of Los Angeles County, 551 P.2d 410 (Cal. 1976).

41. *See, e.g.*, Eidelson v. Archer, 645 P.2d 171 (Alaska 1982). In certain circumstances, clear evidence of decision-maker bias or prejudgment has the potential for excusing compliance with the exhaustion requirement in yet another way. The Supreme Court has held that the exhaustion of remedies doctrine does not apply to a claim under 42 U.S.C. § 1983 (1988), which creates a cause of action in federal court for deprivation of a federal constitutional right under color of state law. Gibson v. Berryhill, 411 U.S. 564 (1973); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Educ., 373 U.S. 668 (1963). Thus, a section 1983 federal court plaintiff alleging that a state or local government official violated the decision-maker impartiality component of due process would not be required to exhaust state administrative remedies prior to filing suit.

42. *See, e.g.*, FTC v. Cement Inst., 333 U.S. 683 (1948); Board of Medical Examiners v. Steward, 102 A.2d 248 (Md. 1953).

43. 416 U.S. 134 (1974). The plurality view in *Arnett* was explicitly repudiated in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540 (1985).

Clause can require no additional procedural safeguards. Such an interpretation, of course, could produce an empty procedural due process guarantee, except, perhaps, in cases of longstanding common-law substantive rights.[44]

II. PROCESS VALUES

A. *Instrumental Values*

To restate an earlier proposition, instrumental values are those associated with the substantive quality of the decision that emerges from the process. When viewed from a purely instrumental perspective, procedure is merely a means to an end. Good procedure is important because it produces better decisions. Although the following instrumental values are sufficiently distinctive to be discussed separately, it will become obvious that there is correlation among them. Moreover, despite the existence of sufficient singularity to justify discrete treatment, one can even find interrelationships among certain instrumental and noninstrumental concepts.

1. Accuracy

Procedures should promote accurate decisions.[45] To appreciate the concept of decision accuracy, one must understand the nature of decisions and the tasks that go into their making. Decisions affecting rights and obligations may be characterized as "norm-creating" or "norm-applying" exercises. The first kind of decision deals with the formulation of policies, principles, or rules. A "policy" identifies a norm in a general way, perhaps no more concretely than to formulate a broad objective. It serves as a guide for the creation of principles and rules. A legislature, administrative agency, or court may determine, for example, to follow a general policy of promoting competitive markets. A "principle" is a somewhat more precise articulation of a standard with the aim of achieving the underlying policy's objective. A legal decision maker may, for instance, adopt a principle that monopolies and conspiracies in

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44. *See, e.g.*, TRIBE, *supra* note 10, at 706-14.

45. In due process cases, the federal courts generally have given primacy to decision accuracy as a goal of good procedure. The analytical model used in due process cases since Mathews v. Eldridge, 424 U.S. 319 (1976), has as its core the risk of an "erroneous deprivation" of life, liberty, or property. As of early 1993, the erroneous deprivation model had been used in 972 federal court cases reported in Lexis, 36 of them in the Supreme Court. *See also* Todd D. Rakoff, Brock v. Roadway Express, Inc. *and the New Law of Regulatory Due Process*, 1987 S. CT. REV. 157, 163 (Supreme Court's rationale for imposing due process rights on regulatory decision affecting property or liberty rights of a corporation was concern for decisional accuracy).

restraint of trade are contrary to the policy favoring competitive markets. A "rule" specifies particular conduct that violates a principle and carries particular legal consequences. The decision maker might specify as a rule that an explicit agreement or an implicit understanding between two or more competitors to divide a market into geographic components and refrain from doing business in each other's territory is illegal and subject to particular penalties. A particular norm-creating decision may accomplish the formulation of only one type of norm—policy, principle, or rule—or it may generate two or more categories of norm at the same time.[46]

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46. The model of norm-creative decision making used here: "norms (standards) = policy _> principle _> rule" —admittedly is almost purely deductive. A deductive model seems most appropriate for the purpose of analyzing the concept of normative decision accuracy. There are both similarities and differences between my usage of terms like "policy," "principle," and "rule" and the usages of other writers. Whenever there are differences, they usually result from the fact that most jurisprudential writing about legal reasoning and decision making focuses either exclusively or primarily on the *application* level—applying norms to decide specific disputes.

Roscoe Pound identified as the "oldest and longest continued use of the term 'law'" one that consists of "precepts, technique, and ideals." 2 ROSCOE POUND, JURISPRUDENCE 105, 107 (1959). He then divided precepts, or legal norms, into (1) rules, (2) principles, (3) precepts defining conceptions, and (4) precepts establishing standards. *Id.* at 124. His idea of rules is parallel to mine, and his concept of principles is roughly equivalent. *Id.* at 124-26. By "precepts defining conceptions" he means organizational principles for coherently grouping sets of rules. *Id.* at 127. His "precepts establishing standards" refers to norms, some of which seem to fall within my conception of policy and some within my conception of principle, prescribing general behavioral standards. *Id.* at 127-28.

Jerome Frank argued that, for application purposes, the "law" (i.e., standards or norms) consists of *decisions*. He recognized principles and rules as components of these decisions, but emphasized that discretion also serves as an important component. JEROME FRANK, LAW AND THE MODERN MIND 118-59 (1930). This is obviously true, but a legal decision maker's proper exercise of discretion should fall within the boundaries of recognizable policy. Frank's conception of a decision also makes room for emotion and even psychological foibles. *Id.* To the extent that emotion and psychological shortcomings cannot be expurgated from legal decisions—and their presence surely is not a rarity—they would seem to have no place in an idealized model of rational decision making.

In criticizing the conception of legal reasoning as a purely rule-based activity, Ronald Dworkin argues that legal problem solvers and decision makers at the norm-application level reason with both rules and non-rule standards that he refers to as principles. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22-26 (1977). Dworkin's use of the terms rules and principles is, however, quite different than mine. His concept of rules includes, at the very least, the ideas included in my usage of both rules and principles. *Id.* at 24-25. Moreover, quite a few of the norms that I would include within the term policy would also be encompassed by Dworkin's use of the term rules. *Id.* To summarize, his notion of rules includes all of what I have included within the terms rules and principles, and a substantial portion (but not all) of what I have identified as policy. In Dworkin's attack on legal positivism, he

A norm-applying decision determines whether certain conduct meets or violates a norm. If meeting or violating a standard is to have meaningful consequences, the standard must be relatively concrete. Therefore, most norm-applying decisions measure conduct against specific rules rather than against policies or principles.

Regardless of whether a decision is norm-creating or norm-applying, it includes two components, one positive (or empirical) and the other normative. The positive aspect of the decision consists of fact-finding, that is, drawing inferences from evidence for the purpose of determining the reality of relevant events. The fact-finding associated with norm-creating decisions typically is broadly focused, without strict limits on issues, parties, or method of presentation. The fact-finding associated with norm-applying tasks is typically focused more narrowly, with stricter constraints on issues, parties, and methods of presentation. The normative component of a decision consists of actually prescribing or applying a norm.

Thus, accuracy as a goal of procedure refers to correctness in both the positive (fact-finding) and the normative (developing or applying norms) aspects of decision-making. Accuracy in fact-finding is achieved when the decision maker's inferences are as close as possible to actual events. Of course, a fact-finder in either a norm-creating or norm-applying exercise can never know with certainty whether he or she has fully captured the relevant reality. The best one can do is to devise and employ procedures which, within available resources, foster the identification of relevant issues, the gathering and effective presentation

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essentially conceives of principles as moral rights transcending any specific domain of legal knowledge. *Id.* at 22. His primary quarrel with legal positivism arises in "hard cases," where "no settled rule dictates a decision either way." *Id.* at 83. In "clear cases," the main difference between Dworkin's thinking and my model is that I have divided his concept of rules into subparts. *See also* Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

When attempting to identify what "law" is, William Read uses the terms rule and principle in the same sense as I do. WILLIAM READ, LEGAL THINKING 25-28 (1986). His universe of legal norms also includes what he refers to as "methods," which are essentially rules about how legal decisions should be made; he uses choice-of-law rules as an example. *Id.* at 27-28. Although he does not use the term policy, or acknowledge the concept as a type of legal norm, he does observe that evidence regarding the purpose of a rule or principle can contribute to a decision maker's understanding of that rule or principle. *Id.* at 53-55. My conception of policy would include the articulated or clearly discernible purpose of a principle or rule.

In arguing for the feasibility of a legal expert system, Richard Susskind promotes a deductive rule-based model of legal norm application for problems that Dworkin would characterize as clear cases. RICHARD SUSSKIND, EXPERT SYSTEMS IN LAW 149-203 (1987). His work is part of a group project—the Oxford Project—on artificial intelligence and law. Given his objective, Susskind expectedly does not deal with what I refer to as policy. His concept of rules seems to include both the principles and rules in my model. *Id.*

of evidence pertaining to these issues, the testing of evidence for indicia of reliability, and the application of sound logic to the drawing of inferences.

The concept of accuracy in the normative aspect of decision making consists of means-ends rationality, whether the decision is norm-creating or norm-applying. Accuracy in policy making occurs when ends have been clearly identified and a policy is articulated that seems best calculated to achieve those ends. Ends may be defined as particularly desired consequences. Thus, in the case of a policy in favor of competitive markets, the identified ends may be lower prices, better service, dynamic product innovation, and individual economic autonomy. Accuracy in principle formation occurs when a principle is established that seems best calculated to promote the underlying policy. Here, the policy is the end and the principle is a means. A principle that agreements in restraint of trade are contrary to the policy favoring competitive markets is based on general experience and particular evidence indicating that prohibiting such agreements is likely to further the procompetitive policy. In a similar vein, accuracy in rule making occurs when a rule is specified that seems best designed to implement the backing principle. The principle is the end and the rule is a means. Creation of a rule that makes a specific kind of geographic market division illegal is based on experience and evidence indicating that such conduct often restrains trade in an unreasonable way.

Accuracy, or means-ends rationality, in norm-applying decisions needs little additional comment. Here, the attaching of certain consequences to the factual inferences that have been drawn from evidence is the means. The consequences may be negative, such as liability, penalties, or denial of some right, or the consequences may be positive, such as compensation, receipt of some privilege, or vindication of some right or interest. The immediate end is consistent application of the rule to the type of conduct to which it was intended to apply.

As with factual accuracy, a decision maker can never know with certainty that a decision is normatively accurate. Again, the greatest degree of confidence is achieved by designing and consistently applying procedures that seem most likely to tend toward accurate results. Whether the decisional task is positive or normative, carefully conceived and applied procedure is the best proxy for substantive decision accuracy.

There simply are no other satisfactory standards for objectively measuring positive or normative accuracy. Rates of affirmance or reversal within a hierarchical decision system clearly do not serve the purpose.[47] There can be too many different reasons for reversal, and

47. In Mathews v. Eldridge, 424 U.S. 319, 346 (1976), a benchmark in the Supreme Court's heavy emphasis on instrumentalism, especially accuracy, in due

it is rarely an all-or-nothing proposition. Moreover, a high reversal rate could be used to support either an argument that the system produces inaccurate first-level decisions or an argument that close scrutiny is being applied at a subsequent level to insure accuracy. Reversal rates may be a commentary on a system's efficiency, but not on the factual or normative accuracy of its decisions. Apparently with reference to both positive and normative questions, Professor Mashaw has suggested consistency as a proxy for accuracy at the application level, at least in the context of mass-justice administrative decision making as occurs in Social Security disability cases.[48] Measuring consistency is also a formidable task. The circumstances of different cases, even in disputes that some might call routine, are seldom similar enough to permit comparison with much confidence. Extreme lack of consistency, where like cases are commonly treated differently, might be detectable in the mass-justice administrative contexts Professor Mashaw emphasized, but an ability only to identify extremes is quite unsatisfactory. Mashaw also noted attempts to use experimental replication techniques as a periodic check for consistency. The General Accounting Office, for example, selected a random sample of disability cases that had been adjudicated by one state agency and submitted the case files to counterpart agencies in ten other states and in the federal government.[49] The results suggested very low levels of consistency. Such techniques might prove useful as occasional tests of both positive and normative decision accuracy, but their utility would be very limited. These methods not only would be workable in only a few decision systems with a small number of relatively simple rules and large numbers of cases having similar characteristics, but they also would consume nontrivial adjudicative resources that would need to be diverted from deciding actual cases. While not eschewing the search for better measures of accuracy, using procedural system design as a proxy is inevitable.

All of the many forms of decision-maker bias interfere with the goal of positive and normative accuracy. For example, a decider who has a substantial ideological blind spot or otherwise has prematurely judged a question, or whose thinking is infected with an economic or emotional stake in a particular outcome, is unlikely to seek truly objective reality in fact-finding. Similarly, a biased decision maker cannot perform a normative task as accurately as one without such bias because he or she either (1) injects personal ends into the norm-creating or norm-applying

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process jurisprudence, the Court was troubled by high reversal rates in Social Security disability cases, but did not know quite what to make of the phenomenon.

48. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 43-44 (1976).

49. *Id.* at 44-45.

process or (2) forecloses a complete formulation of the means-ends relationship by deciding prematurely.

2. Efficacy

Procedures also should be designed and applied with a view toward decisional efficacy. Efficacy exists when the decision can be practically implemented as intended, without unduly sacrificing other process values. Procedures for a court's acquisition of personal jurisdiction over a party, for instance, are designed for several purposes. One, of course, is fairness. Thus, in a judicial system, it is usually thought to be fundamentally unfair to require a nonresident defendant to defend a lawsuit in a forum state with which the defendant has had no significant contact.[50] Efficacy, however, is also at issue. If jurisdiction is taken over a defendant in such circumstances, enforcement of any judgment ultimately rendered by the court is likely to be substantially more difficult and costly than in the case of a defendant with a presence in the forum state, and thus not as likely to be fully implemented.

Decision-maker bias interferes with the goal of efficacy in at least one important way. When an instance of bias is perceived by an affected party and it violates expectations about the process, this appearance of unfairness can have important practical consequences independent of substantive fairness. Experimental research in the procedural justice branch of social psychology reveals, unsurprisingly, that a party to a dispute has a substantially lower level of satisfaction with the experience when the procedures are perceived as unfair.[51] This effect is most pronounced when the party receives a substantively unfavorable decision, but exists even when the final decision was favorable.[52] A low level of satisfaction after an experience with some institution may negatively affect a person's perceptions of that institution's legitimacy.[53] It has been noted that as people's assessments of institutional legitimacy decrease, so too does their acceptance of institutional decisions.[54] It is logical to suppose that individuals who do not accept a decision as legitimate are less inclined to comply with it or to cooperate with its

50. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

51. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 70-72 (1988).

52. *Id.*

53. *See, e.g.*, Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427 (1977); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 52-54 (1984).

54. *See, e.g.*, JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 90-91 (1983) (finding a strong connection between procedural justice perceptions and level of satisfaction, and between satisfaction and acceptance of decisions in court-annexed arbitration).

implementation.[55] Thus, the difficulty, time, and cost of implementation are likely to increase and the effectiveness of decisional implementation to decrease. Research also has found that the expectation of an unbiased decision maker is an important component of most people's vision of procedural fairness.[56] Therefore, a decision rendered by a tribunal perceived as biased does not promote decisional efficacy.

3. Fairness

Justice should be one of the most important objectives of any procedural system that produces decisions affecting rights or obligations. In this article, fairness is treated as the equivalent of justice, and has both objective and subjective components. First, decisions should seek to achieve distributive justice, or fair outcomes. Fairness of outcomes can be viewed as an objective state of affairs by reference to criteria that have been identified through institutionally legitimate means.[57] The criteria, or benchmarks, used to assess the substantive fairness of decisions might include equality among parties based on prior contributions, per capita equality among affected parties, relative need, consistency with previous outcomes for this or other parties, or other established benchmarks.[58]

Distributive justice has a subjective aspect as well. In other words, it is not only important that outcomes be objectively fair but also that they be subjectively perceived as fair.[59] Sometimes the appearance of fairness can be as important as the reality.[60] As we have seen, perceptions of fairness and the degree to which those perceptions align with prior expectations affect levels of satisfaction with decisions and

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55. Although a correlation between lower acceptance of decisions and lower levels of compliance and cooperation with them seems intuitively compelling, the little empirical research that has been done on the question is somewhat inconclusive. *See* Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984) (providing some empirical evidence of correlation between reduced acceptance of decisions and reduced compliance with them, but evidence not strong).

56. E. Allan Lind & Robin I. Lissak, *Apparent Impropriety and Procedural Fairness Judgments*, 21 J. EXP. SOC. PSYCH. 19 (1985); Tyler, *supra* note 53, at 67-68.

57. *See* JOHN RAWLS, A THEORY OF JUSTICE §§ 2-3 (1971).

58. *See, e.g.*, LIND & TYLER, *supra* note 51, at 10-12; J. Stacy Adams, *Inequity in Social Exchange*, *in* 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 267-99 (Leonard Berkowitz, ed., 1965); J. Stacy Adams, *Toward an Understanding of Inequity*, 67 J. ABNORMAL & SOC. PSYCH. 422 (1963); Robin I. Lissak & Blair H. Sheppard, *Beyond Fairness: The Criterion Problem in Research on Dispute Intervention*, 13 J. APPLIED SOC. PSYCH. 45, 46 (1983).

59. *See* Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401, 1402-03 (1979).

60. In several due process cases, the Supreme Court has emphasized the importance of an appearance of fairness in addition to actual fairness. *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986).

decision-making institutions. Levels of satisfaction, in turn, may affect subsequent behavior.[61]

John Rawls also argues for the importance of "pure procedural justice" as a surrogate for distributive justice. When the substantive fairness of an outcome is extremely difficult to measure, which is not a rare occurrence, procedural fairness may be the best proxy for distributive justice that may be achieved.[62]

Prejudgment and several other manifestations of decision-maker bias make it extremely unlikely that the decision will achieve objective distributive justice. Objective distributive justice assesses the outcome for a particular party relative to outcomes for other parties according to some established benchmark. If the decision maker in a given case has become prematurely wedded to an opinion, or is affected significantly by some other biasing influence, the decision has a very good chance of straying from the relevant benchmark.

Prejudgment or other bias has an even more self-evident negative effect on subjective distributive justice if the bias is detected by an affected party. Regardless of the actual effect on distributive justice, the presence of a tribunal that is perceived as not completely open minded will necessarily diminish an affected party's feelings of fair treatment.

In those situations in which Rawls's concept of pure procedural justice comes into play because of the absence of any external benchmarks for measuring objective distributive justice, a procedure employing a jaundiced decision maker is a very poor proxy for a fair outcome.

4. Efficiency

Efficiency in reaching a decision should also be viewed as an instrumental process value.[63] Efficiency refers to the achievement of an

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61. In addition to the likelihood that perceptions of unfair treatment may have a negative effect on compliance and cooperation with decisions, such perceptions of unfair treatment have been shown to produce other negative responses, including anger, frustration, and reduced future efforts in similar situations. *See* Melvin M. Mark, *Expectations, Procedural Justice, and Alternative Reactions to Being Deprived of a Desired Outcome*, 21 J. EXP. SOC. PSYCH. 114 (1985).

62. *See* RAWLS, *supra* note 57, § 14, at 83-90.

63. The cost of additional procedural protections is an explicit part of the model for assessing the adequacy of procedures under the Due Process Clause. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976). The argument that efficiency is an important instrumental process value is not an argument that it should receive primacy over other values. Although it is self-evident that society can afford only so much procedural protection for persons affected by the decisions of government or other powerful institutions, there is general acceptance of the proposition that the fundamental attributes of fairness are of a higher order than efficiency. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 580 (1975); Fuentes v. Shevin, 407 U.S. 67, 90-91 n.22 (1972).

accurate, efficacious, and fair decision, as well as one that promotes noninstrumental values, with the least possible expenditure of time, money, and other resources. Efficiency is an aspect of substantive decision quality for at least two reasons. First, inefficiency in reaching a decision often will impose unnecessary costs on the persons to whom the decision directly applies, thus reducing the value of a positive outcome or increasing the loss associated with a negative outcome. These costs may be direct financial ones or they may take the form of opportunity costs caused by delay and productive energy diversion. Second, decisional inefficiency in one case may unnecessarily reduce the total resources available for pursuing objectives in a class of cases of which the present one is a part. One example of this effect may be observed when decisional inefficiency in a government program reduces the resources available to achieve the program's main objectives.[64] While the first rationale for treating efficiency as an instrumental goal is straightforward, the second is somewhat less so. It requires an expansion of the instrumentality concept so as to take into account the substantive quality not only of the particular decision under scrutiny, but also of that entire class of decisions.

The goal of efficiency no doubt may conflict with other goals in some situations. Up to a point of diminishing returns, there is often a positive correlation between resource expenditure and the achievement of other instrumental and noninstrumental values. Producing high-quality decisions may not come cheaply. The task in cases of conflict is one of optimizing decision quality through careful trade-offs. The nature of the appropriate trade-offs, however, will vary with the interests at stake. Different trade-offs may be necessary, for example, when the public interest is prison security or toxic waste disposal than when it is automobile parking control. Likewise, trade-offs may be different when an individual's long-term incarceration is at stake rather than the payment of a minor traffic ticket.

It bears mentioning that claimed conflicts between efficiency and other process values should be examined carefully before trade-offs are considered. The designer of a dispute resolution or other decision procedure may assert, for example, that efficiency demands the use of a decision maker who has been closely involved with the particular issues or with the conditions leading to the dispute. A decision maker with such involvement, the argument might go, has the expertise and background to make a high-quality decision without having to undergo an expensive and time-consuming educational process. Although use of a decider with substantial relevant knowledge sometimes may optimize decision quality, there can be many unseen costs if the degree of

64. *See generally* JERRY L. MASHAW, BUREAUCRATIC JUSTICE (1983).

involvement and familiarity is so great as to create a serious risk of prejudgment. When affected parties perceive a significant risk of bias, they are likely to demand other procedural safeguards. Additional safeguards, such as an opportunity for de novo or other thorough review of the initial decision, may be quite expensive and time-consuming themselves.[65] Moreover, a skewing of the balance between decision-maker expertise and impartiality may lead to other costs from diminished decisional efficacy. As mentioned above, an affected party who perceives bias in the decision maker is less likely to accept and cooperate with the decision, thus increasing implementation costs.

B. *Noninstrumental Values*

Noninstrumental values are those inherent in the procedure itself, regardless of the procedure's effect on the substantive quality of the decision. These values are a bit more slippery than instrumental ones such as accuracy, efficacy, and efficiency, although perhaps no more so than the notion of fairness. Their amorphous nature also makes them less susceptible to consensus. There is, however, a substantial body of scholarly opinion that procedure does indeed have worth aside from its role in producing better decisions.[66]

1. Individual Dignity

The most commonly identified noninstrumental value of procedure is the elevation of individual dignity.[67] This dignitary value derives from the moral injunction that a person should be treated as an end rather than a means.[68] One aspect of the heuristic function is the

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65. *See* Friendly, *supra* note 3.

66. *See, e.g.*, Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication–A Survey and Criticism*, 66 YALE L.J. 319, 347-48 (1957); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* 18 NOMOS: DUE PROCESS 126 (J. Rolland Pennock & John W. Chapman, eds. 1977); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 144-48 (1978). Even notable procedural reformers such as Pound, Clark, Shelton, and Field, who articulated views of procedure that were essentially instrumental, can be found to have recognized noninstrumental values. *See* Janice Toran, *'Tis a Gift to Be Simple: Aesthetics and Procedural Reform*, 89 MICH. L. REV. 352, 372-76 (1990).

67. *See, e.g.*, Edward A. Dauer & Thomas K. Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CAL. L. REV. 116, 148-49 (1973); Mashaw, *supra* note 66, at 887-88; Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1109-10 (1984); Saphire, *supra* note 66, at 117-25; Robert S. Summers, *Evaluating and Improving Legal Processes–A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 23 (1974).

68. This "end rather than means" expression of the individual's unique worth is, of course, from Kant. *See* FRIEDRICH PAULSEN, IMMANUEL KANT 340 (1910).

importation of knowledge about the institutions that affect people's lives. Procedures should be designed to make affected parties feel that they matter. Thus, a requirement that the tribunal base its decision only on relevant evidence and arguments that have been presented and incorporated into the record connotes that a party's viewpoints expressed in that record are important enough to be taken seriously. If that party perceives, however, that the decision maker has prejudged his or her case for whatever reason, he or she is not likely to emerge from the experience with the idea that his or her views counted for much.

2. Heuristic Goals

A particular procedural requirement also can serve heuristic, or educational purposes.[69] One aspect of the heuristic function is the importation of knowledge about the institutions that affect people's lives. For example, a party who exercises a right to appear and personally participate in the process learns more about the decision-making institution. People are more likely to demand positive change in institutions as they become more informed about them.[70] A second aspect of the heuristic function is norm communication. Procedure should facilitate communication to affected parties of the norms on which the decision was based. Such communication promotes future modification of behavior so as to conform more closely with society's legitimate expectations. If detected by an affected party, decision-maker bias does not necessarily undermine the first aspect of the heuristic goal, because the party correctly learns that something is wrong with the system. Whether detected or not, however, decision-maker bias surely interferes with the second aspect because the communicated norm is less likely to be an accurate one.

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69. Redish & Marshall, *supra* note 2, at 489 (using the term "revelation"). One commentator, Professor Rubin, referred to the heuristic function of procedure as an instrumental value rather than a noninstrumental one. *See* Rubin, *supra* note 67, at 1109. The characterization was made only in passing, however, and the author was not really attempting an analysis of process values. Characterizing the educational function of procedure as instrumental would require an extremely broad conception of instrumentality so as to encompass interests well beyond those of improving the substantive quality of the particular decision.

70. Some might consider it is more than a little depressing to read the findings of political science research, which suggest that people become less satisfied with legal institutions and processes as they acquire more knowledge about them. *See* Austin Sarat, *Support for the Legal System: An Analysis of Knowledge, Attitudes, and Behavior*, 3 AM. POL. Q. 3 (1975). All institutions have failings, however, and the revelation of failings is often the first step toward remediation.

3. Institutional Legitimacy

Procedures also should contribute to the perception that the institution making the decision is legitimate. Institutions must be seen as legitimate by the public in order to avoid the social instability and its many associated costs that would likely result otherwise.[71] In the case of government institutions, the chief source of political legitimacy is consent.[72] When consent is either totally absent or very indirect, as with federal judges, administrative officers, and other appointed decision makers, legitimacy demands substitutes for consent. Many procedural elements found in judicial and administrative adjudication perform a surrogate legitimation function. Procedures that require published rules, party participation, reasoned decisions, and communicated rationales have the intended and actual effect of enhancing public perceptions of legitimacy.[73] As noted in the discussion of instrumental efficacy, prejudgment or other forms of bias clearly undermine institutional legitimacy when perceived by an affected party.

One might suggest other process values of an instrumental, noninstrumental, or hybrid nature. Although the present discussion does not claim to exhaust the possibilities, other values that come to mind seem to be largely subsumed by those already mentioned. Thus, one could argue for consistency as an important goal of decision systems. In other words, procedures should be designed so that like cases are treated alike.[74] Consistency, however, would seem to flow naturally from factual and normative accuracy. Predictability also might be suggested as a recognizable process value.[75] To the extent that predictability is any different from consistency—and it may be no different at all—it, too, appears to follow from accuracy.

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71. *See, e.g.*, ALEXANDER BICKEL, THE MORALITY OF CONSENT 100 (1975); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 20 (1962).

72. *See, e.g.*, MORALITY OF CONSENT, *supra* note 71, at 100; THE LEAST DANGEROUS BRANCH, *supra* note 71, at 20.

73. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366-67 (1978); Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

74. The concept of consistent rule application has been referred to as "integrity" or "coherence." *See* RONALD DWORKIN, LAW'S EMPIRE 176-224 (1986); Thomas M. Franck, *Legitimacy in the International System*, 82 AMER. J. INT'L L. 705 (1988).

75. *See* Redish & Marshall, *supra* note 2, at 485.

III. DECISION-MAKING FORMS AND FUNCTIONS

A. *Decision-Making Forms: The Adjudicative-Legislative Distinction*

The essence of an adjudicative action is the application of established rules to particularized facts for the purpose of making a decision affecting one or a very small number of parties. In other words, an adjudicative decision is one that attaches legal or other consequences to specific past conduct. It is primarily the norm-applying type of decision discussed earlier, although some norm creation also occurs in the adjudicative context. A legislative action, on the other hand, is almost purely of the norm-creating variety. Legislative decisions involve the development of policies, principles, or rules that typically are applied prospectively to a large number of parties. The definition of legislative action includes the formulation of policies, principles, and rules not only by elected representatives but also by any institutions with the power to do so.

These definitions describe prototypes at opposite ends of a continuum. Many decision processes, however, fall between these extremes. For example, a local school board may decide to terminate a group of teachers for illegally striking rather than impose some lesser penalty.[76] Although the decision at first appears to be strictly adjudicative, it is not necessarily so. Suppose, for example, that there are no adjudicative facts to be determined. Assume that the teachers admit striking, the strike was obviously in violation of state law, and the selection of a penalty does not depend on degrees of culpability or any other particularized facts. Assume, as well, that the board has not dealt with such a situation in recent times, and has not articulated a policy to guide its response. In selecting the penalty, the school board balances the likely reaction of parents and other interested members of the public, the probable difficulty of securing replacement teachers, the effect that its action will have on economic demands of other teachers in future years, and other factors. The board's action is not prototypically adjudicative, because its decision has an orientation that is primarily prospective and policy oriented. The decision is not a prototypically legislative one either, because it does indeed impose consequences on individuals for specific past conduct. Mixed decisions such as this are relatively common in local, state, and federal government administrative contexts, and are not unusual in judicial settings.[77]

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76. These facts are taken from Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976).

77. Although a traditional court proceeding will always possess more adjudicative than legislative characteristics, courts do make policies, principles, and rules. A court

1. Legal Significance of the Distinction

The adjudicative-legislative distinction may or may not have practical legal significance when procedures are questioned. The original, and still most important, effect of this difference is on the determination of whether a particular government action is subject to procedural due process guarantees. Although the distinction in due process jurisprudence is far from clear, and application difficulties abound, it may be stated as a general proposition that procedural due process applies to adjudicative government decisions and not to legislative ones.[78] Several rationales may be offered to support this distinction. In the case of decisions made by elected representatives, the democratic political process supplies the legitimacy that rational procedure provides in other contexts.[79] Even when a decision within the legislative class is made by an administrative agency or other nonelected body, the constitutional necessity for certain procedural safeguards is not thought to be as great as when an adjudicative decision is made. The prospective nature of legislative actions lessens the risk of individualized oppression. Likewise, the fact that a large number of parties is often affected by legislative actions increases the probability that publicity and its resulting protection will attend the decision-making process. Moreover, as the number of interested parties increases, so too does the feasibility of preventing or remedying oppressive decisions by bringing to bear collective economic and political power.[80]

The adjudicative-legislative distinction also plays an important role in the APA and its state counterparts. Informal notice-and-comment rulemaking is permitted under the APA unless the agency's enabling statute requires that rules be adopted only after a hearing on the record.[81] In the latter case, agency rulemaking must employ a procedur-

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performs such a function along with an adjudicative one, for example, when it makes a significant change in a common-law rule.

78. The origin of the distinction in the due process context is traceable to two early-twentieth century Supreme Court decisions. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Londoner v. Denver, 210 U.S. 373 (1908). For an extensive discussion of the adjudicative-legislative distinction in due process jurisprudence, see Rubin, *supra* note 67, at 1114-30.

79. *See generally* Fuller, *supra* note 73; Hyde, *supra* note 73.

80. These and other rationales for distinguishing adjudicative from legislative decisions in the due process and administrative law contexts are discussed at length by a number of courts and writers. *See, e.g.*, United States v. Florida East Coast Ry. Co., 410 U.S. 224, 244-46 (1973); PIERCE, *supra* note 7, at 229-36; Barry B. Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 114-137 (1972); Evelyn R. Sinaiko, *Due Process Rights of Participation in Administrative Rulemaking*, 63 CAL. L. REV. 886, 887-98 (1975).

81. 5 U.S.C. § 553(c) (1988).

al model practically identical to that required for formal agency adjudication.[82]

Professor Davis argues that when the question is whether formal adjudicative procedures are required in federal administrative law the adjudicative-legislative distinction should not focus on the overall character of the decision but on the character of individual issues within the decision-making process. In order to recognize the mixed nature of much administrative decision-making, he asserts that the proper distinction is between "adjudicative facts" and "legislative facts." Under this reasoning, the procedural attributes normally associated with formal adjudication should apply to the determination of facts "about the parties and their activities, businesses and properties," such as "who did what, where, when, how, why, [and] with what motive or intent."[83] Legislative facts, on the other hand, "do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."[84] This formula has gained widespread acceptance in the administrative law context.[85]

2. The Distinction's Relation to Process Values

Practical legal significance aside, process values are always important regardless of the form and objective of the decision process. Affected parties justifiably expect an impartial decision maker, regardless of the nature of the decision. It is true, however, that the weight of certain values may differ, depending on the nature of the decision, and that the appropriateness of particular procedural features may vary with the circumstances. For example, as the number of affected parties increases and the action acquires more of a legislative character, it becomes less feasible to accord the same level of individual notice and participation rights as may be provided in a more adjudicative-like process. Under such circumstances, efficiency takes on more weight in relation to other values. Not only does individualized notice and participation become less feasible and often prohibitively expensive as a decisional process takes on more of a legislative character, but the fairness rationale for these protections also diminishes when the impact of the decision is essentially prospective.

Another example of how the form and objective of a decisional process can affect the calculus of process values relates to expectations.

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82. *Id.* § 556, 557. Another way in which the APA attaches significance to the distinction is that the statute's prohibitions against combination of investigative or advocatory functions with adjudicatory ones applies only to adjudications and not to rulemaking. *Id.* § 554(d).

83. DAVIS, *supra* note 6, at 413.

84. *Id.*

85. *See* Rubin, *supra* note 67, at 1123-24.

As a general proposition, affected parties are likely to expect more rigid adherence to the notice, hearing, and impartial decision maker ideal in adjudicative contexts than in legislative ones. This variation in expectations is generated by both (a) the longstanding tradition of providing more procedural safeguards in adjudicative proceedings and (b) the patency of the distinction's effects on process values.

Although the weight of process values may diminish as a decisional process moves along the continuum from adjudicative to legislative, the change becomes even more pronounced in the case of an elected body of representative decision makers. The reasons are twofold: First, participation through voting confers an institutional legitimacy on the body and its decisions that would otherwise have to be promoted by procedural regularity and other safeguards. Second, the expectations of affected parties about their relationship with a popularly elected decision-making body are self-evidently different than in the case of other kinds of institutional deciders. The importance of such values does not diminish to quite the same degree, however, when an administrative agency or other nonelected body engages in legislative-type activity.[86]

B. *Decisional Functions*

In the earlier discussion of some of the nonconstitutional standards demanding decision-maker impartiality, the different functions performed in adjudicative decision procedures were briefly noted in connection with administrative law separation of function issues. That section briefly noted some of the different functions performed in adjudicative decision procedures. The idea merits further discussion because a decision maker's function sometimes can significantly affect both the concept of bias and the way in which a particular instance of bias undermines process values.

The concept of impartiality necessarily varies somewhat with the function of the decision maker. Within the broad category of adjudicative actions, for example, one cannot expect a criminal prosecutor, an administrative agency staff member with investigative and complaint-initiating duties, or other functionary whose job necessarily entails the advocacy of positions, to possess the same degree of open-minded suspension of judgment that one has a right to expect from a judge or other judicial-like decider. An affected party is clearly justified, however, in demanding that such decision makers possess no predispositions that are unrelated to the commitment their particular role demands.[87] The

86. *See* Sinaiko, *supra* note 80.

87. *See* Young v. United States *ex rel.* Vuitton, 481 U.S. 787 (1987) (judicial appointment of a special prosecutor with several forms of stake in the outcome violates due process). The Supreme Court has stated that due process standards of decision-maker impartiality are less rigorous in the case of advocatory officers than

following section examines the different decision making functions and their relationship to the problem of decision-maker bias.

1. Investigative Function

Within the context of adjudicative decision processes, several different decision functions typically are performed. Investigative functions are always present in one form or another and may vary from the very informal or even perfunctory to the formal and sometimes elaborate. Methods of investigation range from a simple conversation with a witness or interested party to a formal investigative hearing bearing many characteristics of a judicial proceeding. The common thread is information gathering.

Some may question the characterization of investigation as a *decision* function. Investigative functionaries do, however, make decisions that can significantly affect the ultimate product of the decisional procedure. Investigators commonly must make decisions about the type of information to be pursued, the allocation of resources among the various kinds and sources of targeted information, the vigor with which different aspects of the investigation should be pursued, and the packaging and presentation of information for use by other functionaries. Sometimes the investigative function may also include an element of interpretation. Thus, those performing investigative functions serve as an initial filter through which the raw material of the decision procedure must pass. Ideology, premature conclusions, and other biasing influences may affect this filtering exercise in subtle but very important ways.

2. Advocatory Function

I use the term advocatory to describe prosecutorial-type functions. Although the term prosecutorial is much more commonly used, I believe that it does not adequately capture the breadth of the concept, as it may limit some people's thinking to traditional criminal prosecution. In speaking of an advocatory function, I include not only the role performed by a criminal prosecutor but also other analogous roles. Thus, certain administrative agency personnel, as well as those in other organizations, develop theories, support them by evidence and arguments, and attempt to persuade someone performing a judging function. The decision to initiate a complaint or otherwise commence a proceeding, even without active advocacy, is an advocatory type of function. Similarly, a person or body making an assessment may be performing an advocatory function. For example, under the Multiemployer Pension

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judicial ones. Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980). In *Jerrico*, however, there were many other reasons for finding no due process violation. The decision maker's alleged monetary stake in the outcome—the basis for the challenge—was so indirect and insubstantial as to border on nonexistence.

Plan Act, the board of trustees of a multiemployer pension plan makes a unilateral assessment of liability for a withdrawing employer's share of unfunded vested benefits, which is subject only to limited review by an arbitrator, and ultimately to similarly limited review by a federal district court.[88] Some courts have characterized this assessment as more of a prosecutorial exercise than a judging one.[89] Similar functions may be found in many other contexts. The key to the advocatory function is the taking and presenting of a position contrary to that of some affected party. The more advocacy that occurs, and the more adversarial the positions, the stronger the advocatory character of the function.

Investigative and advocatory functions are often, but not always, combined in the same person or group of persons. The advocatory function, whether performed in conjunction with investigation or independently of it, constitutes decision making even more clearly than investigation. Advocatory personnel may make decisions about overall allocation of scarce resources among many potential targets; the commencement or continuation of a specific proceeding; the selection

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88. 29 U.S.C. §§ 1381-1401 (1988).

89. *See* Keith Fulton & Sons, Inc. v. New England Teamsters & Trucking Indus. Pension Fund, 762 F.2d 1137, 1140 (1st Cir. 1985), *rev'g en banc*, 762 F.2d 1124 (1st Cir. 1984); Board of Trustees of the W. Conf. of Teamsters Pension Trust Fund v. Thompson Bldg. Materials, Inc., 749 F.2d 1396, 1404 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); Republic Indus., Inc. v. Teamsters Joint Council No. 83, 718 F.2d 628, 640 n.13 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). Because of strong presumptions in favor of the trustees' assessment and the resulting limitations on scope of review, however, a good argument can be made that the trustees' decision resembles a judging function at least as much as it resembles an advocatory one. *See* United Retail & Wholesale Employees Teamsters Local Union No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128, 141 n.18 (3d Cir. 1986), *aff'd by an equally divided Court sub nom.* Pension Benefit Guar. Corp. v. Yahn & McDonnell, Inc., 481 U.S. 735 (1987); John R. Allison, *The Context, Properties, and Constitutionality of Nonconsensual Arbitration: A Study of Four Systems*, 1990 J. DISP. RESOL. 1, 39. The United States Supreme Court finally resolved the controversy in 1993, in Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264 (1993), by agreeing with the majority of circuit courts that the trustees' assessment was quasi-prosecutorial (advocatory) rather than adjudicative (judging), and that this fact taken in conjunction with a number of others caused any economic bias on the part of the trustees to fall short of a due process violation. *Id.* at 2278. Because the Court was concerned only with the question of whether the system violates constitutional due process, that is the only question it answered. *Id.* at 2292. There is no way of knowing, of course, whether the justices, had they been regulatory dispute resolution designers, would have viewed the system as achieving an optimal balancing of process values. The upholding of the system's validity under procedural due process standards does not alter my view, however, that the system's use of an economically self-interested decision maker at the first level represents suboptimal design from a process value perspective. As mentioned earlier, I agree that a suboptimal procedural design does not and should not necessarily violate a constitutional or other legal standard.

of legal theories, arguments, and items of evidence; the interpretation of information to be used in support of particular positions; and the strategies to be employed in presenting theories, arguments, and evidence. As with decisions made in the investigative context, those made in the performance of an advocatory function also can be slanted substantially by inadequately constrained ideological predispositions or other factors that tend to produce premature conclusions.

3. Judging Function

It is fairly common to find the term "adjudicative" used in more than one sense. The term may be employed broadly to contrast adjudicative and legislative forms of decision-making processes. Within this broad conception, the term often is employed more narrowly to describe that part of the adjudicative process normally associated with judicial decision makers, a function consisting of hearing evidence and arguments and deciding between opposing positions. To avoid confusion, however, this article uses the term adjudicative only in its broader sense, and employs the term judging to describe the judicial-like role, differentiating this type of function from the investigative and advocatory functions that also may fall within the general conception of adjudicative decision making.

The occurrence of any form of decision-maker bias in the judging function normally harms process values to a much greater extent than in any other function. Indeed, one initially confronting the subject of decision-maker bias is likely to think exclusively in terms of the judging role. There are several reasons for heightened sensitivity to bias in judging. First, the judging function owes its very existence to the need in an organized society for authoritative officials who can choose between competing positions or adjust conflictive relationships in a way that contributes to social stability and advancement. The many negative consequences of biased judging, such as diminished acceptance of decisions and impaired institutional legitimacy, impede, rather than further social stability and advancement. Second, even when review is available, the decision of a judicial-like, administrative law judge, administrative agency member, arbitrator, or other judicial-like officer in an adjudicative decision process has a much greater degree of finality than the decisions of investigators or advocates. Third, affected parties' expectations of impartiality normally are higher in the case of those performing judging functions. As this article has already discussed, expectations carry substantial independent weight in the assessment of process values.

4. A Note on Decisional Functions in the Legislative Context

Similar decision functions may also be found in legislative or hybrid adjudicative-legislative types of action. Although typically more broadly focused than in adjudicative actions, the investigative function is also an

integral part of fact-finding in legislative actions. In administrative agencies and other nonelected bodies, particularly at the federal level, the investigative function may often resemble evidence gathering in adjudicative processes. In legislatures, city councils, and other representative bodies, information accumulation is not only likely to be broadly focused but also will typically be more overtly political than in other situations.

Much the same can be said about advocatory functions in legislative decision making. Advocatory roles in legislative actions may take various forms, depending on where the process falls on the adjudicative-legislative continuum. Perhaps to state the obvious, the advocatory function in the legislative process more closely resembles its counterpart in an adjudicative action when the process possesses some adjudicative characteristics. For example, a federal agency rulemaking proceeding might be targeted at a very specific problem affecting a relatively small number of parties, such as worker exposure to a particular toxic substance in an economically concentrated industry. In such a hybrid proceeding, the advocatory function of agency staff (as well as the investigative function) will bear a strong likeness to that in pure adjudication. At the legislative extreme, however, such as congressional committee and floor consideration of a broadly focused civil rights bill, the advocatory function is obviously very different. The function, performed both overtly and covertly by various interested parties and groups, congressional staff, as well as the ultimate deciders themselves, generally changes along with the investigative function to a more broadly focused activity involving negotiation and raw exercises of political power in addition to reasoned persuasion.

The final decision function also varies along the adjudicative-legislative continuum. Indeed, the earlier discussion of the general distinction between adjudicative and legislative actions also provides an accurate description of the deciding function in legislative actions. In hybrid processes that possess both adjudicative and legislative characteristics, the deciding function sometimes is judicial-like and accurately could be labeled as judging. In fact, adversarial adjudication is one accepted (although probably not the best) method of rulemaking in administrative agencies.[90] As the form of the process moves farther from the adjudicative model toward the legislative, the deciding function typically becomes

90. 5 U.S.C. § 557 (1988). *See* PIERCE, *supra* note 7, at 256-57, 291-96. The use of formal rulemaking—rulemaking by means of trial-type adjudicative hearings—to adopt rules of general applicability has been harshly criticized. *See, e.g., id.* at 291-92; Boyer, *supra* note 80; Robert W. Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276 (1972); Robert W. Hamilton, *Rulemaking on a Record by the Food & Drug Administration*, 50 TEX. L. REV. 1132 (1972).

more diffuse and partisan, and use of the term "judging" for the function becomes less accurately descriptive. Instead of judging, a more generic term like "deciding" is most appropriate to describe such a process. Although process values never disappear entirely, they become less consequential with this progression.

IV. A PROCESS-VALUE ANALYSIS OF IDEOLOGY AND PREJUDGMENT

In formulating the following taxonomy of decision-maker ideology and premature judgment, no decision rule was employed that automatically excluded legislative decisions. During the development of the taxonomy, however, it became obvious that questions about these phenomena are seldom voiced in the case of pure legislative actions, especially those by elected officials. Thus, the analysis includes few examples of pure legislative actions. Legitimate questions about ideology or prejudgment arise most frequently when the decisional process is either purely adjudicative or at least very close to the adjudicative end of the spectrum. These questions also arise, albeit less commonly, in the case of the many hybrid adjudicative-legislative actions that fall closer to the middle of the adjudicative-legislative spectrum. Examples drawn from such cases are included where appropriate, along with a recognition of the effect that such hybridization may have.

A. *Decision-Maker Ideology*

When formulating a classification scheme for decision-maker ideology, it is impossible to arrange all categories in an orderly sequence based on the degree of likely harm to process values. Here, the analysis begins with the most inevitable and least harmful version: one's general world view. It then moves to a somewhat more concrete and probably more harmful form: a preformed conviction about relevant law or policy. Any attempt to lay out an orderly progression from least to most harmful then begins to break down, however. The next category, organizational empathy, may be more or less harmful than other forms of ideological conviction, depending on a wide variety of circumstances. This category does deserve separate analysis, however, because some of the techniques for diminishing or correcting the harm it can cause to process values may be different than for other forms of ideological conviction. The final category, lack of necessary qualifications, also does not fit neatly into any attempted sequencing of ideological mindsets. It actually represents the opposite of excessively concretized ideological commitments, and creates a special set of possible dangers to process-value optimization. Because of this conceptual relationship, it does belong in an analysis of decision-maker ideology, although one cannot find an obviously correct place for it.

When referring to the question of ideology in a study of decision-maker bias, one could alternatively use the term "intellectual bias."

One's general outlook and predispositions, and even one's lack of necessary knowledge and skills, can color a person's inferences and interpretations.[91] Of course, no experienced person with mature judgment is without ideological convictions. In large measure, then, some closed-mindedness resulting from ideological convictions is unavoidable. Such convictions can differ in both kind and degree, however, and there may be circumstances in which the strength of a preexisting credo is of such magnitude that, in fairness to affected parties, it should be disqualifying. Likewise, the absence of necessary qualifications may create decision-maker blind spots producing similar negative effects.

The notion of decision-maker ideology, as well as the many forms of prejudgment and other potential biasing influences, relates to the psychological theory of "belief perseverance." Substantial evidence from experimental psychology shows that, once most people form a fairly definite theory or belief about something, that belief tends to persevere in the face of contradictory evidence. After a firm belief is formed, the holder tends to discount later evidence that flies in the face of the belief.[92] This phenomenon is found even among the highly educated and, perhaps surprisingly, among those trained and experienced in forms of decision-making that call for suspension of judgment.[93]

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91. Justice Douglas once noted, with reference to federal district judges:

> "Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for the proffered defense, and the like. Lawyers recognize this when they talk about 'shopping' for a judge; Senators recognize this when they are asked to give their 'advice and consent' to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community."

Chandler v. Judicial Council, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting).

92. *See, e.g.*, NISBETT & ROSS, *supra* note 4, at 167-92; Thomas R. Carretta & Richard L. Moreland, *Nixon and Watergate: A Field Demonstration of Belief Perseverance*, 8 PERSONALITY & SOC. PSYCHOL. BULL. 446 (1982); Elissa Jelalian & Arthur G. Miller, *The Perseverance of Beliefs: Conceptual Perspectives and Research Developments*, J. SOC. & CLINICAL PSYCHOL. 25 (1984); James W. Lichtenberg, *Believing When the Facts Don't Fit*, 63 J. COUNSELING & DEVELOPMENT 10 (1984); Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979); Michael J. Mahoney, *Publication Prejudices: An Experimental Study of Confirmatory Bias in the Peer Review System*, 1 COGNITIVE THERAPY & RES. 161 (1977); Mary J. Smith, *Cognitive Schema Theory and the Perseverance and Attenuation of Unwarranted Empirical Beliefs*, 49 COMM. MONOGRAPHS 115 (1982).

93. *See* Clifford R. Mynatt et al., *Consequences of Confirmation and Disconfirmation in a Simulated Research Environment*, 30 Q. J. EXPERIMENTAL PSYCHOL. 395 (1978) (finding belief perseverance and confirmation bias in a simulated scientific research environment); Michael J. Mahoney, *Publication Prejudices: An Experimental Study of Confirmatory Bias in the Peer Review System*, 1 COGNITIVE THERAPY & RES. 161 (1977)

It is common knowledge that decision makers sometimes are chosen precisely because they hold strongly to certain beliefs.[94] Basing the selection of a decision maker on criteria that include particular ideological conviction is an exercise of political power both in the public realm and in private organizations. Ideologically based selection of decision makers will always be a reality, but those making the choices should at least be made aware of the potential costs to fairness and other process values if the chosen decision makers do not possess a judicious temperament and sense of balance along with their ideological biases. Although some might think it naive to believe that those with power to choose decision makers are unaware of some of the consequences of ideologically based selections, I am convinced that this occurs far more often than we realize. An individual, a group, and even the general electorate, probably understand the direct political consequences of the choice in most cases, but given the relatively short-term perspective of even the most able person, it is unlikely that careful consideration is given to the harm that may be done to fairness and other process values when the selected person makes future decisions. "Bounded rationality" as a constraint on human decision making is pervasive.[95] Thus, there is value in sensitizing people to the long-term effects of their actions on process values. For example, many people do care about fairness to others when relevant facts are brought to their attention.[96] Long-term harm to decisional accuracy, institutional legitimacy, and other process

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(finding belief perseverance among peer reviewers for scientific journals); Ian I. Mitroff, *Norms and Counter-Norms in a Select Group of the Apollo Moon Scientists: A Case Study of the Ambivalence of Scientists*, 39 AM. SOC. REV. 579 (1974) (scientists are often both intellectually and emotionally committed to particular theories and beliefs, and commonly seek confirmation rather than disconfirmation); Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 129, 145 (Daniel Kahneman, et al. eds., 1982) (trained scientists guilty of bias in favor of evidence confirming prior belief).

94. One need only consider recent experience with presidential appointments to the Supreme Court to find evidence of the tendency. *See, e.g.*, JOHN MASSARO, SUPREMELY POLITICAL: THE ROLE OF IDEOLOGY AND PRESIDENTIAL MANAGEMENT IN UNSUCCESSFUL SUPREME COURT NOMINATIONS (1990); David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900 (1990).

95. The term "bounded rationality," which originated with Herbert Simon, refers to inherent psychological constraints on the ability of individuals to resolve complex problems involving multiple factors, uncertainties, and projections into the future. *See* HERBERT A. SIMON, MODELS OF MAN 198-200 (1957). *See also* JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 140-41 (1958); James G. March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, 9 BELL J. ECON. 587, 589 (1978).

96. *See, e.g.*, Werner Buth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORGAN. 367 (1982); Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS. S-285 (1986); David M. Messick & Scott T. Allison, *Accepting Unfairness and Attributions*, 17 REPRESENT. RES. SOC. PSYCHOL. 39 (1987).

values is likely to matter to many people when they are made aware of these effects.

1. General World View

A person may hold a laissez faire attitude toward the political-economic relationship, believing that an unbridled marketplace is the best regulator of most of our affairs. He or she may instead believe that market failure is a common occurrence, that the market frequently falls far short of the ideal, and that government intervention is often warranted. He or she may, on the other hand, be convinced that the latter proposition is true but that the costs of regulation usually outweigh the benefits. A person may possess the conviction that law is a useful tool for social engineering or, conversely, that attempts to use law for such purposes typically intrude on individual privacy, freedom, and property rights to an unacceptable extent. One might hold to the view that majoritarianism is always the best political policy, or that law should be used for zealous protection of minority rights.

Obviously it is neither possible nor wise to seek decision makers without such beliefs. We want thinking people in positions of responsibility. The ultimate test, however, is whether a person's views on a given subject are held with such fervor as to prevent him or her from reserving judgment when a decision relates conceptually to that view.[97] Although to my knowledge there has been no situation in which a decision maker already in office has been disqualified because of general ideology, it is not uncommon for a candidate's overall world view to be given serious weight when his or her fitness is being considered.[98]

2. Conviction About Policy or Law

Somewhat further along the continuum of ideological predilection is a decision maker's conviction about a particular policy, principle, or rule directly applicable to a pending decision. Once again, decision makers who have a relevant base of knowledge and accomplishment always possess these kinds of biases. Moreover, the revelation of their existence

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> "Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."

United States v. Morgan (Morgan IV), 313 U.S. 409, 421 (1941).

98. Although one could argue that Robert Bork's nomination to the Supreme Court failed because many members of the Senate thought he had prejudged particular questions, it is much more likely that it was his general view of the world that led to his rejection. *See, e.g.*, Danelski, *supra* note 94.

is likely to be happenstance. Prior to his taking a place on the Supreme Court, Associate Justice (now Chief Justice) Rehnquist had given congressional testimony as an expert witness for his employer, the Department of Justice, on the constitutional and statutory authority of the executive branch to gather information. When he later sat on a case involving a question of such executive branch authority,[99] his openness of mind was questioned. Although the facts take the situation beyond pure internalized conviction to a possible prejudgment of specific legal principles, his discussion of ideological conviction is instructive. Declining to recuse himself from the case, he noted both the inevitability of such convictions and the often coincidental nature of the circumstances that bring them to light. He observed that "[p]roof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."[100]

Although the line between an inevitable and acceptable level of ideological conviction and an impermissibly closed mind is often indistinct and exceedingly difficult to describe abstractly, one may find examples that illuminate that line. For instance, when Federal Trade Commission Chairman Paul Rand Dixon made a speech while an FTC case was on remand to the hearing examiner,[101] his statements explaining his views on applicable antitrust law policy offended no realistic procedural sensibilities.[102] Certain statements by Dixon, however, went much farther, essentially suggesting particular adjudicative conclusions and consequently raising a serious issue of impermissible prejudgment.[103] Another illustration is provided by the South Dakota Supreme Court's recent review of a state-level regulator's conduct. A commissioner on the state's utility regulatory agency held a very strong ideological aversion to the deregulation of telephone companies. While

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99. Laird v. Tatum, 409 U.S. 824, 835 (1972).

100. *Id.*

101. The event antedated the title "administrative law judge" in federal administrative law.

102. *See* Texaco, Inc. v. Federal Trade Comm'n, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965). Professor Pierce argues that the lower federal courts generally have been guilty of overweighting "judicial" process values and underweighting "political" process values when scrutinizing the public expressions of regulatory agency officials. He asserts, however, that the Supreme Court usually has been properly deferential to political process values in reviewing regulators' words and actions. In other words, he believes that the Supreme Court has been more realistic in recognizing the political component of a regulator's job, and that many lower courts have unrealistically imposed their own judicial culture on agency officials. Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 488-95 (1990).

103. *See infra* text accompanying note 141.

clearly not an ideal mindset for one charged with making decisions pertaining to possible deregulation, by itself this belief would not normally violate any legal standard of impartiality. This is particularly true given the quasi-political nature of the position and the hybrid adjudicative-legislative character of the proceedings. Over time, however, the official permitted his ideological convictions to escalate into explicit prejudgment of policy and law, a likely prejudgment of certain adjudicative facts, and strong personal hostility toward the local Bell operating company and its personnel. This escalation required his disqualification.[104]

Because of the commonly held belief that specialized expertise is necessary for effective and efficient regulation, state-level professional regulatory bodies often consist of members from the profession to be regulated. Although skeptics may question whether such regulators are likely to be sufficiently critical of their professional colleagues,[105] concerns of an opposite character may arise. The regulators might, for example, come down very strongly on one side of a policy debate about the proper way to practice the profession, or even the appropriate business structure to be used by practitioners. When decisions are made that affect those on the other side of the issue, these beliefs can color judgment if insufficiently checked. For example, among other sources of bias, strong predispositions about how to properly practice the profession and business of optometry have plagued state-level optometric regulation for years. Regulatory bodies with authority over professional licensure and discipline often have been dominated by those strongly predisposed toward the self-employed "professional" form of practice in contradistinction to the "commercial" form that affiliates with a larger business enterprise.[106]

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104. Northwestern Bell Tel. Co., Inc. v. Stofferahn, 461 N.W.2d 129 (S.D. 1990). The more serious forms of bias that the commissioner ultimately manifested—explicit prejudgment of policy and law and perhaps even of some facts—are referred to at *infra* note 141. A process-value analysis of the personal animosity he also developed is beyond the scope of this article.

105. The attitude may sometimes be captured by the phrase, "There, but for the grace of God, go I."

106. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1 (1979); Gibson v. Berryhill, 411 U.S. 564 (1973); Wall v. American Optometric Ass'n, 379 F. Supp. 175 (N.D. Ga.), *aff'd sub nom.* Hardwick v. Wall, 419 U.S. 888 (1974); LeBow v. Optometry Examining Bd., 191 N.W.2d 47 (Wis. 1971); Kachian v. Optometry Examining Bd., 170 N.W.2d 743 (Wis. 1969). In none of these cases was this general bias toward methods of doing business and practicing optometry treated as a disqualifying bias. It was clear, however, that the view of the regulators that all optometrists should be self-employed, not employees of mercantile establishments, contributed substantially to the conduct that was complained about. Other potential biasing influences, mainly of an economic nature, were specifically challenged and sometimes were used as a basis for invalidating the challenged regulatory action; procedural due process was the most

In a different setting, a medical or mental health professional may have very strong views about whether institutionalization is appropriate for the treatment of a given class of disorders. Such a view may be the subject of intense professional disagreement, and when it is held by one having discretionary decision-making authority it has serious implications for very important individual interests.[107] Of similar effect would be a commitment to the policy of involuntary administration of anti-psychotic drugs to prisoners under certain conditions.[108]

Many other examples may be found, often lurking beneath the surface of other issues. Placing a member of the health care professions on a three-person medical malpractice arbitration panel can raise the issue of ideological bias.[109] Given today's climate of extremism on virtually all sides of the medical malpractice debate, the probability that a decision maker with this background would have very strong negative biases toward malpractice claims is quite significant. Although the panel's need for relevant expertise may more than offset this and other possible biasing influences, the problem must be anticipated and mitigated to the extent possible, such as by seeking ideological balance on the panel.[110]

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common legal ground.

107. *See* Parham v. J.R., 442 U.S. 584 (1979). Although there was no record evidence to support the claimed source of bias in this case, the Court admitted that it was a possibility. *Id.* at 616-17.

108. *See* Washington v. Harper, 494 U.S. 210 (1990). In this case, the medical decision maker's commitment to a particular school of thought was not one of the grounds used to challenge the action. The fact that there were such differences, based on questions about the drug's long-term effectiveness and its serious side effects, demonstrates the importance that such policy-type commitments can have. *See id.* at 248 n.16 (Stevens, Brennan, & Marshall, JJ., concurring in part and dissenting in part).

109. *See* Morris v. Metriyakool, 344 N.W.2d 736 (Mich. 1984). Again, the matter of ideological bias was overshadowed by the more visible possibility of economic conflict of interest, a discussion of which is beyond the scope of this article. Despite the greater visibility of a possible economic conflict of interest, feelings on this issue tend to run so high that ideology is likely to have more effect on the decision maker's judgment.

110. In *Morris, id.*, the governing legislation required that the panel also include an attorney and a person from neither the health care nor legal fields. *Id.* at 738. From the court's decision it cannot be determined whether the attorney member was more likely to come from a particular camp—plaintiffs' or defendants' bar—or was to be chosen randomly from a pool including lawyers of all persuasions. *Id.* at 739. The statute provided for creation of an advisory committee within the state insurance board, 50% of its members coming from health care, insurance, and law, and 50% not from those fields. *Id.* (citing M.C.L. § 500.304; M.S.A. § 24.13054). This advisory committee had responsibility for selecting the pool of candidates from which all arbitrators would be chosen, including attorneys.

A similar example is found in State *ex rel.* Strykowski v. Wilkie, in which a state statute required a medical malpractice claim to be submitted first to a five-member

Likewise, when a state law places a police officer and a person from the state attorney general's office on a three-member state panel that reviews driver license revocation decisions based on refusal to take a breath analysis test, it probably asks the impossible to expect these individuals to perform their judging function dispassionately. A law enforcement officer must continually perform a function requiring strong psychological commitment, aggressive pursuit of clearly defined goals, exposure to considerable physical risk, and a particular set of values, all of which are contrary to any claims the driver is likely to make. The same type of bias may be expected of a decision maker in a prosecutorial position. However, it probably exists to a lesser degree in a case like this one, where the prosecutorial official comes from the attorney general's office, rather than from a local prosecutor's office which regularly deals with the very type of crime charged.[111]

"compensation panel." 261 N.W.2d 434, 438 (Wis. 1978). The panel consisted of one attorney as chairman, two persons from the health care field, and two public members. *Id.* at 440. The panel's charge was to conduct a hearing and determine issues of negligence, causation, and damages. *Id.* at 438. The findings on negligence and causation were to be admissible as evidence in the event of subsequent litigation of the claim, and the finding on damages was to be admissible at the trial judge's discretion. *Id.* Again, the plaintiff's primary contention in the case related to a potential economic conflict of interest, but ideological convictions about the legal policy underlying malpractice claims undoubtedly would be at work, as well, in some cases perhaps to a greater extent than any economic interest. As in *Morris*, it could not be determined from the court's decision whether the attorney-chairman was more likely to be of a plaintiff's or defendants' persuasion.

111. *See* Crampton v. Department of State, 235 N.W.2d 352 (Mich. 1975). The statute provided that the panel would be composed of the state attorney general, secretary of state, and either the sheriff or chief of police in the county or city where the defendant resides, or the designated representative of any of these three officials. *Id.* at 353 n.3 (citing MICH. COMP. LAWS § 257-625f(2)). In this case, the panel consisted of a representative of the secretary of state and a city police officer, a quorum being two. *Id.* at 353. The Michigan Supreme Court found a violation of procedural due process, stating:

> We do not suggest that police officers and prosecutors are not fair-minded. But they are deeply and personally involved in the fight against law violators. As law enforcement officials they are identified and aligned with the state as the adversary of the citizen who is charged with violation of the law. Their function and frame of reference may be expected to make them 'partisan to maintain' their own authority and that of their fellow officers. The risk that they will be unable to step out of their roles as full-time law enforcement officials and into the role of unbiased decisionmaker in a law enforcement dispute between a citizen and a police officer presents a probability of unfairness too high to be constitutionally tolerable.

Id. at 357.

3. Organizational Empathy

One author, referring to administrative agencies, observed that "[m]ore subtle forms of bias can result from agency structure or from an agency's single-minded dedication to a narrowly defined 'mission.' For example . . . bodies that are essentially 'construction agencies,' such as the Army Corps of Engineers, may 'tend to favor structural alternatives' when confronted with a problem . . . ."[112] The author was describing, in small part, the concept of organizational culture and its effect on functionaries within the organization.[113]

In the present discussion, the term "organizational empathy" is used to describe beliefs and attitudes that a decision maker develops because of his or her position within an organization. Organizational empathy occurs when the individual internalizes an organization's culture to such an extent that he or she psychologically adopts substantial parts of its mission, customs, and ways of thinking. Organizations often make conscious efforts to "socialize" employees into their culture.[114] Despite the characterization of organizational empathy as a source of potentially undesirable decision-maker bias, it should be understood that the socialization of employees in an organization is both inevitable and necessary. Any organization unable to socialize employees into its culture in an adequate manner is likely to be dysfunctional.[115]

In this article, organizational empathy is defined as the organizationally induced version of a phenomenon which, if it were not the product of one's affiliation with an organization, would be a strong ideological

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112. Boyer, *supra* note 80, at 123.

113. *See* EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 6 (1985); Ralph H. Kilman, *Corporate Culture*, PSYCHOL. TODAY, April 1985, at 63; Edgar H. Schein, *Coming to a New Awareness of Organizational Culture*, 25 SLOAN MGMT. REV. 3 (1984).

114. Although the term I use, "organizational empathy," is not used in the organizational behavior literature, I believe that it best captures the idea of an individual within an organization making decisions affecting the rights and obligations of others, where those decisions may be influenced strongly by ideological convictions derived from the organization. It is closely related to the concept described in the organizational behavior literature as "organizational commitment." *See, e.g.*, Yoash Wiener, *Commitment in Organizations: A Normative View*, 7 ACAD. MGMT. REV. 418 (1982). In that literature, the internal process by which an individual comes to a point of organizational commitment has been called "organizational identification." *Id.* The term "socialization" is used in this article in the same sense as in organizational behavior, namely, to describe efforts by the organization to achieve identification and commitment. *See, e.g.*, Edgar H. Schein, *Organizational Socialization and the Profession of Management*, 9 SLOAN MGMT. REV. 1 (1968). In the field of organizational behavior, the concern is not with effects of decisions on the rights and obligations of others but on the optimal functioning of the organization itself.

115. Ralph H. Kilman, *Five Steps for Closing Culture Gaps*, *in* GAINING CONTROL OF THE CORPORATE CULTURE 351 (Ralph H. Kilman et al. eds., 1985).

conviction about policy or law. In the earlier example of the problematic inclusion of a law enforcement officer on a panel adjudicating the suspension of a driver's license, the biasing influence could be characterized as organizational empathy to the extent that the officer's convictions and attitudes derive from his or her association with the police department. An element of this kind of influence easily could have been present. To the extent that his or her beliefs and ways of thinking derived from sources independent of the organization, the condition is simply one of general world view or individual ideological conviction about policy or law. Although the mix of sources for ideological convictions on the part of a law enforcement officer certainly will vary with the circumstances, for reasons to be noted shortly it is reasonable to believe that many of his or her important beliefs and attitudes toward policy matters antedate his or her association with the organization.

The importance of a decision maker's organization as a source of his or her ideological convictions typically will be influenced by several factors. Organizations, especially those with a strong value orientation, often focus a great deal of attention on recruiting individuals who already have a set of strongly held ideological convictions that align with those of the organization.[116] In these situations, the preexisting beliefs of the organization's personnel may shape the organizational culture to a much greater degree than the collective culture of the organization shapes the beliefs of its people. Although appearing paradoxical at first glance, organizations with a greater value orientation may actually be characterized by less organizational empathy among decision-making personnel. Functionaries in the organization may exhibit strong and relatively uniform ideologies, but they are not primarily a product of the organization. In the earlier example of the law enforcement officer on a panel adjudicating a driver's license suspension, the primary source of decision-maker bias was probably individual rather than organizational, because police departments have a strong value orientation and place heavy emphasis on recruiting those who fit a particular mold.

Another factor that may affect the degree to which the organization is the source of a person's ideological convictions is the nature and extent of formal efforts to socialize him into the organization's culture.[117] These efforts vary widely from one organization to another, but often are taken very seriously. They often include rituals, symbols,

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116. Joseph Helfgot, *Professional Reform Organizations and the Symbolic Representation of the Poor*, 39 AM. SOC. REV. 475 (1974); Erwin O. Smigel, *The Impact of Recruitment on the Organization of the Large Law Firm*, 25 AM. SOC. REV. 56 (1960); James D. Thompson, *Organizational Management of Conflict*, 4 ADMIN. SCI. Q. 389 (1960).

117. *See* Schein, *Coming to a New Awareness*, *supra* note 113; Bruce Buchanan II, *Building Organizational Commitment: The Socialization of Managers in Work Organizations*, 19 ADMIN. SCI. Q. 533 (1974); John P. Wanous et al., *Organizational Socialization and Group Development: Toward an Integrative Perspective*, 9 ACAD. MGMT. REV. 670 (1984).

special kinds of work assignments and supervision, specific reward structures and various other forms of feedback, and other characteristics of the work environment designed to mold attitudes into alignment with the organizational culture.[118] Sometimes this molding process may begin with efforts to break down preexisting attitudes.[119]

The extent to which a person's ideological convictions are derived from the organization also is likely to correlate positively with the person's level of responsibility within the organization. On the average, the greater the individual responsibility the closer the person is likely to move toward alter ego status with the organization.[120] Similarly, the higher the overall level of reward the person receives from his association with the organization, the more likely it is that he will be fully socialized into the organizational culture because his stake in the organization's achievement of its mission is greater.[121] Such rewards include both extrinsic ones such as compensation and benefits, and intrinsic ones such as achievement opportunities, recognition, and self-esteem.[122] It is also logical to expect that length of tenure in the organization would be positively correlated with the degree to which the organizational culture is adopted, although other factors may provide an offset.[123]

The effects of organizational empathy that are relevant to the subject of decision-maker bias may be felt when an individual within an organization performs decision functions, particularly judging ones, that directly affect the rights or obligations of others. Organizational empathy can occur in administrative agencies at all levels of government, as well

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118. Buchanan, *supra* note 117, at 533; David E. Berlew & Douglas T. Hall, *The Socialization of Managers: Effects of Expectations on Performance*, 11 ADMIN. SCI. Q. 207 (1966); Jeffrey Kerr & John W. Slocum, Jr., *Managing Corporate Culture through Reward Systems*, 1 ACAD. MGMT. EXECUTIVE 99 (1987); Edgar H. Schein, *Organizational Socialization and the Profession of Management*, 9 SLOAN MGMT. REV. 1 (1968); Harrison M. Trice & Janice M. Beyer, *Using Six Organizational Rites to Change Culture*, *in* GAINING CONTROL OF THE CORPORATE CULTURE 372 (Ralph H. Kilman et al. eds., 1985).

119. John Van Maanen, *Police Socialization: A Longitudinal Examination of Job Attitudes in an Urban Police Department*, 20 ADMIN. SCI. Q. 207 (1975); Gary L. Wamsley, *Contrasting Institutions of Air Force Socialization: Happenstance or Bellwether?*, 78 AM. J. SOC. 399 (1972).

120. STUART M. KLEIN & R. RICHARD RITTI, UNDERSTANDING ORGANIZATION BEHAVIOR 148 (2d ed. 1984).

121. *Id.*

122. JOHN M. IVANCEVICH & MICHAEL T. MATTESON, ORGANIZATIONAL BEHAVIOR AND MANAGEMENT 182-93 (2d ed. 1990).

123. One such offset might occur, for instance, when an individual who has been affiliated with an organization for a long time suffers a diminished level of job satisfaction and motivation because he or she concludes that his or her career has peaked. *See, e.g.*, KLEIN & RITTI, *supra* note 120, at 268. Although a diminished level of general job satisfaction, by itself, does not necessarily translate into diminished performance within the organization, *id.* at 268-71, it seems logical to presume that it could translate into reduced affinity for the values and goals of the organization.

as in other situations in which organizations have some degree of power over others. These other situations involve organizations that are either quasi-governmental, private entities possessing certain explicitly or implicitly delegated attributes of governmental power, or totally nongovernmental. Examples of the former include self-regulatory organizations in the securities industry, such as a stock exchange or the National Association of Securities Dealers, or certain professional associations having the delegated power to control entry into and continued participation in a profession. An example of the latter would be a hospital or other private institution having a degree of power over the economic well-being and reputation of certain individuals, such as medical staff.[124] Other nongovernmental organizations might have significant power over the supply of goods, services, or facilities necessary to compete effectively.[125]

Although the concept is rarely raised as an independent issue, one can find many cases in which the circumstances suggest that organizational empathy may have played a significant part in shaping a decision maker's convictions about relevant matters of policy or law. When, for example, a prison official responsible for security also serves on a panel that decides cases of alleged breaches of security, the official's association with the security branch of the organization probably molds his thinking about what does or does not constitute a breach of security.[126] Although his general attitudes about law enforcement and law breakers very likely antedated his association with the organization, his concept of what constitutes a breach of security was probably induced more by his affiliation with the organization. Other examples might include a

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124. Unless some sovereign attributes are present, the degree of power that a hospital or any other institution has over others depends on market or market-like dynamics. Thus, a rural hospital in an area in which physicians are in short supply has far less power over medical staff than one of the major hospitals in an urban area.

125. *See, e.g.*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (claimed boycott under antitrust laws based on allegedly capricious refusal to grant seal of approval to plaintiff's new gas burner by a trade association having collective market power); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912) (similar claim based on denial by an association of railroad companies of access to a natural monopoly terminal facility).

126. Powell v. Ward, 542 F.2d 101 (2d Cir. 1976). Because this was a facial challenge to the decision-making structure asserted in a class action, the only question presented was the presence of the security official on the panel. Although the concept of deriving one's ideological convictions from the organization was not specifically addressed, this is about the only basis on which the claimed violation of due process could be made. The due process claim failed. In cases involving challenges to actual disciplinary hearings, there probably would be claims based on the combination of decision functions and actual prejudgment. Thus, the *Powell* case involves the relatively rare situation in which the legal challenge is actually based on a specific contention that sounds very much like my concept of organizational empathy.

university administrator adjudicating a student discipline case,[127] a manager for the corporate owner of a government-subsidized low-income apartment project participating in the adjudication of a tenant eviction decision,[128] and current or former employees of an insurance company adjudicating Medicare claims administered by the company for the government.[129]

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127. Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972). The actual claim in *Winnick*, which was rejected, was that due process was violated because the decision maker's superior performed the investigation and served as the main witness. *Id.* at 548.

128. *See* Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1974). Here, as in *Powell*, 542 F.2d 101, the only claimed basis for disqualification was the decision maker's affiliation with an organization. Like *Powell*, this case thus involves the unusual situation in which the specific basis for a legal challenge is a contention that closely resembles organization empathy. Also like *Powell*, the court in *Lopez* found no violation of procedural due process. See also Wilson v. Lincoln Redevelopment Corp., 488 F.2d 339, 342 (8th Cir. 1973), the facts of which are very similar to *Lopez*. The only relevant allegation in *Wilson*, however, was a combination of decision-making functions, a problem briefly referred to *infra* at note 188 and accompanying text, but a thorough analysis of which is beyond the scope of this article. *Id.* at 342. The due process claim in *Wilson* was rejected. *Id.* at 343.

129. Schweiker v. McClure, 456 U.S. 188 (1982). In *Schweiker*, the rejected due process claim was based on an alleged monetary conflict of interest, an analysis of which is beyond the scope of this article. *Id.* at 192. However, the government paid the hearing officer's fee, and there was no apparent pressure from the insurance carrier that might cause the decision maker to either fear for his job or curry favor with a view toward future appointments as a hearing officer. *Id.* at 195-97. In the case of current employees, hearing officer assignments were apparently outside the normal scope of their jobs. *See also* Overlook Nursing Home, Inc. v. United States, 556 F.2d 500 (Ct. Cl. 1977). In *Overlook*, a claim by a nursing home for Medicare reimbursement was at issue rather than an individual's claim. *Id.* at 501. Two members of a three-person review board were employees of the insurance carrier that administered the program as an agent of the government. *Id.* at 502. The claimant contended that these two employee-members necessarily would be concerned about setting precedents unfavorable to this and other insurance carriers. *Id.* at 502-03. There was no claim of an economic conflict of interest or other biasing influence.

Another example is Jonal Corp. v. District of Columbia, 533 F.2d 1192 (D.C. Cir.), *cert. denied*, 429 U.S. 825 (1976). In a contract dispute between a construction company and the District of Columbia, a claim was denied by a contract officer for the District and then appealed to the Contract Appeals Board, which also denied the claim. *Id.* at 1194-95. The board consisted of three members appointed by the District's Corporation Counsel; two were attorneys subordinate to the Corporation Counsel and the third was a contracting officer. *Id.* at 1194. There were several claimed sources of decision-maker bias, including an improper combination of decision-making functions and economic conflicts of interest, both of which are beyond the scope of this article. Although not raised as an issue, the case clearly involved a degree of organizational empathy as well. The court of appeals in *Jonal* found no violation of procedural due process, but remanded the case because the district court apparently had not been given the entire record for review of the Contract Appeals Board decision. *Id.* at 1197-98.

Except for a very small number of unusual cases, the concept of organizational empathy has not been used as a specific basis for challenging a decision or decision-making structure.[130] There are several reasons why such a challenge would almost certainly fail under any existing legal standard of decision-maker impartiality. First, organizational empathy probably is as inevitable as any of the other ideological convictions whose origin is less easily identified. Second, as noted above, in practice it may often be difficult to differentiate from convictions having other origins. Third, organizational empathy is likely to occur only in contexts in which other biasing influences, such as the decision maker's economic dependence on the organization, are also operating.

Despite the low probability that organizational empathy could ever be used to mount a successful legal challenge, it is nevertheless important to recognize the condition as a discrete source of potential bias. Not only does this recognition deepen our understanding of decision-maker bias at a conceptual level, but there may be practical opportunities to lessen negative effects on process values without simultaneously undermining the legitimate objectives of socialization in organizations. Although the effects of organizational empathy on decisions may not be differentiable from other biasing influences after the fact, it is possible that practical reasons may exist for distinguishing the sources at the decision system design stage. In particular, it is worthwhile to isolate the phenomenon if its effects are open to mitigation by design features that differ from the appropriate preventive mechanisms for other ideologically produced blind spots.

Most of the design features that may be incorporated into a decision system to minimize harm to process values from ideological biases will not vary with the source. Assuming adequate notice and participation rights as a foundation, an example of such a feature might be something no more profound than simply requiring the decision maker to include the appropriate role of ideological approach as one of the issues to be argued, and then reflect it in a written decision. The adoption of such a feature would not depend on the source of the ideological conviction.

There appears to be one way, however, in which organizational empathy should be treated differently. When the individual in question will perform a decision-making function, especially a judging one, that affects the rights and obligations of others, the socialization process itself should explicitly or implicitly address the tension between the need for personnel to internalize the organization's culture and the desirability of open-mindedness on certain issues. The message, which could be

130. *See, e.g., Powell*, 542 F.2d at 103; *Lopez*, 498 F.2d at 943; *Overlook*, 556 F.2d at 502.

delivered in various ways during the formative stages of the individual's relationship with the organization, might consist of the following:

> The organization's goals, customs, attitudes, approaches to problem-solving, and other aspects of its culture are very important. It cannot do the job for which it was created unless its people adopt these cultural properties to a substantial degree. We recognize, however, that the function you will be performing demands that you reserve judgment on certain questions even though achievement of the organization's goals might suggest a particular conclusion. You must seek to incorporate in your thinking the fact that the organization's long-term goals actually may be better served by producing completely impartial decisions regardless of occasional incongruence with the more immediate and visible organizational objectives. Permitting organizationally induced blind spots may produce decisions that are less thoroughly considered and perhaps less accurate, do not cause us to periodically rethink our attitudes as we should, may be more difficult and costly to implement because they are less accepted by affected parties, and may bring more external control over what we do because of concerns about fairness.

4. Lack of Necessary Qualifications

Qualifications and expertise represent a paradox in decision-making systems. Although accuracy and efficiency often demand certain threshold knowledge and skills, it is possible for specialized knowledge to translate into improper bias when it produces a Procrustean vision of how certain things should be done. Overly specialized knowledge, an intractable ideological bent, or prejudgment produced by premature over-familiarity with a problem, all of which were discussed previously, can create their own risks to process values.

If expertise and overfamiliarity can create the risk of one form of blind spot, lack of minimum qualifications can create the danger of another. Lon Fuller observed that lack of relevant training or experience can cause a blind spot of which the decision maker is unaware.[131] A decision maker who does not have an adequate "feel" for the task at hand may fail to get the point of particular testimony or argument. The problem is one of potential bias because the underqualified decision maker is more likely to decide on the basis of alien factors, including an ideological conviction that is completely irrelevant to the issues at hand. Failing to understand the relevant point, the decision maker will rely on some other point with which he or she is familiar and comfortable. Moreover, lack of qualification may create an insecurity that makes him or her more susceptible to ex parte communications and more likely to seek evidence outside the record. Perhaps the most obvious example of

131. *See* Fuller, *supra* note 73, at 391.

the problem is found in the case of a judge without legal training.[132] The often-questioned ability of lay jurors to perform their task adequately in complex cases with highly technical evidence represents another manifestation.[133]

There is, of course, no such thing as a perfect decision maker. One probably cannot find a decider possessing the perfect balance of qualifications and a mental clean slate. Designers and evaluators of dispute resolution and decision-making systems must continually keep the dilemma in mind, however, and seek a point as close to equilibrium as possible. One shortcoming of many systems is that many disparate classes of problems are lumped together for determination by the same kind of decision maker. Our jury system arguably suffers from this defect. Although it would be folly to atomize categories of decision makers corresponding to the almost infinite array of decisional subjects, the search for some workable middle ground should continue to be a goal of system designers. An attractive feature of the modern alternative dispute resolution movement is that many of its manifestations permit the parties themselves to customize procedures, including selection of the decision maker. For example, panels of arbitrators can be selected with representatives from different fields (such as an engineer, a lawyer, and an executive from the relevant industry in a technical business dispute),

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132. *See* North v. Russell, 427 U.S. 328 (1976). In the *North* case, a defendant convicted of a first-offense DWI by a non-lawyer police court judge in Kentucky asserted that the use of judges without legal training violated due process. *Id.* at 333. The judge had denied the defendant's request for jury trial even though state law permitted it in such a case, and sentenced the defendant to a jail term despite the fact that state law provided for only a fine in the case of a first-offense DWI. *Id.* at 330. Trial de novo could be had in the circuit court, but the defendant had not sought it because, he claimed, he did not know of its availability and had not been so informed by the police court judge. He ultimately sought federal constitutional review by habeas corpus. *Id.* at 331. The Supreme Court found no violation of procedural due process because trial de novo was available before the circuit court. *Id.* at 339. In dissent, Justices Stewart and Marshall argued that the risk of decision-maker bias was too great to tolerate because of the likelihood that a lay judge will rely ex parte on the prosecutor in a criminal case. *Id.* at 344 (Stewart & Marshall, JJ., dissenting). The police court judge in the *North* case admitted that he did, in fact, make a practice of relying on the local prosecutor for legal advice. *Id.* at 344 n.4 (Stewart & Marshall, JJ., dissenting). Stewart and Marshall also believed that the right to participate, as well as the right to counsel, was rendered meaningless in a forum in which the judge could not understand counsel. *Id.* at 341 (Stewart & Marshall, JJ., dissenting).

133. *See, e.g.*, Warren E. Berger, *Thinking the Unthinkable*, 31 LOYOLA L. REV. 205 (1985); Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33; Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); William W. Schwarzer, *Reforming Jury Trials*, 1990 U. CHI. LEGAL F. 119.

thus creating complementarities of expertise and perspective, and perhaps guarding against expertise-induced myopia.[134]

B. *Prejudgment*

As with decision-maker ideology, the root problem with the various forms of prejudgment is belief perseverance. Although it may not be an easily detectable step from some kinds of specific and very firmly held ideological convictions to some kinds of prejudgment, it is an important one. "Prejudgment" is a closed state of mind on one or more important pending issues. The unfortunate reality, however, is that sometimes the only external basis for distinction is that a decision maker has inadvertently tipped his or her hand, thus providing evidence of the prejudgment. A discussion of this reality by Justice Rehnquist was noted earlier.[135] Irrespective of the element of caprice that may be involved in detection, when certain kinds of prejudgment are detected they should be rectified. At the system design level, it is vital that designers be cognizant of the possibilities of prejudgment and shape decision-making structures to anticipate it and diminish its effects.

As with the attempt to classify ideological convictions, it is not possible to arrange the different classes of prejudgment into a perfect sequence. The many possible forms of premature judgment are somewhat easier to arrange than ideology, however, and an attempt has been made to follow a general pattern of least to most harmful. Thus, within the category of explicit prejudgment, the movement is from prejudgment of policy or law to the typically more damaging prejudgment of disputed fact. Within the class of fact prejudgment, the order is from situations involving legislative or hybrid legislative-adjudicative facts to pure adjudicative facts, again a least-to-most-pernicious progression. This article's discussion of adjudicative fact prejudgment looks first at ad hoc situations and then at structural ones occurring when a decision maker rehears or reconsiders an earlier decision. Here, one cannot really say whether the process value effects of ad hoc or structural prejudgment are generally less or more negative; the two situations are just different and their effects are mixed. Next, the article examines prejudgment that is implicit in a decision maker's conduct, a class of biases that also does not fit very well in any sort of orderly progression. The article then closes with a discussion of prejudgment by referring

134. *See, e.g.*, John R. Allison, *Easing the Pain of Legal Disputes: The Evolution and Future of Reform*, 33 BUS. HORIZONS 13, 15 (1990); John R. Allison, *Five Ways to Keep Disputes Out of Court*, HARV. BUS. REV., Jan.-Feb. 1990, at 166, 168-72; John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 N.C. L. REV. 219, 244-45 (1986).

135. Laird v. Tatum, 409 U.S. 824, 835 (1972).

briefly to combinations of decisional functions, a very special case the thorough study of which is beyond the scope of this article.

1. Explicit Prejudgment of Policy or Law

Although this condition may first appear no different than an ideological conviction that relates to a relevant policy or law, closer scrutiny reveals it to be a more advanced form of bias at both the theoretical and practical levels. This is so even though the discovery of tangible evidence to connect the state of mind with the pending issue is often serendipitous. A true case of expressed prejudgment involves a greater degree of both specificity and closed-mindedness, and leaves even less room for the benefits of open debate on issues of interpretation and application.

Again, the core problem continues to be one of belief perseverance. However, the fact that a position on applicable policy or law has been expressed prematurely in a pending case, and in a way that gives the appearance of a "done deal," makes a difference for at least two reasons in addition to belief perseverance.

First, there is the matter of perceived appearances that violate expectations. As we have seen, such expectations and perceptions have significant independent importance for process values. Recall for a moment Justice Rehnquist's detailed views about how certain constitutional and statutory provisions should be interpreted with respect to executive branch information-gathering authority. Let us consider the hypothetical situation in which his conduct more clearly violates traditional expectations about one who performs a judging function. Suppose, for example, that he had not expressed these convictions in the performance of a previous job where the expressions were clearly within his job description and had been required by his superior.[136] Instead, assume that he had made similar statements, either directly through some public medium or in a way that became public, while a case involving precisely this legal issue was pending before the Supreme Court. Even without considering whether there is any substantive difference between this case and another situation in which he either (1) expressed the position at an earlier time as part of the requirements of a different job or (2) held but did not express these views, there is an enormous difference in the degree to which expectations are violated. Although the general expectation of open-mindedness, and the corresponding harm to process values, is likely to be highest in the case of judges, the same sort of perceptual problem would be caused by similar conduct on the part of any other decision maker performing a

136. In the actual situation, Rehnquist had been *sent* by the Justice Department in response to a request from Congress for expert testimony. *Laird*, 409 U.S. at 826.

judging type of function, where affected parties have a legitimate expectation that the decider will hold any commitment to a legal position in abeyance until they have had a reasonable opportunity to exercise persuasion.

A second reason for attaching more importance to explicit prejudgments is the increased probability of face-saving behavior by the decision maker. Most people feel uncomfortable with the prospect of having to publicly admit prior error.[137] Thus, one who made a public pronouncement of an opinion or belief can be expected, on the average, to resist contrary evidence and arguments to a greater degree than one who has held, but not explicitly revealed, such sentiments.[138] Even strong convictions can be changed by additional experience and information when it is especially salient.[139] Experience and information are salient when they are particularly vivid or concrete, thus causing them to be remembered better and recalled more precisely when a decision is subsequently made.[140] The argument of a real party with a real problem who will be substantially affected by one's decision would seem to constitute very salient additional information for the decision maker. The likelihood of a conviction about policy or law being changed by persuasive argument would seem reduced, however, when the decider has already committed him or herself *explicitly* to a position and a face-saving element is superimposed on belief perseverance.

The playing of multiple roles by some regulators can create an environment in which this and other types of prejudgment are a bit more likely to occur. For example, a regulator's active participation in the legislative arena followed by performance of a judging role in a closely related case may create both the actuality and appearance of a closed mind on important legal issues. Suppose, for example, that several members of a state optometry board actively push for legislation outlawing the employment of optometrists in "mercantile establishments." Their activities include procurement of legislative sponsors and

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137. *See, e.g.*, Joel Brockner et al. *Face-Saving and Entrapment*, 17 J. EXPER. SOC. PSYCHOL. 68, 77 (1981) (importance of face-saving when individuals are deciding whether to continue or terminate nonproductive investments, and others know that they have made these investments); Greg Leichty & James L. Applegate, *Social-Cognitive and Situational Influences on the Use of Face-Saving Persuasive Strategies*, 17 HUMAN COMM. RES. 451 (1991) (discussing face-saving in communication strategies); Sandra Petronio, *Communication Strategies to Reduce Embarrassment Differences Between Men and Women*, 48 W.J. SPEECH COMM. 28, 29-32 (1984) (review of communication literature on face-saving).

138. *See* sources cited *supra* note 137.

139. Although a firmly held theory tends to persevere in the face of conflicting evidence, the tendency to discount new evidence that contradicts the theory diminishes somewhat with the saliency of the new information. *See, e.g.*, NISBETT & ROSS, *supra* note 4, at 190.

140. *Id.*

presentation of testimony to a legislative committee. Their testimony and other publicly stated positions might relate not only to the bill's underlying rationale, but also to details such as how to define "mercantile establishment." Assume that the bill passes and the board presides over an adjudicative disciplinary hearing on charges that an optometrist violated the law by practicing with such an establishment. If an issue exists pertaining to the nature of the establishment with which the respondent is affiliated, there is a very real problem of actual or apparent legal prejudgment.[141]

2. Explicit Prejudgment of Fact

Two basic propositions must be kept in mind as we proceed to discuss other forms of prejudgment. The first is that prejudgment usually offends process values increasingly as it moves along a continuum from policy/law to fact. The second is that fact prejudgment also tends to become more harmful as it progresses from legislative fact to adjudicative fact. Keeping in mind these two propositions, this article first considers the situation in which a colorable claim of fact prejudgment derives from ad hoc circumstances. This is followed by a brief discussion of a class of situations in which the problem of fact prejudgment arises from structural conditions that are transitional in nature; such cases possess both ad hoc and structural characteristics, but probably are more akin to the former than the latter. Next, the discussion moves to relatively

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141. These facts are adapted from LeBow v. Optometry Examining Bd., 191 N.W.2d 47 (Wis. 1971). In the actual case, the subsequent disciplinary hearing did not involve the definition of "mercantile establishment," but instead focused on a charge that the respondent had not performed a fourteen-point eye examination as required by licensing regulations for *all* optometrists. *Id.* at 50. Thus, the argument that legal prejudgment had occurred was substantially weaker than in my hypothetical, and the court found no disqualifying bias. *Id.* There also were several other possible biasing influences, including a combination of certain decision functions and indirect economic interests; the court similarly found no disqualifying bias stemming from these influences. *Id.* at 50-51.

Another example may be found in the facts of Northwestern Bell Tel. Co., Inc. v. Stofferahn, 461 N.W.2d 129 (S.D. 1990). This case was mentioned earlier as an example of how a decision maker can permit an ideological conviction to develop into more serious forms of bias. *See supra* notes 104 and accompanying text. In *Stofferahn*, a public utility regulator's strong predisposition against permitting market forces to govern telephone utilities evolved into an almost complete prejudgment of a hybrid legislative-adjudicative deregulation proceeding. *Id.* at 133-34. Although some prejudgment of fact may have been present, prejudgment of policy and law was the predominant problem. *See also* Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965) (In a speech made after the FTC remanded a case to the hearing examiner, but before the examiner's decision on remand, the FTC chairman not only stated his general views about antitrust law and policy but also about the application of those laws to the pending case; there was a clear case of policy/law prejudgment, and maybe even a case of fact prejudgment.).

permanent structural conditions that create risks of fact prejudgment. These consist of system design features that cause a decision maker to reconsider all or part of its own prior decision. In all three classes of fact prejudgment, it is not uncommon to find that a scenario illustrating fact prejudgment also includes some degree of policy/law prejudgment. In such a case, our emphasis here is on the more serious problem of fact prejudgment.

a. Ad Hoc Fact Prejudgment

Consider a situation in which Congress requires a regulatory agency to conduct an investigation of certain industry-wide practices and report on its findings. The agency performs its assigned task by gathering detailed company-specific evidence of business practices throughout the industry. It then issues a report that, among other things, concludes that the practices violate a particular law. In response to this report, Congress articulates no new policy and makes no new law. The agency then institutes an adjudicative proceeding in which it charges the industry's trade association and its members, who constitute virtually the entire industry, with a violation of the relevant law.[142]

In one sense there can be no doubt that the agency explicitly prejudged something. There clearly was nothing left to adjudicate at the time it instituted an adjudicative proceeding. The question is, what had it prejudged? The agency acted as an agent of Congress to (1) document and analyze conduct suspected of being contrary to the public good, (2) determine that the practice had effects that fell within the scope of previously articulated policy, and (3) conclude that no new law was necessary to deal with it because existing law was sufficient. The agency essentially acted as a legislature, but with the addition of some adjudicative-type fact finding.

Some might see a problem in the fact that the agency then sought to impose legal consequences for past conduct, an adjudicative function, based on factual and legal judgments it had already made without the charged parties having had any opportunity for rebuttal. It is true that they would have a rebuttal opportunity during the adjudicative proceeding. What, however, is the probability that agency members would be affected by the parties' arguments after having committed themselves in writing on all factual and legal points to Congress? Even if members of the agency were not completely committed psychologically to their

142. These facts are taken from FTC v. Cement Inst., 333 U.S. 683 (1948). The practice in question was use of the multiple basing point system for assessing freight charges in the cement industry. *Id.* at 688. The charge was that industry-wide usage of the system constituted illegal price fixing. *Id.* The Supreme Court rejected a claim by the charged parties that the FTC's institution of a complaint after issuance of the report violated procedural due process. *Id.* at 694.

conclusions, the reality of congressional budget-writing power would seem to make the probability remote indeed. An additional element that might save the agency's action from a charge of impermissible prejudgment is that, in such a scenario, the legal consequences for past conduct would consist solely of an administrative cease-and-desist order. This injunctive relief is essentially of a prospective nature, and gives the entire proceeding more of a legislative than an adjudicative slant. Were these same events to be replicated in a situation in which the legal consequences are more than just prospective, one would be much more justified in questioning the procedural propriety of the events.

Numerous other examples may be found in which the evidence demonstrates, or at least suggests, an explicit prejudgment of hybrid legislative-adjudicative facts. Suppose, for instance, that a member of the federal agency regulating interstate natural gas rates makes a public address in which he or she answers arguments in the trade press in support of pending legislation that would eliminate or limit the agency's jurisdiction over natural gas producers. In the speech, he or she states that competition among independent producers is not adequate as a substitute for price regulation by the agency pursuant to existing legislation. Subsequently, he or she sits on a natural gas rate case in which the degree of competition is one element of the ultimate determination of a "just and reasonable rate."[143] The prejudgment here is one of fact: the existence and degree of competition among producers in a particular industry. A public utility rate-making proceeding focusing on the appropriate rate of return, although often classified as rulemaking (legislative) in nature, does possess significant adjudicative characteristics. The number of directly affected industry members may range from one to a larger but still clearly identifiable number. The decision is essentially prospective in operation, but past actions can play a significant part in the decision. For example, very specific questions of managerial prudence can affect the extent to which particular capital costs may be included in the rate base.[144] In the case under discussion, the prejudged fact was not exactly the same as the one to be resolved in the rate case. The former related to competition generally and was more of a legislative than an adjudicative fact, while the latter related to competition within a particular producing area. Ultimately, the prejudgment was found to be insufficient to disqualify the agency

143. These facts are taken from Skelly Oil Co. v. FPC, 33 F.P.C. 43 (1965) (memo. op. and order rejecting motion to disqualify vice chairman David S. Black), 375 F.2d 6 (10th Cir. 1967) (dismissing prejudgment contention without analysis), *aff'd in part and rev'd and remanded in part on other grounds sub nom.* Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

144. *See, e.g.*, W. KIP VISCUSI ET AL., ECONOMICS OF REGULATION AND ANTITRUST 359-60 (1992).

member for bias.[145] Although this is surely a correct decision on legal grounds, there was, undoubtedly, some damage to the appearance of open-minded fairness. Such occurrences should be avoided when possible because they cannot help but increase the distrust and animosity that so often characterize the various relationships present in utility regulation. If the prejudged fact had been more nearly coterminous with the fact subsequently to be decided, damage to process values clearly would have been greater. Even in such a case, however, the legislative characteristics of the proceeding probably would have been sufficiently predominant to preclude a violation of due process or other applicable legal requirement of open-mindedness.

In a similar vein, assume that the Federal Trade Commission, pursuant to its authority over unfair or deceptive trade practices, is preparing to commence a rulemaking proceeding regarding television advertising aimed at children. Shortly before the proceeding, the chairman of the agency makes speeches and gives interviews in which he or she presents a strongly held belief in the legal theory that advertising aimed at young children is unfair even if it is not deceptive. In addition, he or she indicates rather clearly that he or she has come to conclusions on certain factual matters without having yet considered any evidence, the kind of evidence that would be forthcoming in the pending proceeding. These factual matters include the age at which children typically can understand that a presentation on television has commercial objectives, the extent to which their lack of understanding influences their behavior, and the likely effects of different alternative solutions. Assume that the rulemaking proceeding is of neither the informal notice-and-comment nor formal trial-type adjudicative variety. Instead, it is a hybrid proceeding with objectives that are primarily legislative in nature, but with several adjudicative earmarks such as cross-examination and application of the substantial evidence rule at the review stage. However, the allegedly prejudged facts in this scenario are of a definite legislative character. If we are attempting to assess the importance that should be placed on process values in a given situation, it is the fundamental objective of the proceeding and the type of facts to be determined that are most important, rather than the particular procedural accoutrements that have been added. The latter are important subsequently when we seek to determine whether process values have been appropriately protected under the circumstances. The prejudgment in this case arguably is more harmful than in the natural gas rate example, because

145. Skelly Oil Co. v. FPC, 33 F.P.C. 43, 45 (1965) (memo. op. and order rejecting motion to disqualify vice chairman David S. Black), 375 F.2d 6, 18 (10th Cir. 1967) (dismissing prejudgment contention without analysis), *aff'd in part and rev'd and remanded in part on other grounds sub nom.* Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

here the facts are more specific and more obviously relevant to the pending proceeding. Again, however, the predominantly legislative character of the facts and the ultimate decision to be made causes the harm to process values to be less than it otherwise would be.[146]

As noted earlier, explicit fact prejudgment arising from ad hoc circumstances causes increasing harm to process values as the context becomes more adjudicative in nature.[147] Indeed, a clear case of adjudicative fact prejudgment by a decision maker performing a judging function is one of the most egregious forms of bias. If the proof is strong, it is a case of bias that can offend the rigorous standards of the Due Process Clause even when the infractor is but one of a multimember judging body.[148]

The risk of legal issue prejudgment arising from the various roles performed by regulators was discussed in the previous section. Unless great care is taken, these multiple roles combined with the sometimes political nature of their positions also can create the reality or appearance of adjudicative fact prejudgment when the regulators perform a judging function. One of the legitimate functions of a high-level regulator may be the communication of policy positions and agency plans of action to the public or to specially affected groups. It may even be legitimate for the official to refer to pending adjudications, although the arguments in favor of doing so may often be outweighed by the inherent

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146. The facts in this example are from Association of Nat'l Advertisers, Inc. v. FTC, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). The court held that, in a case of alleged prejudgment, the due process standard for disqualification in rule making is less rigorous than in an adjudication. *Id.* In a rulemaking proceeding, the court stated that disqualification is required "only when there is a clear and convincing showing that he has an unalterably closed mind on matters critical to the disposition of the rulemaking." *Id.* at 1154. The prejudgment in *Nat'l Advertisers* did not violate this less stringent standard. *Id.* at 1173-74. In an agency adjudication, on the other hand, disqualification is required if a "disinterested observer may conclude that the decisionmaker has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Id.* at 1158 (quoting Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959))).

147. It bears repeating that, in cases of fact prejudgment, it is common also to find an element of legal issue prejudgment.

148. *See, e.g.*, Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965). In *Cinderella Career & Finishing Schools* the court observed that when one member of a multimember judging body is demonstrably biased, it is impossible to know what effect the biased member had on the group even if his vote was not needed for a majority. *Cinderella Career & Finishing Schools*, 425 F.2d at 592. *See also* Berkshire Employees Ass'n v. NLRB, 121 F.2d 235 (3d Cir. 1941) (similar observation about unknown effect of biased member on a group of decision makers).

risks to process values. In interviews, speeches, press releases, or the like, relatively little harm is done to process values when the regulator simply refers to the kinds of adjudicative actions that might be instituted as part of a regulatory program, generally describes a complaint that has been filed, or makes other noncommittal references to pending adjudicative actions. Again, however, the line between serving legitimate informational purposes and damaging the procedural integrity of the process can be fine enough to counsel reticence about discussing these matters at all.

Examples certainly may be found in which this line is clearly crossed. Such would be the case if, while an unfair competition adjudication against several oil and tire companies is pending on remand from the Federal Trade Commission to a hearing examiner, the commission chairman gives a speech to a national petroleum retailers' association in which he or she discusses all of the "bad things" being done to them by oil and tire companies, specifically identifies the perpetrators as if they had already been found guilty, and promises results with language and tone strongly suggestive of a sentencing judge in criminal court.[149] Another example of such clear crossing of the line was a speech very similar to the above in tone and content, the subject this time being deceptive advertising, made by the same regulator to the National Newspaper Association while a deceptive advertising case was pending on appeal from the hearing examiner to the FTC.[150]

Somewhat less glaring, but still seriously infringing on process values, would be a formal press release by a regulatory agency shortly after commencement of an adjudication stating that the respondent *had violated* a particular law.[151] In one sense, this infringement would be more egregious than the previous two because the communication constitutes an official statement of the agency as a whole rather than the views of one member. In another sense, it arguably is not as serious,

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149. The case is Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965), and involved one of the several infamous excesses of Paul Rand Dixon. The court of appeals found a violation of due process and ordered the disqualification of Dixon; ordinarily it would have remanded the case for a de novo adjudication without Dixon's participation, but on this occasion it dismissed the FTC's complaint because it also found that the commission's decision was not supported by substantial evidence. *Texaco*, 336 F.2d at 762. The Supreme Court subsequently vacated the court of appeals' judgment, but its decision pertained only to the substantial evidence question. *Texaco*, 381 U.S. at 740. The FTC had not sought review of the due process disqualification question, so the Supreme Court did not deal with it. *Id.* The Court then did what the court of appeals normally would have done by remanding to the FTC for de novo adjudication without Dixon. *Id.* at 740.

150. *Cinderella Career & Finishing Schools*, 425 F.2d at 589-90.

151. *See* Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959) (concluding that respondent had waived right to complain by failing to make timely objection, although strongly disapproving of the practice).

however, because the communication channel, lack of stridency, matter-of-fact bureaucratic tone, and plausibility of an interpretation that the language was inadvertent, might make the information less psychologically salient than in the other situations. Although these features do not undo the inherent damage of prejudgment to accuracy and other objective process values, they may lessen the harm to those process-value components that are perceptual and subjective in nature. In any event, not only is it a type of communication to be avoided but its mere occurrence may signify a need for reevaluation of institutional procedures and attitudes.

A press release using explicit language of prejudgment may be contrasted with the common regulatory agency practice of issuing purely factual press releases that merely announce the filing and summarize the allegations of a complaint, outline the contents of a respondent's answer, or report the results of a first-level adjudication along with a clear indication of its contingent nature.[152] In one case in which such a practice was challenged as a manifestation of prejudgment, the affected party argued that the mere issuance of preliminary press releases places agency members "under a very real pressure to vindicate themselves and justify the charges to which the publicity has been given."[153] Although the court found no due process violation, it did recognize that the practice of publicizing complaints probably does result in harm that is not undone by the defendant's subsequent exoneration despite qualifying language in the press release.[154]

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152. A similar contrast may be made between the speeches of Chairman Dixon and an interview given by FTC Commissioner Jones in which she stated that, in a pending case, "[t]he complaint says . . . ."

153. FTC v. Cinderella Career & Finishing Schools, Inc., 404 F.2d 1308, 1315 (D.C. Cir. 1968). *See also* Philip Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652, 653 (1965) ("[A]gency members have a more active and affirmative commitment to achieving the goals and effectuating the policies declared by Congress; their success is measured by the agency's results in striving to attain those positive objectives.").

154. *Cinderella Career & Finishing Schools*, 404 F.2d at 1315. *See also* Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 324-25 (1788) ("[F]or many will read the charge who may never see the answer . . . . Where much has been said, something will be believed.").

In *Cinderella Career & Finishing Schools*, the court of appeals viewed such harm as the occasional price to the individual of attempts to benefit the public—publicizing initial charges informs those members of the public about unlawful practices who might otherwise not have been able to identify and protect against them. *Cinderella Career & Finishing Schools*, 404 F.2d at 1313. Also, by recognizing the reality of reputational and even economic harm from a publicized charge despite subsequent exoneration, the court disagreed with another federal court of appeals that had viewed a due process claim based on such allegations to be completely frivolous. *Id.* *See* Bowman v. Department of Agric., 363 F.2d 81 (5th Cir. 1966).

Many other scenarios may be described in which the evidence indicates an ad hoc, explicit prejudgment of adjudicative facts. A number of examples further illustrate the inherent dangers to process values that exist when adjudication is performed by one occupying a position characterized by multiple roles and a quasi-political nature. On several occasions, for example, the United States Attorney General has mounted strident, highly visible campaigns to deport certain individuals on a list of "undesirables." An evidentiary adjudication is later purportedly conducted by the Attorney General's subordinates in the Immigration and Naturalization Service. Despite the obvious appearance and likely reality of explicit prejudgment, the cases involving this situation basically stand for the legal proposition that there is neither a violation of due process nor a violation of INS regulations requiring adjudicator independence unless the evidence demonstrates that the decisional autonomy of those performing the judging function was actually overcome by the Attorney General.[155]

The risk of adjudicative-fact prejudgment that can be created by entangling judging functions with political ones is also illustrated by the following situation. Suppose that, as a result of a widely publicized tragedy involving alcohol consumption by minors, both the legislature and the state liquor regulatory agency begin to pay more attention to underage drinking. Through its normal investigative and complaint procedures, the agency institutes four cases against a bar owner alleging the unlawful sale of liquor to minors. The cases are to be heard by the agency's administrative law judge, with review and final decision by the agency members as a group. Between the filing of the action and the hearing, a legislative committee demands that the chairman of the

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155. *See* Marcello v. Bonds, 349 U.S. 302 (1955); Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954); Bufalino v. Kennedy, 322 F.2d 1016 (D.C. Cir. 1963). In *Shaughnessy*, the Supreme Court held that the testimony of the Attorney General's subordinates (members of the INS Board of Immigration Appeals), that they had not been influenced by the Attorney General, was enough to prove the absence of prejudgment. *Shaughnessy*, 349 U.S. at 282-84. Besides disagreeing with this holding, the dissenters in *Shaughnessy* noted the substantial risk of unfairness in such a process by observing that the deportee's name had been put on the Attorney General's original list of "racketeers" because of anonymous information obtained by the FBI and reported to the Attorney General, information to which the deportee never had access or any opportunity to rebut. *Id.* at 289-90 (Black & Frankfurter, JJ., dissenting). In addition, the dissenters pointed out that some evidence indicated that the deportee's name could have been placed on the list because of mistaken identity. *Id.* at 293 n.3 (Black & Frankfurter, JJ., dissenting). They also emphasized that the deportee had entered the United States as a child twenty-one years earlier without a proper visa, now had an American wife and an American-born child, and had been specifically found by the Board of Immigration Appeals to be of good moral character. *Id.* at 284-85 (Black & Frankfurter, JJ., dissenting).

agency testify before the committee regarding the agency's efforts to deal with underage drinking. Some of the legislators are openly critical of the agency's efforts and hostile to the chairman. The chairman is placed in the position of having to defend the agency against attack. In doing so, he testifies that he has completely made up his mind about the bar owner's guilt. The chairman's only expressed reservation is whether the agency will be able to successfully prosecute the cases because three of the four minors involved are not state residents and are beyond the agency's compulsory reach as witnesses. Although one immediately recognizes the unenviable position of the chairman and the almost inevitable nature of his response, it is difficult to ignore the prejudgment. Despite sympathizing with the chairman's dilemma, the state court hearing the bar owner's challenge to the procedure also was unable to overlook the prejudgment.[156] The court noted that the chairman had so wedded himself with a position which would not allow him to change his mind without publicly admitting error.[157]

Among the array of other situations which present problems of adjudicative-fact prejudgment are those involving a judging functionary's previous comments which could have been based on various types of factual foreknowledge. The problem can arise, for example, when a trial judge presides over a contempt proceeding based on prior conduct of an attorney, party, or witness that had taken place in his or her presence. In general, the judge is permitted to conduct the subsequent contempt hearing unless he or she had become emotionally involved in the prior conduct.[158] This is a problem of having an emotional stake in the outcome, a special form of bias outside the scope of this article. Judges often will have made comments at the time of the conduct that raise questions regarding prejudgment of facts. Assuming that a judge acts with appropriate restraint in the face of contemptuous behavior, the reprovals or warnings given at the time are not only legitimate but absolutely necessary for maintenance of court-room control, prevention of recurrence or escalation, and notification to the offending party. There can be no doubt, however, that these necessary comments coupled with the judge's intimate prior knowledge of the circumstances create a case of explicit adjudicative-fact prejudgment when he or she subsequently presides over a hearing to determine whether the behavior constitutes punishable contempt. The prejudgment may not have been complete because some judges may be sincerely willing to consider arguments

156. 1616 Second Ave. Restaurant, Inc. v. New York State Liquor Auth., 550 N.E.2d 910 (N.Y. 1990).

157. *Id.* at 912-13.

158. *See* Taylor v. Hayes, 418 U.S. 488 (1974); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Ungar v. Sarafite, 376 U.S. 575 (1964); Offutt v. United States, 348 U.S. 11 (1954); Cooke v. United States, 267 U.S. 517 (1925).

regarding mitigating circumstances. Prejudgment does not have to be complete to harm process values. Even a partial predisposition alters a decision maker's starting point. By permitting the same trial judge to preside over a later contempt hearing when there is no evidence of serious emotional involvement, the Supreme Court has implicitly weighted efficiency more heavily than other process values.[159] Although this weighting of efficiency may be appropriate, there is no evidence that the Supreme Court has given conscious, much less careful, consideration to this balancing of process values.[160]

Other examples of explicit adjudicative-fact prejudgment arising from foreknowledge of and comments about relevant circumstances include cases in which a decision-making body is publicly factionalized, an individual has taken sides with a faction that ultimately loses power, and the body then exercises adjudicative authority in a way that negatively affects that individual.[161]

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159. *See* cases cited *supra* note 158.

160. United States v. Parker, 742 F.2d 127 (4th Cir. 1984), *cert. denied*, 469 U.S. 1076 (1984), is somewhat analogous to the contempt cases with respect to the prejudgment question. In *Parker*, four defendants were on trial in federal district court for drug smuggling. *Id.* at 127. Two other individuals allegedly involved in the same crime were tried separately. *Id.* The two testified against the four; however, in a hearing on a motion for a new trial in the case against the four, the two recanted their earlier testimony against the four on the basis that it had been coerced by the prosecutors. *Id.* at 128. The judge hearing the motion for new trial was the same one who had tried the case against the four; he was not presiding over the separate trial against the two. This judge warned them about perjury, but they nevertheless insisted on recanting. They were subsequently charged with perjury; the judge who had tried the drug case against the four, and before whom the two had recanted, served as the presiding judge in the perjury trial. *Id.* The two defendants claimed that the judge was disqualified from hearing their perjury case under 28 U.S.C. § 455(a), providing for disqualification where there are reasonable grounds for questioning the impartiality of a federal judge, because the alleged perjury was committed in his presence and he had warned them about it. *Id.* The court of appeals found no grounds for disqualification, particularly in view of the fact that the trial judge had insisted that a jury hear the perjury case to ameliorate any appearance of diminished impartiality. *Id.* at 128 n.1. The two defendants also claimed that the judge should be disqualified under 28 U.S.C. § 455(b)(1), which calls for recusal of a federal judge having personal knowledge of disputed facts; the court of appeals likewise rejected this claim because of its view that this provision contemplated only knowledge gained outside the judicial process. *Id.* at 128.

161. *See, e.g.*, Staton v. Mayes, 552 F.2d 908 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977). In *Staton*, the decision-making body was a public school board and the affected individual was the school superintendent. *Id.* at 909-10. After the winning faction acquired majority control of the board, it terminated the superintendent on grounds of willful neglect of duty and incompetence. *Id.* at 910. The court of appeals found a violation of procedural due process. *Id.* at 911. The court also recognized the validity of the Rule of Necessity, under which courts will sometimes overlook a serious procedural flaw if the decision-making body is the only one with legal authority to make a decision. *Id.* at 915. In *Staton*, however, the court did not

b. Transitional Structural Conditions

There is a class of situations creating risks of explicit fact prejudgment that might be termed transitional structural conditions. These kinds of cases typically involve a person who renders a decision while occupying one position, and then is promoted to or otherwise comes into another position that requires reviewing (or participation in a body that reviews) the earlier decision. Although basically structural conditions, their effects on process values are probably more like those of ad hoc prejudgment than permanent structural conditions. At a theoretical level, generalized comparison of these effects is difficult because the comparison seems to point in opposite directions at the same time. Both ad hoc prejudgment and transitional structural conditions arguably pose less danger to process values than permanent structural conditions because the element of systematic recurrence is absent in the first two and present in the third. On the other hand, both ad hoc prejudgment and transitional structural conditions are less likely to be justified by the efficiency considerations that sometimes support permanent structural conditions. In weighing these effects, one may be able to generalize to the extent that ad hoc prejudgment and transitional structural conditions probably do less harm to process values than permanent structural conditions except in situations in which the latter are clearly justified by efficiency gains.

Regardless of how its effects may compare with other forms of prejudgment, the problem of transitional structural prejudgment has been recognized as a serious violation of process values in certain circumstances. Federal judges are prohibited, for instance, from hearing the appeal of a case or issue previously tried by them; this situation is

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apply the Rule of Necessity, but instead voided the board's decision, because after the facts of the case arose the state legislature had created procedures for appeal from local school board actions of this nature; the newly created procedure, use of which the court required in this case, included a full hearing by the State Professional Practices Commission with further appeal to the State Board of Education. *Id.*

Also, in Goodman v. Laborer's Int'l Union, 742 F.2d 780 (3d Cir. 1984), a local union's business manager was removed and barred from union office for five years by a trial board of the local; the reason was that he allegedly exceeded his authority in removing certain others from union offices. Goodman claimed that six of the seven board members had been involved in the facts leading to the dispute and had, among other forms of bias, made statements prejudging his case. *Id.* at 783. Again, his claim presents a type of adjudicative-fact prejudgment generated by prior knowledge of, involvement in, and comment upon relevant facts. His claim raised issues of other forms of bias, as well, including an emotional stake in the outcome, a discussion of which is beyond the scope of this article. The court of appeals held that the district court erred in granting summary judgment for defendants, because Goodman's allegations raised fact issues regarding a possible violation of the "full and fair hearing" requirement for union disciplinary actions under section 101(a)(5) of the Landrum-Griffin Act, 29 U.S.C. § 411(a)(5) (1988). *Id.* at 1070.

most likely to occur, of course, when a federal district judge is either appointed permanently or temporarily assigned to a court of appeals that then reviews the district judge's earlier decision.[162] It also could occur in a number of other circumstances, such as when a federal district judge hears a habeas corpus petition in a criminal case that he or she had previously heard as a state supreme court justice.[163]

Similar concerns have been addressed in some administrative agencies. Suppose, for example, that an American employer hires an alien with a student visa rather than one permitting working status. The employer, who is very pleased with his or her employee and wants to retain the employee, assists the employee in obtaining Labor Department certification that American workers are not available for the job held by the alien employee. The initial determination by the Labor Department, a denial of certification, is by a certifying officer. This decision is then reconsidered by a reviewing officer. If the certifying officer in the case is promoted to reviewing officer, there is a violation of Labor Department regulations if the officer reviews his or her earlier certifying decision.[164] The prejudgment is too obvious for comment. The possible variations on this theme are virtually endless, however. If a recently promoted decision maker reviews factual or legal issues that differ in some way from those decided earlier, the degree of prejudgment diminishes to the extent of the difference because there should be a concomitant reduction in belief perseverance and face saving by the decision maker. Suppose that the employer and employee had filed three different applications with the Labor Department, each introducing some new information and containing variations on earlier arguments. Two were initially ruled upon by the certifying officer before being promoted, but the third by a different certifying officer after the promotion. The former certifying officer, now a newly promoted reviewing officer, does not review the two applications he or she had originally acted upon, but does review the third application that the other certifying officer had decided. The parties are the same, the fundamental facts and legal questions are the same, but there are some relatively minor factual differences.[165] While perhaps not a violation of agency regulations

162. 28 U.S.C. § 47 (1988).

163. *See* Rice v. McKenzie, 581 F.2d 1114 (4th Cir. 1978). The court held that 28 U.S.C. § 47 did not apply, because it applies only to a judge's review of his own prior decision on direct appeal, rather than by a collateral attack such as habeas corpus. The court concluded, however, that this situation did constitute a violation of 28 U.S.C. § 455(a), which disqualifies a federal judge where his impartiality reasonably might be questioned; this provision requires no inquiry into actual bias, but merely seeks the objective impression of a reasonable person. *Id.* at 1118.

164. *See* Doraiswamy v. Secretary of Labor, 555 F.2d 832 (D.C. Cir. 1976).

165. This variation in the scenario represents the actual facts in *Doraiswamy*. *See id.* at 835-38.

prohibiting the reviewing of one's own decision, it seems intuitively obvious that the chances of a complete suspension of judgment and open-minded review would be quite low. If there is to be an appeal for the purpose of promoting objective and subjective process values, the appeal in this situation appears lacking in its capacity to serve that purpose.[166]

c. Structural Fact Prejudgment

When speaking of structural prejudgment, I am referring to design features of a decision-making system that may require or permit a decision maker to reconsider or review all or some part of its own earlier decision. Any prejudgment that occurs because of such design features is explicit. Although the phenomenon sometimes occurs in the context of a hybrid legislative-adjudicative process, it usually arises in a purely adjudicative one. It also commonly involves only decision makers performing judging types of functions. I have not divided structural prejudgment into policy/law and fact subcategories, because almost all of the circumstances in which a decision maker is called upon to review its own decision involve either adjudicative facts alone or a combination of these facts with legal issues, rather than policy or legal issues alone. Thus, the situations in which the practice most often occurs are those where any concerns about process values are likely to be the greatest. As noted earlier, when explicit adjudicative-fact prejudgment springs from a system's permanent structural design features, rather than ad hoc occurrences or transitional conditions, any harm to process values arguably is more serious because of the certainty of repetition. On the other side of the equation, however, there are situations in which efficiency gains from these permanent structural features clearly offset the greater harm from systematic recurrence. The following subdivisions of structural prejudgment are admittedly imperfect, with significant overlap among them. Despite their imprecision, further partitioning may aid identification and evaluation of process-value implications.

1. Reconsideration After Review With No Additional Factual or Legal Elements

Most of the prejudgment questions arising from a decision maker's reconsideration of its own prior decision after review involve relatively permanent structural design features rather than a transitional change-of-position problem. Occasionally a decision maker performing a judging function may be called upon to reexamine a decision without the

166. In *Doraiswamy*, the court of appeals rendered a strict construction of department regulations, and found that the prohibition against reviewing one's own decision did not apply; the newly promoted reviewing officer was not technically reviewing his own decision, and there were some factual differences. *See id.* at 839, 845. It was unclear how meaningful these differences were.

addition of any new factual or legal elements. When events dictate such a review, the real question is whether the original decisional exercise paid proper attention to process values. Assume that a professional disciplinary board revokes the license of a practitioner after a hearing accompanied by those procedural features necessary under the circumstances to optimize the various process values. One member of the body is ill, however, and the board decides to secure a substitute without any statutory authority to do so. The alternate member apparently possesses the necessary qualifications to participate meaningfully and dispassionately in the collegial decision-making process. The lack of statutory authority to use a surrogate, however, leads a reviewing court to set aside the decision and to order a rehearing by a properly constituted body. Here, there is little doubt that the second outcome has been prejudged. Has damage been done to process values, however? There almost certainly has been no harm done to accuracy or objective fairness, although the goal of efficiency may suffer significantly from both public and private cost perspectives. Also, there may be some risk of harm to certain subjective components of the catalog of process values. For example, a participant in such a process may come away with a lower estimation of the decisional institution's legitimacy than he or she had before the experience. All in all, however, the harm to process values in the described scenario does not seem substantial. The absence of any new factual or legal elements in the second hearing simply means that the relative quality of the first hearing is transferred to the second. Had the remand occurred because of an irregularity in the first hearing that negatively affected process values, however, the prejudgment associated with the second hearing would be problematic.[167]

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167. These facts are identical to those of Board of Medical Examiners v. Steward, 102 A.2d 248 (Md. 1954). In a rather strange series of judicial events, the circuit court vacated the board's decision and remanded for a new hearing. *Id.* at 253. This court also stated that, because of due process requirements, the same board members who decided the case the first time could not decide it on remand. *Id.* at 251-52. The Maryland Court of Appeals stated that the relevant statute made the circuit court's decision final, and that the court of appeals thus had no jurisdiction to review the circuit court's decision. *Id.* at 251. Inexplicably, however, the court of appeals then discussed the circuit court's due process ruling and rejected it, holding that the board did not have to abide by that part of the circuit court's ruling disqualifying all of the board members. *Id.* The court of appeals not only questioned whether there was a due process violation at all, but also found that the Rule of Necessity precluded the disqualification of the board because no other body was legally authorized to make the decision. *Id.* Consequently, the board could rehear the case without the illegally appointed surrogate. *Id.* at 252. The real outcome of this case was simply that the board was punished for its mistake although no harm had been done. The board's punishment consisted of having to redo the entire process, a punishment which perhaps was sufficient to deter the board from similar actions in the future under circumstances in which actual harm might be a greater possibility.

2. Reconsideration After Review With the Addition of New Factual or Legal Elements

The situation is different, however, when the decision maker, reexamining his or her earlier decision after review and remand, has additional factual or legal issues to determine. The degree of relationship between the new and old issues is important. At one extreme, where the decision maker is called upon to decide new issues so different from those earlier considered that for all practical purposes a new case is being decided, the potential for prejudgment is far less. If the same parties are involved, it is certainly possible for other biasing influences to exist because of the decider's prior experience, such as emotional empathy or antipathy; however, this is a separate kind of problem, and the sort of prejudgment we are concerned with here, deriving from premature theory formation and belief perseverance, seems at most to be only a small problem. At the other extreme, as we have just seen, when reconsideration involves nothing new factually or legally, the primary question is whether the first decision was accompanied by process value protections appropriate to the circumstances.

Most cases of decision reconsideration are between these extremes, however, and it is in such intermediate cases that the risk of improper prejudgment probably is the greatest. The fact that new factual and legal issues are to be resolved means that affected parties have a right to expect a fresh and completely unbiased determination of those issues. Protection of process values in the first proceeding does not automatically transfer to the second. However, when the new issues to be addressed upon reconsideration are conceptually related to those already determined, as is normally the case, the danger that previously formed factual and legal theories will foreclose a completely open-minded second decision appears substantial.[168] While this risk is most typically created

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See also In re J.P. Linahan, Inc., 138 F.2d 650 (2d Cir. 1943). In an involuntary bankruptcy reorganization proceeding, the debtor and others sought removal of the bankruptcy referee (now called a bankruptcy judge) who had been appointed as a special master by the federal district court. *Id.* at 651. The asserted ground for removal was that the special master was biased, as supposedly shown by the fact that several earlier rulings in the case had been overturned by the court of appeals and remanded to him. *Id.* The only apparent evidence of bias was that several rulings adverse to appellants had been remanded to the special master for rehearing. *Id.* There evidently were no additional factual or legal elements to be determined. Thus, the only process-value question was whether such values were appropriately optimized in the first instance, and there was no evidence that they had not been. The court of appeals opinion was a masterful essay, much of it dicta, by Judge Jerome Frank on bias, psychology, human nature, the art of judging, and other topics on which Judge Frank had much to offer. *Id.* at 651-54.

168. An especially instructive case is NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947). In *Donnelly Garment*, a union charged an employer with unfair labor practices, including the formation and domination of a plant union to forestall the

efforts of the complaining union to organize employees. *Id.* at 223. The trial examiner refused to permit the employer to prove through the testimony of 1200 of its employees that they had not been coerced to join the plant union and also excluded evidence that formation of the plant union had followed strike threats and violence by the complaining union against other plants. *Id.* The trial examiner and the NLRB found against the employer and ordered the disestablishment of the company union. *Id.* The court of appeals rejected all of the company's claims, including a charge of examiner bias, except that the court found that the company had been denied a fair hearing when the examiner refused to permit testimony by any of the employees, and remanded for the admission of such testimony. *Id.* at 223-24. On remand, the examiner heard testimony of eleven of the 1200 employees; the examiner and the NLRB concluded that this evidence did not alter their earlier conclusion and issued an order identical to the earlier one. *Id.* at 224. The court of appeals then denied enforcement, apparently because it thought that the examiner should have conducted a completely new hearing. *Id.* at 225. The Supreme Court then held that, because the original court of appeals remand order did not explicitly mandate a de novo hearing, none was required, and that it was permissible for the examiner merely to hear eleven additional witnesses. *Id.* at 227-29. With respect to the employer's claim that the examiner and the Board heard the additional evidence with a totally closed mind, the Supreme Court ruled that the legal presumption was to the contrary, and that there was no evidence affirmatively showing such a closed mind. *Id.* at 229. Seemingly guided not only by necessary pragmatism but also by insufficient appreciation of process values, the Court stated:

> According to an early English judge, "The devil himself knoweth not the mind of man," and a modern reviewing court is not much better equipped to lay bare unexposed mental processes. It is a grave responsibility to conclude that in admitting the testimony of the Company's employees, the Board went through a mere pretense of obedience to the Court's direction, and heard the testimony with a deaf ear and a closed mind. In light of the authority with which Congress has endowed the Board, and with due regard to the conscientiousness which we must attribute to another branch of the Government, we cannot reject its explicit avowal that it did take into account evidence which it should have considered unless an examination of the whole record puts its acceptance beyond reason. Since this matter is crucial, it is appropriate to quote fully the Board's decision on the point:
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> > In remanding the case to the Board for further hearing, the Circuit Court directed that the respondent [the Company] and the D.G.W.U. [the plant union] be permitted to adduce the previously proffered testimony of respondent's [the Company's] employees to show, in substance, that they formed and joined the D.G.W.U. of their own free will and that they were not influenced, interfered with, or coerced by the respondent in choosing that organization as their bargaining representative. In compliance with the Court's mandate and pursuant to the respective offers of proof submitted by the respondent and the D.G.W.U. at the original hearing, the Board permitted the introduction of such testimony. We have carefully considered all such evidence adduced by the respondent and the D.G.W.U. We find, however, that the testimony in question does not overcome more positive evidence in the record that the respondent committed acts of interference and assistance in the formation and administration of the D.G.W.U. which subjected that organization to the respondent's domination and

> which removed from the employees' selection of the D.G.W.U. the complete freedom of choice which the Act contemplates. Since we find the testimony here adduced totally unpersuasive that the employees voluntarily designated the D.G.W.U., we are moreover impelled to adhere to the opinion, derived from our experience in administration of the Act, that conclusionary evidence of this nature is immaterial to issues such as those presented in this case. A consideration of all the evidence convinces us, and we find, that the respondent dominated and interfered with the formation and administration of the D.G.W.U. and contributed support thereto; and that the respondent thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. 50 N.L.R.B. 241
>
> We cannot read this otherwise than as an assurance by the Board that it did not merely go through the motions of allowing the testimony of these witnesses to get into the record as an empty formality, but that it duly heeded the order of the Court and reflected upon the testimony. The Board judged of its worth, as it had a right to, in light of the mass of other testimony in the case, and found it unpersuasive. Had the Board said no more, the court below could hardly have found disregard of its mandate. The Board's skeptical expression regarding this kind of testimony hardly disproves obedience to the Court's mandate.

Donnelly Garment, 330 U.S. at 229-31.

The Supreme Court also rejected the company's argument that the Board's examiner was necessarily biased on remand because he had ruled against them originally. The Court stated:

> This brings us to the only other objection to a ruling of the Board made after the first hearing. On the first review, the court [of appeals] rejected the Company's contention that the Examiner was biased. 123 F.2d at 219. On the second review, the Court was of opinion that the Board improperly denied the Company's application for a new Examiner. It did so, apparently, not because it found actual bias on the part of the Examiner demonstrated at either hearing. The Court seemed to be moved by the generous feeling that a party ought not to be put to trial before an examiner who, by reason of his prior rulings and findings, may not be capable of exercising impartiality. Certainly it is not the rule of judicial administration that, statutory requirements apart . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing. The Board might have gone beyond the legal compulsions and ordered the new evidence to be heard before a new Examiner who could report with a mind wholly free from prior litigious embroilments. The Board might have been well advised also to allow greater leeway in admitting evidence not strictly relevant. It takes time to avoid even the appearance of grievances. But it is time well spent, even though it is not easy to satisfy interested parties, and defeated litigants, no matter how fairly treated, do not always have the feeling that they have received justice. In any event, we are not the advisers of these agencies. And we have no right to upset their orders unless they fall afoul of legal requirements. . . . We do not find that the Board's order offends them.

when decision reconsideration is compelled by a higher authority, it is possible that a similar risk may arise when a decision maker is given initiative-exercising responsibility for reopening, on the basis of new evidence, its own earlier decision. The extent of the risk in this setting would vary greatly with numerous factors, such as the type of initial decision function, the value content of the decision, the amount of time and effort devoted to the decision relative to other job responsibilities of the decision makers, the weight of efficiency concerns created by degree of technical complexity, and the number of individuals involved in the initial decision.[169]

3. Sequential Preliminary Decisions Leading to Final Determination by Same Decision Maker

Questions of a somewhat similar nature may be raised by decision systems in which the same individual or body makes sequential preliminary determinations leading to an ultimate decision in the same case. The situation here is different from one involving combinations of investigative or advocatory functions with judging ones, a problem referred to at the end of the prejudgment section but not analyzed there because of its uniqueness. The discussion here is concerned with system structures in which an individual or group makes sequential decisions that each constitutes the performance of a judging function.[170]

Id. at 236-37.

169. In Porter County Chapter v. NRC, 606 F.2d 1363 (D.C. Cir. 1979), the plaintiffs complained about the risk of closed-mindedness inherent in the statutory discretion given to NRC staff to decide whether new evidence warrants the reconsideration of a decision granting a nuclear power plant operating permit. The court of appeals rejected a due process challenge, stating that "[t]he contention of petitioners is evocative of a monolithic assumption that once members of a staff have taken a position, (a) their view is forever fixed and (b) it will infect other members of the agency with regulatory responsibilities." *Id.* at 1371. The court also noted that the NRC staff, in another case, had in fact recommended the institution of proceedings to revoke a construction permit, even though it had earlier supported the grant. *Id.* From a process-value perspective, the critical point is that it was part of the NRC staff's explicit responsibility to take the initiative and reopen cases when they thought there was evidence to warrant doing so. *Id.* Thus, when deciding initially there was probably far less chance that they would develop a psychologically hardened belief about a given state of affairs. *Id.* Moreover, when reconsidering their earlier decision, they operated from a premise that something important had changed—a premise they developed themselves. In addition to presenting a situation in which belief perseverance was not likely to take place, the case also involved circumstances in which there was little chance of face-saving behavior because the staff had no reputational stake in the earlier decision. *Id.*

170. Particular scenarios drawn from actual cases are sometimes difficult to classify. Suppose, for example, that a system is designed so that the same decision-making body is supposed to conduct an investigation followed by a formal adversarial hearing. After the adversarial hearing, a judging function is performed. An advocatory function may or may not be interposed between investigation and judging. Contrary

Although it is not only legitimate, but even essential, to maintain a keen sensitivity to the prejudgment tendencies inherent in sequential judging, there can be no doubt that efficiency often dictates such structures because of the substantial time and resources required for someone else to develop necessary familiarity with the evidence and law. In relatively formal systems, for example, there is typically a preliminary decision on the sufficiency of the allegations, decisions at various stages on the sufficiency of evidence to justify continuation of the proceedings, preliminary decisions on legal questions, and a final determination of fact and law that may be subject to various degrees of review. This is a case in which efficiency weighs very heavily in the calculus of process values, and demands that some of these decisions be made by the same people. Just as it is intolerably inefficient, in the name of competition, to atomize markets by prohibiting all combinations of productive resources, so too it is intolerably inefficient, in the name of open-minded impartiality, to atomize decision procedures by requiring independent minds for each component of a complex process.[171]

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to the system's formal design, however, the decision maker in a particular case changes the informal investigative hearing to a formal adversarial one and makes a decision. The second hearing is also a formal adversarial one as it was designed to be. Thus, if the procedure had been carried out as designed it would have constituted a combination of investigative and judging functions (and possibly an advocatory function, as well). As actually carried out, however, it constituted sequential judging, in which a judging function was performed, followed by a second judging function by the same decider. This set of facts is taken from King v. Caesar Rodney Sch. Dist., 380 F. Supp. 1112 (D. Del. 1974). In *King*, the school board apparently turned the first hearing into a formal adversarial one because of conscientious concern for the rights of the tenured physical education teacher who allegedly had been involved in an incident in which a student had been injured in gym class. *Id.* at 1114-15. The first hearing was attended by ample procedural safeguards, including representation, full access to his file, and substantial participation rights. *Id.* at 1115. One possible deficiency in the first hearing was that the teacher had his complete file, school board members had a packet consisting of only certain parts of his file, and he did not know which parts of the file board members were concentrating on. *Id.* In addition, he may have been prepared only for an informal investigative probable-cause hearing and not a formal adversarial one. Without these possible deficiencies, all one can really say about the procedure is that the second hearing was superfluous. Because there were no new issues or evidence at the second hearing, the overall process was adequate if the first hearing appropriately served process values. If the first hearing had in fact optimized process values, the only harmful consequence of the redundancy was inefficiency. The federal district court held that the procedure, as actually carried out, violated due process because of the explicit prejudgment created by sequential judging. *Id.* at 1119. This may or may not have been a correct application of due process standards, because it is not clear that the deficiencies in the first hearing were sufficiently aggravated to rise to the level of a constitutional violation.

171. The obvious predominance of efficiency considerations in this situation has led to such strong customary acceptance that challenges are rarely made. When made, they are likely to involve unusual variations on the theme rather than the

There are many examples, however, of situations in which decision systems permit sequential judging to an extent that is either arguably or obviously not justified by efficiency. Suppose, for example, that a regional administrator for the Environmental Protection Agency conducts an informal investigative hearing and makes an initial decision on effluent limitation permits pertaining to offshore oil platforms and onshore facilities. A formal adjudication is then conducted by an ALJ. The regional administrator reviews the products of that adjudication, an evidentiary record and recommended decision, and makes a final decision, subject to appellate-type review by the EPA administrator.[172]

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common model of a single decision maker (or group) performing step-by-step preliminary decisions leading to an ultimate judgment. For example, in Delaney v. United States, 263 U.S. 586, 588 (1924), a federal district judge, Evans, had overruled a motion to quash a criminal indictment of Delaney's alleged co-conspirators. Judge Evans did not preside at Delaney's trial, but later sat by designation on a panel of the court of appeals reviewing Delaney's conviction. *Id.* Delaney contended that Judge Evans was disqualified under the predecessor of 28 U.S.C. § 47 (1988). *Id.* (citing Judicial Code § 120). This statute precluded a judge from participating in the court of appeals review of a decision he had earlier rendered as a district judge, whether he was merely sitting temporarily on the appeals court by designation or had recently been promoted to the appeals court. *Id.* at 588. The Supreme Court held that the statute did not disqualify Judge Evans, because he was not reviewing the same decision he had made earlier. *Id.* at 589. Although involving a somewhat novel application, the logic is identical to that of a case in which a decider initially determines that allegations are sufficient on their merits and then presides over a trial or other evidentiary hearing leading to a final decision.

Occasionally, however, a challenge is made to a traditional situation involving a series of preliminary determinations leading up to a final decision. For example, in United States v. Haldeman, 559 F.2d 31, 129-30 & n.283 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), two of President Nixon's subordinates (Ehrlichman and Mitchell) charged with crimes in connection with the Watergate coverup attempted to disqualify the federal district judge (Sirica) on several grounds. One of these was that Judge Sirica had sequentially acquired detailed knowledge of the facts and parties during the multi-stage proceeding. *Id.* at 129-30 & n.293. He had presided over grand jury deliberations, hearings on subpoenas, and hearings on grants of immunity for some parties. *Id.* at 131 n.293. Other claims of prejudgment, not pertinent to this discussion, pertained to his overzealousness and development of a tough guy reputation through interactions with the news media. *Id.* at 134-35. With regard to the prejudgment risks associated with his sequential judging, however, the difference in the questions that were sequentially decided and the powerful efficiency gains from permitting one individual to preside over the various stages clearly justified the procedure. The court of appeals rejected the defendants' variously grounded attempts to disqualify Judge Sirica. *Id.* at 136.

172. These facts are taken from Marathon Oil Co. v. EPA, 564 F.2d 1253, 1256-57 (9th Cir. 1977). The court of appeals first held that the APA provision requiring the initial adjudication to be made by an ALJ does not apply to the licensing, so that due process was plaintiffs' only theory. *Id.* at 1264. Rejecting the claimed violation of procedural due process, the court stated:

> We see no more reason to assume that a Regional Administrator cannot objectively review his earlier decision in light of additional hearings than to

While this procedure certainly is not an egregious example of structural prejudgment, and was found not to violate any applicable legal standard of open-minded decision-making, it does seem to reflect inadequate sensitivity to process values. At a minimum, this procedure is likely to create the perception that the ALJ adjudicative hearing is a sham.

Far more questionable system design properties may be illustrated by the following two scenarios. In the first one, suppose that a functionary within the U.S. Postal Service has responsibility for determining whether to grant permits for particular mail classifications, and to revoke existing ones because of changed circumstances or new evidence. When the National Rifle Association applies for certain special postage rates for one of its publications, a postal official conducts an ex parte investigation, with no rights of participation for the permit applicant. Based on this investigation, the application is denied, and simultaneously the NRA is notified that its special rate for another publication has been revoked. The decisions are written, accompanied by supporting justifications, and made public. The reason stated for these decisions is the lack of an authorized category of organization in the postal law into which the NRA could reasonably be included in order to qualify for special rates. The official states that he or she has determined that NRA's primary purpose is not educational, and, in the alternative, that the organization is an ineligible "action organization." These quintessentially adjudicative decisions by one performing a judging function will cost the NRA about $900,000 per year. The organization submits additional written material to the government official, who reviews and affirms his or her own decision. This exercise is repeated, and the official again affirms the original decision.[173] In the second scenario, a federal district judge presides over an extradition hearing and decides that the defendant may be extradited to France. Subsequently, the same federal judge hears the individual's habeas corpus petition. The scope of habeas corpus review of extradition is limited to the questions of jurisdiction, whether the charges in the foreign country are covered by the extradition treaty, and

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> assume that a federal judge cannot retry or review a case after its remand following the initial trial or review. The presumption of objectivity extended to administrative law judges . . . in NLRB v. Donnelly Garment Co., 330 U.S. 219 (1947), is equally appropriate in this case.

Marathon Oil, 564 F.2d at 1265. The result in *Marathon* seems correct in that the potential harm caused by the risk of prejudgment is not so severe as to deserve constitutional status. It does seem sufficient, however, to deserve a place within an explicit balancing of efficiency against other process values.

173. *See* National Rifle Ass'n v. United States Postal Serv., 407 F. Supp. 88 (D.D.C. 1976). In the *NRA* case, the organization also complained about the fact that the government official had participated in drafting the regulations. *Id.* at 92. The court did not discuss this point, but it seems to have no bearing on the fact prejudgment issue. The court ultimately concluded that the postal service procedure violated due process. *Id.* at 94.

whether there is probable cause to support the charges. The judge denies the habeas corpus challenge.[174] Permitting the same decision maker to render a final judgment and later to review preliminary elements of that judgment is, to put it mildly, a bizarre procedure. In both of these scenarios, particularly the second, efficiency gains are not substantial enough to justify the prejudgment risks.[175]

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174. *See* David v. Attorney General, 699 F.2d 411 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983). In *David*, the accused claimed that the procedure violated 28 U.S.C. § 455(a), requiring disqualification of a federal judge whose impartiality might reasonably be questioned. *Id.* at 413. The court of appeals found no violation of the statute. *Id.* at 416. The court of appeals also held that 28 U.S.C. § 47 was inapplicable; the court ruled that this statute, which prohibits a federal judge from reviewing his own prior decision, applies only to direct appeals and not to collateral attacks such as habeas corpus. *Id.* at 417-18 & n.8.

175. Pangburn v. Civil Aeronautics Bd., 311 F.2d 349 (1st Cir. 1962), provides another example of sequential judging probably not justified by efficiency gains. After the crash of a commercial airliner (involving no deaths, but the plane was destroyed), the federal CAB conducted a statutorily required investigation for the purpose of determining the accident's probable cause and making recommendations for change in conditions, practices, or facilities. *Id.* at 350. The CAB issued a public report as it was required to do. *Id.* at 351. At the same time, the Federal Aviation Administration (FAA) instituted a proceeding under another statutory provision to determine whether the pilot's certificate should be modified, suspended, or revoked. *Id.* at 350-51. In the CAB proceeding, that agency conducted public investigative hearings and issued a report which found that pilot negligence was the probable cause, with some conditions at the airport possibly contributing. *Id.* at 352. The report recommended certain changes at the airport. This report was provided to the FAA. The FAA conducted a hearing and suspended the pilot's certificate for 90 days. *Id.* at 351. Under the statute governing the FAA's proceeding, its decision was reviewable by the CAB. *Id.* The CAB reviewed the FAA's decision and upheld it. *Id.* Although the CAB expressly stated that it was not taking its earlier report into account, is it realistic to expect that the CAB could avoid doing so unless none of the same individuals were involved in the later decision who were involved in the initial proceeding? That first CAB proceeding, while nominally investigative in nature and having a hybrid legislative-adjudicative objective, produced a publicly announced decision regarding adjudicative facts and the legal characterization of those facts; these facts and their legal characterization were central to the FAA's decision. Thus, unless (1) none of the CAB employees were involved in both making the initial decision and reviewing the FAA decision and (2) there was a complete separation and lack of communication between these previously and subsequently involved individuals, the CAB was reviewing its own prior decision. However, the court of appeals viewed this as a mere combination of investigative and judging functions, which does not violate due process in the administrative agency context. *Id.* at 356. (As noted before, function combinations are not analyzed in this article, but are briefly referred to *infra* at text accompanying note 188.). The circumstances in *Pangburn* presented much more than a combination of investigative and judging functions, of course, because the CAB not only investigated initially but also made a formal, publicized judgment that the pilot was negligent, which was the ultimate issue determined by the FAA and then reviewed by the CAB. *Id.* at 351. The court may well have been correct in concluding that the infringement of process values here did not rise to the level of a constitutional violation; however, the statutorily prescribed

4. Initial Decision Makers Forming Part of Reviewing Body

Several other examples of questionable sequential judging involve reviewing bodies that include among their membership one or more of the initial deciders.[176] In such cases, one might argue that the system

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procedure seems to reveal suboptimal process-value balancing by Congress.

176. *See, e.g.*, Duffield v. Charleston Area Medical Ctr., Inc., 503 F.2d 512 (4th Cir. 1974). In *Duffield*, a surgeon challenged a hospital's withdrawal of his staff privileges. *Id.* at 514. The court of appeals held that due process applied because of substantial government regulation and funding. *Id.* at 517-18. It concluded, however, that there was no violation of due process in a procedure by which several members of the hospital governing board that had made the initial decision subsequently sat with others on the Joint Conference Committee that made the final decision. *Id.* at 518-19. *See also* Wilson v. Lincoln Redevelopment Corp., 488 F.2d 339 (8th Cir. 1973). In *Wilson*, a tenant was evicted by a three-member panel (officers of the corporation) from a low- and moderate-income housing complex. *Id.* at 340. Her lease was terminated for breach of lease conditions—a disturbance in which a shot was fired and police were called. There was some question about her involvement in the incident. *Id.* at 342 n.6. She sued under 42 U.S.C. § 1983 for violation of a constitutional right (procedural due process) under color of state law, claiming that the corporate owner-operator of the housing complex was a quasi-public entity because of both state subsidies and federal financing. *Id.* at 340 n.1. Her claim was that one officer of the corporation had participated in development of the evidence and had then joined with another officer in a two-person preliminary decision to evict. *Id.* at 342-43. These two were later joined by the president of the corporation in a final three-member decision panel. *Id.* at 342. The court of appeals questioned the district court's conclusion that there was sufficient state action for the Constitution to apply, but assumed arguendo that it did apply and concluded that the procedure did not violate due process. *Id.* at 340 n.1. Here, again, the procedural deficiencies may not have reached constitutional proportions, and no extant statutory standards were offended, but designers of the system probably could have done a much better job of optimizing process values.

Similarly, in Intercontinental Indus., Inc. v. American Stock Exch., 452 F.2d 935, 937 (5th Cir. 1971), *cert. denied*, 409 U.S. 842 (1972), a company's stock was delisted by the American Stock Exchange (AMEX). The stock exchange had no rules specifying the procedures to be employed in a delisting case; these procedures were set on an ad hoc basis. *Id.* at 940-41. At the time of this case, there was no legal requirement that exchanges have predetermined procedures for delisting. *Id.* In this particular case, an initial hearing had been conducted by AMEX's Committee on Securities; although denominated an investigative hearing, in actuality it was a full adversarial one. *Id.* at 942. The Committee made a recommended decision and then participated with the AMEX board as a final decision-making body. *Id.* at 942-43. Although the subject of this decision was the filing of a delisting application with the SEC, it was in fact a final adjudicative determination—the exchange makes the delisting decision, and the SEC then merely determines whether any additional actions are necessary to protect investors. Since 1975, the SEC also determines whether the exchange has followed its own rules, and may postpone the delisting for up to 60 days, but the merits of the exchange's delisting decision are not reopened. Securities Exchange Act of 1934, § 12(d), 15 U.S.C. § 78*l*(d) (1988); SEC Rule 12d2-2(c), 17 C.F.R. 240.12d2-2(c) (1991). The court of appeals held that procedural due process did apply to AMEX's delisting decision because the exchange operated pursuant to substantial delegated governmental power, and that the ad hoc

could have provided for no appeal at all, and that by permitting review by a body composed of some original and some new deciders the procedure commendably adds independent minds. From a purely legalistic perspective the argument is substantially valid. Even in the case of decisions to which procedural due process applies, i.e., governmental adjudicative actions, there is no guaranteed right to appellate or other form of review.[177] From a process value perspective, however, the argument contains a significant element of sophistry. Appeals exist for a purpose. Providing a mechanism for error correction generally promotes all process values, unless it is carried to an extreme.[178] This is the reason that some form of review is a statutorily required feature of most systems that produce decisions significantly affecting rights and obligations. There may be circumstances in which exigencies of time or resources may leave room for little or no review, but these are unusual. Moreover, providing for a review mechanism that really does not incorporate a realistic chance of error correction may be worse than providing for no review at all, because of the subjective consequences of disappointed expectations. These consequences may offset much of the good done by adding independent minds.

3. Prejudgment of Adjudicative Facts Implicit in Decision Maker's Conduct

Prejudgment may be inferred from the decision maker's conduct. Although implicit prejudgment may relate to policy/law or facts, it usually involves either the latter alone or a combination of the former and the latter. Cases in which prejudgment is seriously suggested by circumstantial evidence normally do not relate to policy/law alone. Although it is possible for these cases to involve facts at any point along the legislative-adjudicative continuum, in reality it is almost always adjudicative facts that are involved. As a consequence, this discussion does not subdivide implicit prejudgment as was done with explicit prejudgment, even though it is theoretically possible to do so.

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procedure employed in this case was sufficient to comply with due process. *Id.* at 941-43. With respect to the initial decision makers' sitting with the AMEX board as a final judging body, the court erroneously viewed the question merely as one of combining investigative and judging functions, and concluded that such combinations are permissible in the administrative domain. *Id.* at 943. In reality, however, this was more than an investigative-judging combination, because the initial decider did much more that just investigate—it conducted a full adversarial hearing and made a *decision.*

177. Ross v. Moffit, 417 U.S. 600 (1974).

178. Appeal or other review mechanisms are extreme, and thus counterproductive, when (1) they harm efficiency more than they enhance other process values by demanding more resources than is necessary to promote these other values, or (2) harm the initial decision maker's motivation by diluting the actual or perceived value of his work.

Most of the consequences for process values are the same whether the prejudgment is explicit or implicit. The effects on accuracy and other objectively definable values will normally be the same; we are essentially dealing with the same problem identified by different evidence. One possible substantive difference is that face-saving is not likely to harden belief perseverance when there has been no explicit commitment to a position. In addition, implicit prejudgment is ad hoc in character, and thus cannot be designed out of a system in the same manner as a structural condition.

One example of implicit prejudgment may be found in a decision maker's failure to consider all or most of the relevant evidence prior to deciding. This was the primary issue in the first of the famous series of *Morgan* cases.[179] The clear inference in such a case is that evidence-taking is a sham, and that the decider is actuated by factors other than those ostensibly the subject of the proceeding. As with other kinds of ad hoc prejudgment, however, the fact that a decision maker has not really considered the evidence before deciding is likely to be revealed only by happenstance. The *Morgan* cases were decided prior to the introduction of meaningful procedural regularity into the work of federal administrative agencies, and most decision makers today are not likely to be so unsophisticated as to allow a clear revelation of their disregard of the evidence.

Parties who are consistently on the losing end of a long series of rulings sometimes argue that an inference of prejudgment or other bias

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179. *See* Morgan v. United States (*Morgan I*), 298 U.S. 468 (1936). In *Morgan*, a proceeding by the Department of Agriculture for market agencies at the Kansas City stockyard, the procedure began with an adjudicative-type hearing before an examiner. *Id.* at 472. The hearing examiner prepared no report to which exceptions could be made. *Id.* Written briefs and oral arguments were required to be directed to two Acting Secretaries who had been appointed by the Secretary for this purpose. *Id.* at 476-77. These two heard oral arguments, and they and other employees of the department conferred ex parte with the Secretary. *Id.* The Secretary then adopted findings of the two subordinates and signed an order that they prepared. The plaintiffs then sued for an injunction, claiming that the Secretary did not hear or read any evidence, arguments or briefs. *Id.* at 478. The district court struck these allegations. *Id.* The Supreme Court reversed, holding that the plaintiffs should have an opportunity to prove the allegations; if proved, the allegations would show a violation of the "full hearing" requirement in the pertinent statute. *Id.* at 479-80. The Court said that the Secretary could have delegated to a subordinate the responsibility of hearing evidence and making a decision. *Id.* at 478-79. But here the examiner who heard the evidence made no decision. *Id.* at 479. The two Acting Secretaries did not hear the evidence, but merely heard oral arguments and read briefs (not transcripts). *Id.* It could be argued that they were really the decision makers, because they prepared findings and a rate order that was reviewed by the Secretary. The main problem, however, aside from the ex parte communications that constitute a separate form of biasing influence, was the almost complete divorcement of evidence from decision.

should be drawn from the decision maker's conduct. Regardless of the legal standard being employed, courts almost always reject an inference of bias based solely on a sequence of unidirectional rulings.[180] Most of these claims are based on a series of evidentiary rulings, as when an ALJ or a trial judge, hearing the case without a jury, uniformly credits the testimony of one side's witnesses and uniformly discredits the other's.[181] It is possible to envision a situation in which a series of unidirectional rulings might, by itself, create a strong suggestion of prejudgment or other biasing influence, such as when the number of evidentiary rulings is large, the rulings are totally one-sided, and the evidentiary conflicts actually present very close questions. Despite this possibility, the courts' general unwillingness to draw such an inference is correct. Otherwise, those asserting frivolous claims or defenses would be given a potentially powerful tool with which to delay their adverse outcome and impose additional costs on their adversaries, thus unfairly increasing their bargaining leverage for all the wrong reasons. Given this danger, when the rulings are evidentiary in nature, any problem of prejudgment or other implicit bias can be adequately dealt with indirectly through traditional standards of evidentiary review: either the factual findings are supported by evidence in the record or they are not.[182] This assumes,

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180. *See* NLRB v. Pittsburgh Steamship Co., 337 U.S. 656, 659-60 (1949). Disagreeing with the court of appeals, the Supreme Court in *Pittsburgh Steamship* held that the making of all rulings in one direction was not enough, by itself, to show bias of a serious enough nature to violate due process. *Id.* at 659. The Court then observed, however, that a careful examination of the transcript actually revealed a thoughtful and discriminating evaluation of the evidence by the hearing examiner and the NLRB rather than totally one-sided fact-finding. *Id.* at 660.

The Supreme Court in *Pittsburgh Steamship* quoted and relied on the reasoning of NLRB v. Robbins Tire & Rubber Co., 161 F.2d 798, 800 (5th Cir. 1947), where the court of appeals stated:

> The fact alone . . . of which Respondent makes so much, that Examiner and Board uniformly credited the Board's witnesses and as uniformly discredited those of the Respondent, though the Board's witnesses were few and the Respondent's witnesses were many, would not furnish a basis for a finding by us that such a bias or partiality existed and therefore the hearings were unfair. Unless the credited evidence . . . carries its own death wound, that is, is incredible and therefore, cannot in law be credited, and the discredited evidence . . . carries its own irrefutable truth, that is, is of such nature that it cannot in law be discredited, we cannot determine that to credit the one and discredit the other is an evidence of bias.

See also United States v. Mobile Materials, Inc., 881 F.2d 866, 877 (10th Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990); United States v. Panza, 612 F.2d 432, 440 (9th Cir. 1979), *cert. denied*, 447 U.S. 925 (1980); Jays Foods, Inc. v. NLRB, 573 F.2d 438 (7th Cir.), *cert. denied*, 439 U.S. 859 (1978).

181. *See* cases cited *supra* note 180.

182. *See, e.g.*, Local No. 3, United Packinghouse Workers v. NLRB, 210 F.2d 325 (8th Cir.), *cert. denied*, 348 U.S. 822 (1954). In *United Packinghouse*, the court of appeals denied enforcement of an NLRB order that had found an employer guilty

of course, the existence of a relatively formal adjudication on the record. These kinds of bias claims are less likely to be made in other decision-making contexts. Although less common, claims of implicit prejudgment also have been based on a series of unidirectional rulings involving issues other than the weighing of evidence. The attitude of the courts has been the same in these situations; without more, a series of rulings in one direction is simply not enough for an inference of bias.[183] Again, this seems to be the correct view because the danger of empowering those with frivolous claims or defenses is serious and review of the underlying rulings' merits should provide adequate protection.

When there is substantial circumstantial evidence of prejudgment or other bias in addition to sequential unidirectional rulings, a reviewing authority is more justified in inferring an absence of requisite impartiality. In such cases, the balance between the need to avoid equipping frivolous claimants with more tools and the protective adequacy of traditional substantive review is quite different. Suppose, for instance, that a first-level decision maker not only makes virtually all rulings in one direction but also takes the initiative to pull items from the record to create theories that were not raised or argued by the parties. Here, an inference of impermissible prejudgment is warranted. The decision maker seems to have forced the proceeding to fit his or her own preconceived theory.[184] One could characterize the decision maker's

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of discharging employees because of their union activities. *Id.* at 328. The employer had claimed that it discharged each of the employees because of their violent acts during a strike. *Id.* at 327. Although lack of substantial evidentiary support in the record was the court's legal basis for denying enforcement, it also held that the NLRB hearing examiner's bias was so evident as to remove the normal presumption of correctness. *Id.* at 330. Here, the series of unidirectional evidentiary rulings by the hearing examiner was not used as the basis for denying enforcement; the court found that the overwhelming evidence in the record flatly contradicted the examiner's fact findings. *Id.* The court found that not only the violent acts but also the identities of the fired perpetrators were clearly established. *Id.*

183. *See, e.g.*, Trotter v. International Longshoremen's Union, 704 F.2d 1141 (9th Cir. 1983). Under 28 U.S.C. § 455(a), the plaintiff in *Trotter* sought disqualification of a federal district judge on the grounds that his impartiality could reasonably be questioned because the judge had denied the plaintiff's application for a preliminary injunction without a hearing, dismissed the action without an order to show cause or other prior notice, dismissed pendent state claims, and acted without a hearing to deny a motion to vacate the order striking state claims. *Id.* at 1144. The court of appeals rightly found no grounds for disqualification. *Id.*

184. NLRB v. Tamper, Inc., 522 F.2d 781 (4th Cir. 1975). In *Tamper*, the court of appeals denied enforcement of that part of the NLRB's order involving two issues that the ALJ raised, apparently to fit his preconceived theory. *Id.* at 789-90. No due process claim was made; the court said that the ALJ's action might have raised a due process issue, but did not so decide. *Id.* at 789. The court's legal basis for denying enforcement was that the ALJ had "overstepped the permissible scope of his duties," that is, had exceeded his authority. *Id.* at 790.

actions as taking what was supposed to be an adversarial proceeding and turning it into a European-style inquisitorial one, in which the judge not only has authority to make a decision but also controls the process to a much greater extent than in the adversarial system. The decision maker in the inquisitorial model may have the power to determine which issues are to be raised, to control the investigation and evidence-gathering process (usually through investigators answering to the court), and to exercise initiative to superintend the questioning of witnesses and other aspects of evidence presentation.[185] An inquisitorial model of adjudicative decision making can certainly serve process values as well as (some would argue better than) our traditional adversary system, so long as the parties are permitted competent representation and a meaningful opportunity to provide their factual and legal input.[186] The problem in the scenario pictured above is that everyone expected and prepared for an adversarial proceeding.

A variety of other situations may be envisioned in which circumstantial evidence might suggest that the decision maker has prematurely made up his or her mind for one reason or another. Such an inference could be warranted, for example, if the decision maker apparently manipulated notice of hearings, time limits for preparation, or other procedural details so as to clearly disadvantage one party.[187]

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185. *See, e.g.*, Ellen E. Seward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 313-16 (1989).

186. One may find many scholarly and practical critiques of the adversarial model of adjudicative decision making that focus on its various failures to achieve certain basic procedural goals, such as accuracy. *See, e.g.*, MARVIN E. FRANKEL, PARTISAN JUSTICE (1980); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 MINN. L. REV. 1 (1984); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906). Of course, one also can find defenders of the adversarial model. *See, e.g.*, STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE (1984); Lon L. Fuller, *The Adversary System, in* TALKS ON AMERICAN LAW 34 (Harold J. Berman ed., 1972).

187. *See* Brotherhood of Locomotive Firemen & Enginemen v. United States, 411 F.2d 312 (5th Cir. 1969). In *Brotherhood of Locomotive Firemen*, the court of appeals found that this circumstantial evidence of bias, coupled with other procedural deficiencies, violated due process. *Id.* at 317-18.

United States v. Haldeman provides an example of a very unusual set of circumstances creating at least a colorable claim of prejudgment implicit in the decision maker's conduct. 559 F.2d 31 (D.C. Cir. 1976). That part of the case involving the issue of prejudgment arising from a series of sequential rulings in this and related proceedings was discussed previously. *See supra* note 172. Another claim, also rejected by the court of appeals, related to the possibility that Judge Sirica had developed a vested interest in cultivating a public image as a tough, aggressive law-and-order judge who would ultimately get to the bottom of the Watergate affair. *Id.* at 137. The basis for this contention was that the judge had become a media celebrity, including selection as Time Magazine's Man of the Year and being the

C. *A Note on Combinations of Decision-Making Functions*

It will be recalled that each of the three major types of function does involve decision-making authority and discretion. Although legitimate concern about decision-maker bias increases as the function moves from investigative to advocatory to judging, it is not just "judges" who make important decisions affecting the rights and obligations of others.

Combining decision-making functions can sometimes create a special case of prejudgment. Thus, one who performs an investigative or advocatory function may become too wedded psychologically to a position to properly perform the judging function. One example of ideological conviction used earlier in the article—when a law enforcement officer was temporarily placed on a judging body to review a driver license revocation decision—could actually be included in a separate discussion of function combinations. Any attempt to isolate particular forms of decision-maker bias necessarily involves the use of boundary lines that may be fuzzy at times. Also, some of the process-value considerations discussed earlier with respect to sequential judging are similar in the case of function combinations. There are, however, enough differences between the case of sequential decision making by a judging functionary and the case of function combinations to treat the latter as a distinct phenomenon. There are many possible permutations of function combination, and the necessary process-value analysis is rather complex. This article will not attempt to perform this analysis because it possesses sufficient distinctiveness and complexity to warrant separate treatment.[188]

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honoree at a large party sponsored by the news media on his seventieth birthday. *Id.* at 134-35, 137 n.340. Judge Sirica apparently had offered no resistance to the media's creation of this image. The defendants' claim that anything but a conviction would have undermined this cultivated image was not a trivial one. *Id.* at 137. However, to have disqualified the judge would have entailed enormous efficiency costs based on a colorable but still speculative claim of bias. The case actually may have come close to being *sui generis*, but a judge with appropriate sensitivity to process values probably would not have permitted himself to become such a celebrity. He did not have complete control over the media's cultivation of the tough-guy image, but he surely had some control.

188. The law's treatment of function combinations is ably analyzed elsewhere. *See, e.g.*, DAVIS, *supra* note 6, at §§ 18.1-.6, .8; Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981); William F. Pedersen, Jr., *The Decline of Separation of Functions in Regulatory Agencies*, 64 VA. L. REV. 991 (1978); Ronald D. Rotunda, *The Combination of Functions in Administrative Actions: An Examination of European Alternatives*, 40 FORDHAM L. REV. 101 (1971). An analysis of the legal status of function combinations, like a process value analysis of such combinations, is beyond the scope of this article. From the legal perspective, suffice it to say that the law of function combinations lacks the coherence we would wish. Briefly, in the administrative agency context, any

V. OTHER FACTORS EFFECTING POTENTIAL HARM TO PROCESS VALUES

A. *Cumulative Effects*

In this article, I have isolated certain classes of biasing influence for the purpose of sensitizing those who design or evaluate decision systems, and those who review the decisions emanating from them, to the risks that these influences can create for process values. As noted in the Introduction, however, many of the cases from which illustrative examples were drawn involved more than one source of potential bias. When designing or evaluating a decision system as a whole, the cumulative effect of multiple biasing influences must be taken into account. Although one source of bias may be relatively inconsequential when considered alone, it may cause an intolerable infringement of process values when considered aggregately with other sources of bias present in the system.

B. *Decision-Making Forms and Functions*

As previously noted at several points, the form of the decision-making procedure and the function of the possibly biased decision maker are always important to an analysis of process values. The distinctions between (1) legislative and adjudicative kinds of proceedings, (2) issues of policy/law and fact, (3) adjudicative and legislative types of factual issues in either an adjudicative or legislative proceeding, and (4) investigative, advocatory, and final deciding (judging) functions must be taken into account in any situation in which a serious question of process-value optimization is presented.

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combination of decision-making functions is very unlikely to ever violate procedural due process. *See* DAVIS, *supra* note 6, at §§ 18.1-.6, .8. On the other hand, combinations run a greater risk of violating due process when the final decider occupies a more traditional judicial role, where party expectations and other factors relevant to process values can be significantly different than in the administrative setting. *See, e.g., In re* Murchison, 349 U.S. 133 (1955) (state trial judge serving as a "one-man grand jury" and performing all three types of decisional functions held to violate due process); *In re* Oliver, 333 U.S. 257 (1948) (same, with added negative factor of secrecy). Constitutional due process aside, in the case of federal administrative agencies, the APA prohibits combinations of investigative or advocatory functions with judging functions. 5 U.S.C. § 554(d) (1988). The prohibition affects but a small portion of agency decision making, however, because it applies only to formal adjudication and not to rulemaking or informal adjudication. *Id.* Even if a proceeding is formally adjudicative, the APA's separation of functions requirement applies only to staff, not to agency members themselves, and has no applicability to licensing or rate-making actions. *Id.*

C. *Managerial Model*

Decisions made in a managerial context sometimes warrant special consideration. In other words, when the decision maker is the superior of the affected party in an organization, several aspects of the relationship can be relevant to an analysis of process values. The decision maker in such a case often will be unavoidably intimate with the factual details leading up to the dispute, thus legitimating certain potential instances of prejudgment that otherwise might be offensive. In addition, the need to maintain the authority of the decision maker may be sufficiently important to the organization's ability to pursue its mission efficiently and effectively that certain features of the decision-making system may pass muster in a process-value analysis more easily than in other situations.

D. *Volume and Relative Routineness of Decisions*

Some decisional systems are designed to handle relatively few disputes that possess unique attributes, the resolution of which produce very serious consequences for affected parties. Others are designed to handle a large volume of relatively similar disputes that produce less serious consequences. Viewing decision systems from this perspective, they fall along a continuum with an almost infinite number of points between the extremes. In any given situation, the importance of a system's location on this continuum relates to the weight that efficiency should be given in attempting to optimize the various instrumental and noninstrumental process values.

VI. CORRECTIVE MEASURES

A. *General Procedural Safeguards*

When it is possible to do so, the best corrective technique for decision-maker bias is always to purge the system of the biasing influence. The use of a decision maker completely untainted by any hint of excessive ideological conviction, prejudgment, emotional or economic stake, or other biasing influence is necessarily the ideal to be sought. When this ideal cannot be achieved, the various mechanisms available for alleviating the effects of the biasing influence necessarily entail resource expenditures that would be unnecessary, or at least much less necessary, if the bias could be completely purged. Obviously, however, a complete purging of biasing influences is often not possible, thus necessitating corrective measures.

Many of the corrective mechanisms consist of features easily recognizable as being common attributes of a decision system that has been designed with a view toward procedural regularity. These include

requirements that (1) affected parties be given an opportunity to present evidence and arguments that are meaningful under the circumstances, (2) the decision maker provide reasons for the decision that tie the applicable policies, principles, or rules to the evidence and arguments presented in this particular decision-making exercise, and (3) a higher-level review of the initial decision be available that is of sufficient thoroughness to comport with (a) the importance of the affected party's and the decision-making institution's interests and (b) any unavoidable deficiencies in the impartiality of the first-level decider.

B. *Involvement of Other Minds*

A number of other corrective measures also may be feasible. For example, whenever a decider's objectivity is subject to question and the biasing influence cannot be completely purged, the involvement of other independent minds in the decisional process cannot help but diminish the effect of the biasing influence. Other independent intellectual and moral agents not only can help us recognize our biases but also can present alternative ways of thinking that may counter a biased state of mind.

C. *Communication*

When a particular source of bias is unavoidable, complete communication to affected parties about the facts creating this condition can be of immeasurable value in helping them prepare for countering the bias. While affected parties frequently will realize that something is amiss, they may not always understand the exact nature or full extent of the bias. Decision makers themselves are not always fully cognizant of a biasing condition. In any event, the parties and the decision maker are not likely to have identical understandings of the condition, its causes, and the reasons for its incomplete remediation. An imbalance in knowledge, assumptions, and expectations can only exacerbate the harm to process values. As discussed earlier, the appearance of fairness, which is partly dependent on the expectations of those involved, has substantial independent value. A designer or evaluator of a legal decision system, if properly sensitized to the many forms of premature judgment or other biasing influences, may be able to incorporate communication mechanisms into the system that place all participants on an equal plane of knowledge, assumptions, and expectations.

D. *Choices*

There also may be situations in which an affected party may be given a choice among decisional procedures, each possessing different attributes that may be weighed. In other words, it may be possible to permit an affected party to engage in his or her own process-value analysis at the outset. For example, a customer asserting a claim against

a commodity futures broker has a choice of asserting the claim in state or federal court, a reparations proceeding conducted by the Commodity Futures Trading Commission, or legally binding arbitration. Each involves a different mix of attributes. Although the selection of arbitration may involve the use of decision makers whose long experience in the commodity futures business may predispose them one way or the other, the customer and broker each have a role in picking the arbitrator, the expertise of the arbitrator may produce a more accurate and expeditious decision, and the process itself may possess certain positive attributes such as lower cost and greater finality. In any event, the most important factor is that the customer has a choice, and his or her consent legitimates the selected procedure from his or her perspective regardless of its particular deficiencies.[189]

VII. CONCLUSION

Although there are many possible sources of decision-maker bias, this article has focused on two related classes—decision-maker ideology and premature judgment. Beginning with the ideological predilections possessed by all informed and thoughtful people, I have proceeded to other, more serious problems associated with decision-maker ideology, and then to still more harmful manifestations of premature judgment, including the ad hoc and the structural, the explicit and the inferred. I have employed process values—the goals that decisional procedures should seek to promote—as the normative basis for evaluating the potential negative effects of ideology and prejudgment. Although some of the questionable mental states and some of the system structures that

189. In this example, of course, complete legitimation of the procedure would require the bargained-for agreement of both customer and broker. It has been held that the broker consents to whatever choice the customer might make when he or she registers as a member of a commodities exchange. *See* Geldermann, Inc. v. Community Futures Trading Comm'n, 836 F.2d 310 (7th Cir. 1987), *cert. denied*, 488 U.S. 816 (1988). The question in *Geldermann* pertaining to the broker's consent did not arise in the context of a decision maker bias issue, or any other issue within the purview of the Due Process Clause, but rather involved the broker's claim that he had been denied the right to a decision by an Article III tribunal and the right to a jury trial. *Id.* at 316. The Seventh Circuit concluded that he had waived such claims not only by his registration as a broker, thus subjecting him to the laws and exchange rules permitting a customer to choose one of the several dispute resolution procedures, but also by his belated assertion of a challenge to the customer's choice. *Id.* at 321. The first basis for decision, waiver by registration as a broker, does not represent real consent. The second basis for decision does represent at least a legitimate substitute for real consent. In any event, from the customer's perspective the choices provided are illustrative of how a party's selection from an array of procedural alternatives may legitimate a process regardless of any deficiencies it might possess. For a general discussion of the resolution mechanisms available in commodity customer-broker disputes, see Allison, *supra* note 89, at 43-48.

can encourage them are inevitable, many are not. When they are not inevitable, system designers and evaluators should seek to purge them.

Even to the extent that predisposed mental states and the structures that nurture them are unavoidable, however, it is of great importance that they be recognized and understood for what they are. When biasing influences cannot be purged from a decisional system, the mere recognition and understanding of them can have many salutary effects. System designers are more likely to build corrective devices into the system when they recognize and understand the potential effects of various biasing influences. Sincere, conscientious decision makers themselves are more likely to engage in various self-correcting behaviors if they are fully aware of biasing influences and their likely effects on instrumental and noninstrumental process values. Parties affected by decisions will be better equipped to prepare for, and at least partially counter, various kinds of predisposition and prejudgment if they are fully cognizant of their presence, source, and probable effects.

COMMENTS

Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources: Solid Waste Management and the Dormant Commerce Clause

I. INTRODUCTION

> [W]hile many are willing to generate waste—indeed, it is a practical impossibility to solve the waste problem by banning waste production—few are willing to help dispose of it. Those locales that do provide disposal capacity to serve foreign waste effectively are affording reduced environmental and safety risks to the States that will not take charge of their own waste.[1]

The Supreme Court's recent decision in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources* declared that a state's comprehensive and exhaustive efforts to solve its own solid waste management problems violated the Commerce Clause of the United States Constitution.[2] The Court thus reaffirmed *Philadelphia v. New Jersey*,[3] implying that states cannot simply close their doors to the problems of others. The ensuing result of the Court's ruling is that "cheap-land States [will inevitably] become the waste repositories for their brethren, thereby suffering the many risks that such [landfill] sites present."[4]

Michigan's Solid Waste Management Act (MSWMA)[5] was established pursuant to a Congressional finding outlining the environmental and

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1. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2028 (1992) (Rehnquist, C.J., dissenting).

2. *Id.* *See infra* notes 142-80 and accompanying text; *see also infra* text accompanying note 21 (containing the text of the Commerce Clause).

3. 437 U.S. 617 (1978); *see infra* notes 73-89 and accompanying text (discussing *Philadelphia*).

4. *Fort Gratiot*, 112 S. Ct. at 2030 (Rehnquist, C.J., dissenting).

5. MICH. COMP. LAWS ANN. §§ 299.401-.437 (West 1984 & Supp. 1991).

health dangers presented by inadequate solid waste disposal and planning.[6] The Michigan legislation requires each county in the state to adopt and periodically update a solid waste management plan that would forecast the amount of waste the county will generate and provide for its appropriate disposal.[7] The MSWMA contains two provisions that allow individual counties to exclude out-of-county garbage if they deem such action essential for the effective operation of their waste management.[8] Although these Waste Import Restrictions apply to both in-state and out-of-state interests,[9] the Supreme Court nevertheless ruled they were in conflict with the Commerce Clause.[10]

Part II of this Comment explores the development of relevant Dormant Commerce Clause[11] principles. Parts III and IV discuss their application to various types of state actions.[12] In Part V, situations are described in which states are constitutionally permitted to curtail interstate activities in order to serve the public's health and safety interests.[13] Part VI summarizes the facts of *Fort Gratiot*[14] and the disposition of the case in the lower federal courts,[15] and a synopsis of Justice Stevens's majority opinion[16] and Chief Justice Rehnquist's dissent[17] is followed by an analysis of their reasonings in Part VII.[18] This Comment concludes that the Court has abandoned one of two constitutional tests it developed to analyze Dormant Commerce Clause concerns, and furthermore, that the Court has ignored state concerns about uncontrolled waste importation.

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6. *See* 42 U.S.C. 6901 (1988); *see also infra* note 298.

7. MICH. COMP. LAWS ANN. § 299.425(1) provides:

> Each solid waste management plan shall include an enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas.

8. MICH. COMP. LAWS ANN. §§ 299.413(a), .430(2); *see infra* note 118 (containing text of the provisions).

9. *See infra* note 118.

10. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2028 (1992).

11. *See infra* notes 19-29.

12. *See infra* notes 30-101 and accompanying text.

13. *See infra* notes 102-10 and accompanying text.

14. *See infra* notes 111-23 and accompanying text.

15. *See infra* notes 124-41 and accompanying text.

16. *See infra* notes 142-80 and accompanying text.

17. *See infra* notes 181-202 and accompanying text.

18. *See infra* notes 203-303 and accompanying text.

II. THE PRINCIPLE OF THE DORMANT COMMERCE CLAUSE

The Framers of the United States Constitution were primarily concerned with the "economic warfare between the states" and worried that such hostility was "a threat to the unity of the nation."[19] When a state seeks to isolate itself, and thereby protect its own interests, it hampers the overall stability and commercial integrity of the entire country.[20] In response to these concerns, the Framers developed the Commerce Clause of the Constitution, which grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[21] Even though the Commerce Clause expresses authority which Congress may actively pursue, it "also directly limits the power of the States to discriminate against interstate commerce."[22]

The recognition of this "negative" or "dormant"[23] aspect of the Commerce Clause arises when a state attempts to regulate interstate commerce in the absence of any significant congressional intent to the

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19. James Hinshaw, *The Dormant Commerce Clause After* Garcia*: The Application to the Interstate Commerce of Sanitary Landfill Space*, 67 IND. L.J. 511, 520 (1992). The Supreme Court has noted that:

> The few simple words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.

Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979).

20. *See* Hinshaw, *supra* note 19, at 521.

21. U.S. CONST. art. I, § 8, cl. 3.

22. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273 (1988). *See* Wyoming v. Oklahoma, 112 S. Ct. 789, 800 (1992) ("It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce."); Maine v. Taylor, 477 U.S. 131, 137 (1986) ("Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade."). *See also* Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245, 248 (3d Cir. 1989) (citation omitted) ("The commerce clause has been so construed in order to preserve 'our national solidarity' by preventing the rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation . . . .'").

23. *See, e.g.*, Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2023 (1992); New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273 (1988); David Pomper, *Recycling* Philadelphia v. New Jersey: *The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309, 1313 (1989).

contrary.[24] The Dormant Commerce Clause "prohibits economic protectionism–that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[25] Although a state "may [not] attempt to isolate itself . . . by raising barriers to the free flow of interstate trade,"[26] it does retain powers to police the general welfare of its inhabitants.[27] Further, in exercising its police powers, a state may enact legislation, in the face of congressional silence, which will nevertheless bear some adverse affect on interstate commerce.[28] Determining when state legislation is a valid exercise of its police powers or when it is an attempt to protect its own citizens from national competition has proven to be a tedious effort for the Supreme Court.[29]

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24. Hughes v. Oklahoma, 441 U.S. 322, 326 (1979).

> These issues arise when Congress has not asserted its control over that interstate activity by addressing it in any form. Accordingly, Congress' intentions are unknown. Because the text of the Constitution is silent regarding this dilemma, the Court has developed the dormant commerce clause doctrine to guide states' activities in this important area.

Hinshaw, *supra* note 19, at 518. The Dormant Commerce Clause, which has been implied by the courts to exist, has therefore become a common law doctrine rather than a constitutional one. Pomper, *supra* note 23, at 1313.

25. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74 (1988).

26. Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2012 (1992). *See also* Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978); Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951).

27. *See* H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949).

> This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.

Id.

28. *See* Maine v. Taylor, 477 U.S. 131, 138 (1986) (citation omitted) ("[T]he States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."); Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("[I]ncidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people."); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977) (citation omitted) ("[T]here is a residuum of power in the state to make laws governing matters of local concern which . . . affect interstate commerce or even, to some extent, regulate it."); H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 531-32 (1949) ("[T]he State [has broad power] to protect its inhabitants against perils to health or safety . . . even by use of measures which bear adversely upon interstate commerce.").

29. *See infra* notes 30-89 and accompanying text.

III. CASES DEVELOPING THE VARIOUS DORMANT COMMERCE CLAUSE TESTS

The formulation of appropriate and adequate constitutional standards for Dormant Commerce Clause issues has had a sporadic development in the Supreme Court. The central premise in the Court's synthesis is that a state may not create trade barriers solely for the purpose of enhancing its own economy.[30] In placing this theme into context, however, one commentator has concluded that the Court "has failed to generate the kind of consistent, principled decisionmaking that is essential to the orderly development of constitutional law."[31] As the following section will illustrate, the Court has confronted the concerns of the Dormant Commerce Clause, but has done so by adopting several constitutional tests.

A. *Dean Milk Co. v. Madison*

In *Dean Milk Co. v. Madison*,[32] the Supreme Court struck down a Madison city ordinance which required any milk sold in the city to be pasteurized within five miles of the city's center.[33] While the Court was willing to accept that the quality of milk was a "matter . . . which may appropriately be regulated in the interest of the safety, health and well-being" of the citizens of the city,[34] it invalidated this particular regulation because it discriminated against interstate commerce despite the availability of "reasonable and adequate alternatives."[35] The finding that Madison's sole purpose in enacting the ordinance was to protect the

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30. *See supra* notes 25-26 and accompanying text.

31. Earl M. Maltz, *How Much Regulation Is Too Much–An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 89 (1981). *See also* Hinshaw, *supra* note 19, at 522-23 (suggesting that the Court lacks the ability to sufficiently address Dormant Commerce Clause matters).

32. 340 U.S. 349 (1951).

33. *Id.* at 356. The Court disposed of Madison's argument that the ordinance applied not only to out-of-state milk but to Wisconsin milk as well. *Id.* at 354 n.4. "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id. But see infra* notes 227-32 and accompanying text.

34. *Dean Milk*, 340 U.S. at 353.

35. *Id.* at 354. The dissent criticized the Court for basing its rejection of the Madison ordinance on the "reasonable alternative" concept. *Id.* at 358 (Black, J., dissenting). The dissent intimated that the majority encroached upon legislative duties. *Id.* at 359. "[T]he Court should not strike down local health regulations unless satisfied beyond a reasonable doubt that the substitutes it proposes would not lower health standards. I do not think that the Court can so satisfy itself on the basis of its judicial knowledge." *Id.* The dissent further contemplated that "[s]urely the Court is not resolving this question by drawing on its 'judicial knowledge' to supply information as to [reasonable alternatives]." *Id.*

financial security of those pasteurizing plants within five miles of the city was essential to the Court's ruling.[36]

The *Dean Milk* Court concluded that in order for a local law to stand up against burdens imposed upon interstate commerce, it must be directed toward legitimate health and safety concerns which cannot adequately be addressed by "reasonable nondiscriminatory alternatives."[37] This standard adopted by the Court discounted the principle that a local legislation may withstand Dormant Commerce Clause challenges simply because it deals with health and safety measures.[38]

B. *Pike v. Bruce Church, Inc.*

After establishing the *Dean Milk* test for state laws that affirmatively discriminated against interstate commerce, the Supreme Court next considered the validity of state statutes which regulated commerce intrastate as well as interstate, i.e., evenhandedly.[39] The appropriate Commerce Clause standard was outlined in *Pike v. Bruce Church, Inc.*:[40]

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[41]

The Arizona statute at issue in *Pike* required all cantaloupes grown in Arizona to be packaged within the state.[42] The state claimed that the in-state packaging requirement assured the quality of Arizona cantaloupes and prevented growers from exporting below standard melons.[43] The Court concluded, however, that the burden on interstate commerce outweighed the furtherance of the state's interest and struck down the statute.[44] It distinguished Arizona's desire to prevent inferior produce

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36. *Id.* at 354. "In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce." *Id.*

37. *Id.*

38. *Id.*

39. Even though the Madison ordinance in *Dean Milk* affected both in-state and out-of-state commerce, the Court decided the statute it was confronted with was not an attempt to regulate in an evenhanded fashion. *See supra* note 33.

40. 397 U.S. 137 (1970).

41. *Id.* at 142 (citation omitted).

42. *Id.* at 138.

43. *Id.* at 143.

44. *Id.* at 146. The *Pike* standard allows the Court to balance the "local benefits" against the "burden imposed on [interstate] commerce." *Id.* at 142. Yet, this

from entering into interstate commerce and the statute's effect of preventing growers without in-state packing facilities from introducing high quality cantaloupes into the market.[45] The *Pike* Court even went so far as to suggest that Arizona's law was outright economic protectionism, which has consistently been held to be "virtually *per se* illegal."[46]

C. *Hunt v. Washington State Apple Advertising Commission*

Several years later, in *Hunt v. Washington State Apple Advertising Commission*,[47] the Supreme Court further refined the *Dean Milk* standard. In *Hunt*, the Court was concerned with a North Carolina statute requiring all apples sold inside the state to display only the requisite U.S. grade or standard.[48] North Carolina claimed a uniform grading system would assure its citizens of the quality of any apple bought.[49] The State of Washington complained, however, that by disallowing stickers signifying the origin of the apples, the regulation hindered the sale of its high quality apples in North Carolina.[50]

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approach might not be "much more flexible" than *Dean Milk*. *See* Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). For, even if the burden on interstate commerce is only incidental, if the local interest "could be promoted *as well* with a lesser impact on interstate [commerce]," the Court might not weigh the burden to see if it is "clearly excessive in relation" to the local interests. *Pike*, 397 U.S. at 142 (emphasis added). The Court might simply invalidate the statute because there are lesser discriminatory means available. *See id.* ("The extent of the burden that will be tolerated will of course depend on . . . whether it could be promoted as well with a lesser impact on interstate activities.").

45. *Pike*, 397 U.S. at 144. "[T]he evil of protectionism can reside in legislative means as well as legislative ends." Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978). "[Arizona] is not complaining because [Bruce Church, Inc.] is putting the good name of Arizona on an inferior or deceptively packaged product, but because it is not putting that name on a product that is superior and well packaged." *Pike*, 397 U.S. at 144. The Court noted that Arizona has a legitimate concern in protecting its own growers' reputations, but it may not accomplish this by protecting its own growers from outside competition. *Id.*

46. *Pike*, 397 U.S. at 145. The *Pike* Court laid out the constitutional test applicable when a state statute regulates even-handedly. *Id.* at 142. However, the Court also implied that the statute it was dealing with was not one that regulated evenhandedly, but was one that affirmatively discriminated against interstate commerce. *Id.* at 145.

47. 432 U.S. 333 (1977).

48. *Id.* at 335.

49. *Id.* at 349. The state argued that apples displaying various signs of quality, other than the U.S. grade, would cause confusion and frustrate the goal of providing quality apples to the public. *Id.*

50. *Id.* at 336. Washington State apples have grades equal to or above the U.S. standard. *Id.* Washington claimed that the effect of the North Carolina statute violated the Commerce Clause. *Id.* at 348.

The Court held that this statute affirmatively discriminated against interstate commerce.[51] The statute raised Washington's cost of doing business in North Carolina,[52] removed the competitive advantage Washington apples held in the market,[53] and allowed North Carolina apple growers to enjoy a competitive advantage at the cost of others.[54] When a state statute is shown to have such discriminatory effects, the Court said the burden shifts[55] to the "discriminating" state to demonstrate that the statute promotes legitimate local interests which could not be achieved by nondiscriminatory alternatives.[56] The Court concluded that North Carolina failed to meet its burden.[57] The *Hunt* Court affirmed the premise acknowledged in *Dean Milk*, but modified it by requiring the state to justify its law in the face of a Commerce Clause challenge.[58]

D. *Maine v. Taylor*

Almost a decade after *Hunt*, the Supreme Court upheld a state law against a Dormant Commerce Clause challenge. In *Maine v. Taylor*,[59] the Court initiated its inquiry into the validity of the state legislation by reiterating the several Dormant Commerce Clause standards espoused by the Court since 1951:

> [T]his Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local

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51. *Id.* at 350. Though it would seem that the North Carolina statute regulated evenhandedly, by requiring the same of in-state and out-of-state apples, the Supreme Court concluded otherwise and applied the stricter constitutional standard. *Id. But see infra* note 224.

52. *Hunt*, 432 U.S. at 351.

53. *Id.*

54. *Id.*

55. *Id.* at 353. The initial burden of showing discrimination against interstate commerce lies with the party challenging the validity of the statute. *See* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

56. *Hunt*, 432 U.S. at 351. In the *Pike* standard, there is no burden shifting. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Once the statute is shown to discriminate against interstate commerce, it will be upheld unless this burden outweighs the putative effects of the statute. *Id.* The state is not required, as in *Hunt*, to carry the burden of proving the statute's validity. *Id.*

57. *Hunt*, 432 U.S. at 354. The Court noted several nondiscriminatory alternatives which North Carolina might have chosen if its purpose was to protect the quality of apples sold within the state. *Id. But see* supra note 35.

58. The presumption of validity is withdrawn from the state statute once it is shown to have affected interstate commerce. *See supra* notes 55-56 and accompanying text.

59. 477 U.S. 131 (1986).

> benefits," . . . statutes in the second group are subject to more demanding scrutiny . . . . [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in its effect," the burden falls on the state to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.[60]

The Court declared that a Maine statute forbidding the importation of live baitfish did not offend the Commerce Clause.[61] The specific goal of the statute, as the Court recognized, was to protect Maine's native species from foreign parasites which might be found in imported shipments of baitfish.[62]

Though the Supreme Court held that the statute discriminated against interstate commerce on its face,[63] it accepted Maine's argument that the ban on importation served a legitimate local objective.[64] It also agreed that this concern could not be dealt with by nondiscriminatory alternatives.[65] The Court was not persuaded by the lower court's conclusion that nondiscriminatory methods of assuring the protection of Maine's baitfish could possibly be developed.[66] The remote possibility that a state's interests may be threatened justifies the state taking affirmative action rather than "to sit idly by and wait."[67] The Court also explained that the state should not be prevented from acting simply because its efforts might not prove to be totally successful.[68] The *Maine* Court concluded that "[a]s long as a State does not *needlessly* obstruct interstate trade . . . it retains broad regulatory authority to protect the

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60. *Id.* at 138 (citations omitted).

61. *Id.* at 152.

62. *Id.* at 133.

63. *Id.* at 138. Since the statute treated out-of-state baitfish differently from in-state baitfish, it affirmatively discriminated against interstate trade. *Id.*

64. *Id.* at 151.

65. The district court concluded that Maine met its burden of proving the statute's validity. *Id.* at 142. The court of appeals, however, reversed, stating that Maine did not establish that its interests could not be served as well by nondiscriminatory alternatives. *Id.* at 144. It noted several options which Maine could have relied upon. *Id.* The Supreme Court, though, "emphasized [that] appellate courts are not to decide factual questions *de novo*, reversing any findings they would have made differently." *Id.* at 145. The Court also noted, however, that "clearly erroneous" findings of fact by the trial court may appropriately be cast aside. *Id.*

66. *Id.* at 147. "A State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost." *Id.* *See supra* note 35.

67. *Taylor*, 477 U.S. at 148.

68. *Id.* at 151. The Court stated that "it is of little relevance that fish can swim directly into Maine from New Hampshire . . . . 'The impediments to complete success . . . cannot be a ground for preventing a state from using its best efforts to limit [an environmental] risk.'" *Id.* (citation omitted).

health and safety of its citizens and the integrity of its natural resources."[69]

IV. RELEVANT "GARBAGE" CASES

The Commerce Clause only governs interstate commerce and those objects which "are . . . *legitimate* subjects of trade . . . ."[70] However, as the Supreme Court duly observed, "*all* objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."[71] Therefore, those objects that are secured by the Commerce Clause must be defined as *legitimate* articles of trade.[72]

A. *Philadelphia v. New Jersey*

In *Philadelphia v. New Jersey*,[73] the Supreme Court announced that solid waste is a legitimate subject of commerce.[74] In so holding, the Court invalidated a New Jersey law prohibiting the importation and disposal of solid waste in the state.[75] The Court noted that New Jersey has "every right to protect its residents' pocketbooks as well as their environment[;]"[76] but that it cannot accomplish this goal through economic protectionism.[77] Since "the evil of protectionism can reside in legislative means as well as legislative ends[,]"[78] the Court reasoned that the legislative purpose behind the law was irrelevant to the present Commerce Clause analysis.[79]

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69. *Id.* (emphasis added). "'[T]he States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected.'" *Id.* at 138 (citation omitted).

70. Bowman v. Chicago & N. W. Ry. Co., 125 U.S. 465, 489 (1888) (emphasis added).

71. Philadelphia v. New Jersey, 437 U.S. 617, 622 (1978) (emphasis added).

72. *Cf. infra* notes 102-07 and accompanying text (states may enact legislation curtailing the importation of harmful objects).

73. 437 U.S. 617 (1978).

74. *Id.* at 622.

75. *Id.* at 629. The New Jersey statute provided that "[n]o person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except" certain garbage which was to be productively used. *Id.* at 618.

76. *Id.* at 626.

77. *Id.* at 627.

78. *Id.* at 626.

79. *Id.* This statement by the Court, that the legislative intent is immaterial, suggests that the Court might have predisposed of any attempt by New Jersey to demonstrate the validity of the law. For, nowhere in the opinion did the Court recognize that, once a statute is shown to facially or effectively discriminate against interstate commerce, the burden shifts to the state to establish that the law is aimed at legitimate local concerns which could not be achieved in a nondiscriminatory manner. The Court explained that the New Jersey law could either be a protectionist measure or one that regulated with only incidental effects on interstate trade. *Id.* at

The Court found that where a statute's primary aim is to discriminate against interstate commerce, there has been erected "a virtually *per se* rule of invalidity . . . ."[80] New Jersey, however, claimed the legislation preserved the health of the people living near the landfills, controlled the lifespan of the existing landfills, and prevented further use of undeveloped lands as landfills.[81] Nonetheless, the Supreme Court was not convinced. Since the New Jersey law discriminated against out-of-state waste solely because of its origin,[82] the Court concluded there were facial and effective violations of the Commerce Clause.[83] The Court explained that one state could not segregate itself from the waste problem simply by shutting its doors to another's garbage.[84]

The Supreme Court also dismissed New Jersey's emphasis on the quarantine law rationale,[85] noting that the objects at issue in the quarantine cases presented grave health and safety problems while in transit and thus were appropriately forbidden from being transported in interstate commerce.[86] The Court suggested that solid waste only becomes harmful after its disposal, not during its transportation.[87]

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624. The Court did not consider the possibility that the statute might affirmatively discriminate against interstate commerce, but be directed toward legitimate local concerns which could not be addressed by nondiscriminatory alternatives. *See id.* at 625-29.

80. *Id.* at 624.

81. *Id.* at 625.

82. *Id.* at 627. "[W]hatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-27.

83. *Id.* at 628.

84. *Id.* The dissent reasoned that:

> New Jersey must either prohibit *all* landfill operations, leaving itself to cast about for a presently nonexistent solution to the serious problem of disposing of the waste generated within its own borders, or it must accept waste from every portion of the United States, thereby multiplying the health and safety problems which would result if it dealt only with such wastes generated within the State.

Id. at 631 (Rehnquist, J., dissenting).

85. *See infra* notes 102-10 and accompanying text (discussing the quarantine principle).

86. *Philadelphia*, 437 U.S. at 628-29. *But see infra* notes 259-68 and accompanying text.

87. *Philadelphia*, 437 U.S. at 629. In his dissent, Justice Rehnquist questioned the comparison the Court drew between the present issue and the quarantine laws:

> I do not see why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety. The Commerce Clause was not drawn with a view to having the validity of state laws turn on such pointless distinctions.

Id. at 632-33 (Rehnquist, J., dissenting).

Consequently, by distinguishing between in-state and out-of-state waste before its disposal, New Jersey was "saddl[ing] those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites . . . [something] clearly impermissible under the Commerce Clause of the Constitution."[88] In deciding the unconstitutionality of the New Jersey law, the Court remarked that the Commerce Clause will also allow New Jersey to export its garbage when the necessary time arises.[89]

B. *Evergreen Waste Systems v. Metropolitan Service District*

Although the Supreme Court did not confront another "garbage case" until *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*,[90] other federal courts did occasionally face the issue.[91] For example, in *Evergreen Waste Systems v. Metropolitan Service District*,[92] the Ninth Circuit Court had to decide whether a local ordinance, which banned the dumping of out-of-district waste at a certain landfill, intruded upon the Commerce Clause's limitations.[93] The ban, which only applied to one particular landfill in Portland, Oregon, was intended to preserve the future life of the landfill.[94] It was argued that this ordinance was like the statute in *Philadelphia* because it was a *per se* violation of the Commerce Clause "'overtly block[ing] the flow of interstate commerce at a State's borders.'"[95]

The court concluded that this ban, unlike the one in *Philadelphia*, only applied to one of Portland's many landfills and prohibited Oregon waste from in-state as well as from out-of-state.[96] The court concluded,

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88. *Id.* at 629. The Court stated that it made no difference to the constitutional analysis whether the article of trade was the solid waste or the landfill capacity. *Id.* at 628.

89. *Id.* The dissent implied that each State should bear their share of the waste disposal burden. *Id.* at 631 (Rehnquist, J., dissenting). It did not interpret the Constitution as requiring one state to become the receptacle of all others' waste. *Id.* at 633 (Rehnquist, J., dissenting).

90. 112 S. Ct. 2019 (1992).

91. In Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990), the issue was whether a public entity, as owner and operator of the landfill, may restrict the importation of foreign waste. The court concluded that "[n]othing in the purposes animating the Commerce Clause prohibits a State . . . from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 254 (citation omitted). *See* Stanley E. Cox, *Burying the Misconceptions About Trash and Commerce: Why It Is Time to Dump* Philadelphia v. New Jersey, 20 CAP. U. L. REV. 813, 831-38 (1991) (discussing the market participant doctrine in the solid waste disposal context).

92. 820 F.2d 1482 (9th Cir. 1987).

93. *Id.* at 1483.

94. *Id.*

95. *Id.* at 1484 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

96. *Id.*

therefore, that the ordinance did "not fit the [Supreme] Court's paradigm of a per se violation: 'a law that overtly blocks the flow of interstate commerce at a State's borders.'"[97] The court pronounced that the ordinance was subject to the *Pike* standard.[98] There was evenhanded regulation, which "requires simply that out-of-state waste be treated no differently from most Oregon waste,"[99] that was directed toward Portland's legitimate interest in preserving the life of the landfill.[100] Since other landfills within Oregon were available, the court concluded that the burden imposed upon interstate commerce was only incidental, and thus not in conflict with the Constitution.[101]

V. THE QUARANTINE CASES

The Supreme Court has long recognized a "broad power in the State[s] to protect [their] inhabitants against perils to health or safety . . . even by use of measures which bear adversely upon interstate commerce."[102] This principle was soundly fostered in those cases that addressed state quarantine and inspection laws.[103] The Supreme Court considers "articles of trade . . . that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption . . . illegitimate subjects of trade and commerce."[104] "The function of the quarantine laws was noncommercial in nature and thus, did not so unnecessarily burden[] interstate transportation as to contravene the commerce clause."[105] As exemplified by the quarantine cases, the danger to the health and safety of those within the state

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97. *Id.* (quoting Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

98. *Id.* The court stated that "in the absence of an obvious barrier to interstate commerce," the ordinance should be subjected to the standards of *Pike*. *Id.*

99. *Id.*

100. *Id.* at 1485.

101. *Id.* "Although the ordinance may make the landfill useful for only an additional six to twelve months, that buys critical time for a large metropolitan area to site a new landfill." *Id.*

102. H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 531-32 (1949). *See also* Asbell v. Kansas, 209 U.S. 251, 256 (1908); Reid v. Colorado, 187 U.S. 137, 151 (1902); Bowman v. Chicago & N.W. Ry., 125 U.S. 465, 489 (1888).

103. *See* Mintz v. Baldwin, 289 U.S. 346 (1933); Asbell v. Kansas, 209 U.S. 251 (1908); Reid v. Colorado, 187 U.S. 137 (1902). An example of a quarantine law is a state statute prohibiting the importation of diseased livestock when the disease would threaten the health and safety of livestock within the state. The livestock intended to be imported would be subject to inspection at the state's border. *See, e.g., Mintz*, 289 U.S. at 347 n.1.

104. *Bowman*, 125 U.S. at 489.

105. *Mintz*, 289 U.S. at 350. "The self-protecting power of each state, therefore, may be rightfully exerted against [the] introduction [of unhealthy objects], and such exercise of power cannot be considered regulations of commerce prohibited by the constitution." *Bowman*, 125 U.S. at 489.

justified the burden on interstate commerce.[106] "The state . . . may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States."[107]

However, since the time when the majority of the quarantine cases were decided, the Supreme Court has developed constitutional standards to govern state laws influencing interstate commerce.[108] State statutes which specifically curtail the free flow of commerce, like the quarantine laws, face "the strictest scrutiny of any purported . . . local purpose . . . ."[109] Yet, in constructing the framework for the Dormant Commerce Clause analysis, the Court incorporated the quarantine principle into its standards. The quarantine laws addressed legitimate local interests which could only be achieved by discriminating against foreign commerce.[110] Even though the quarantine laws were not exposed to the current constitutional tests, they would nevertheless withstand Commerce Clause challenges.

VI. *FORT GRATIOT SANITARY LANDFILL V. MICHIGAN DEPARTMENT OF NATURAL RESOURCES*

A. *The Facts*

The Fort Gratiot Sanitary Landfill (Landfill) has been owned and operated by Bill Kettlewell Excavating, Inc. in St. Clair County, Michigan since 1971.[111] The private landfill operated via a license obtained in 1987 from the Michigan Department of Natural Resources (MDNR).[112] Such a license is issued under the authority of the MDNR,[113] and

106. *See Mintz*, 289 U.S. at 349-50 ("Undoubtedly [the statute] was promulgated in good faith and is appropriate for the prevention of further spread of the disease among dairy cattle and to safeguard public health."); *Asbell*, 209 U.S. at 256 (A state may enact a law to ban the importation of diseased cattle if it is "exercised in good faith to protect the health of its own animals and its own people."); *Reid*, 187 U.S. at 151 (A state may refuse to accept within its borders "livestock affected by a contagious, infectious, or communicable disease, and whose presence in the State will or may be injurious to its domestic animals and its citizens.").

107. *Reid*, 187 U.S. at 151.

108. *See supra* notes 30-69 and accompanying text.

109. Hughes v. Oklahoma, 441 U.S. 322, 337 (1979).

110. *See supra* text accompanying note 60.

111. Kettlewell Excavating v. Michigan Dep't Natural Resources, 931 F.2d 413, 414 (6th Cir. 1991) [hereinafter *Kettlewell II*].

112. *Id.*

113. Brief for Respondents at 11, Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Res., 112 S. Ct. 2019 (1992) (No. 91-636) [hereinafter *Brief for Respondents*].

denial of a request for a license would result if the landfill site was contradictory to a county-adopted solid waste management plan.[114]

A waste management plan was to be established by each county of the state pursuant to Michigan's Solid Waste Management Act (MSWMA).[115] "Under the . . . Act, every Michigan county is required to prepare and periodically update a 20-year solid waste management plan which projects the amount of solid waste that will be generated within that county (or planning area) and provides for its disposal at facilities which comply with the Act . . . ."[116]

The MSWMA, however, was amended in 1988 by the Michigan legislature.[117] The two sections which were added to the Act dealt with the dumping of waste which originated outside the county. Pursuant to these amendments (Waste Import Restrictions), before a landfill may accept imported waste, there must be explicit authorization by the landfill county's waste management plan.[118]

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114. *Id.* at 12.

115. MICH. COMP. LAWS ANN. §§ 299.401-.437 (West 1984 & Supp. 1991). The local and state governments were given control over determining which landfill sites would be allowed licenses. *See Brief for Respondents, supra* note 113, at 22. This control entailed dictating the "terms upon which disposal facilities exist, how they will be operated and the area that they will be able to serve." *Id.*

The individual county's proposed plan would be prepared by a planning committee which included members of the solid waste industry. MICH. COMP. LAWS ANN. §§ 299.426(1), (2). The planning committee would submit the proposal to the MDNR director, each municipality in the county, and to other counties that could be affected by the plan. *Id.* § 299.427(d). Then the county would hold public hearings before approving the plan. *Id.* § 299.428(3). After the county adopts the plan, at least 67% of the county's municipalities would have to approve it. *Id.* § 299.429. Once approved locally, the plan would have to pass approval by the director of the MDNR in order to become part of the state's overall solid waste management plan. *Id.* § 299.432(1).

116. *Brief for Respondents, supra* note 113, at 6. The Act "calls for a thorough evaluation of the existing and projected waste generation rates in the planning area, current and projected disposal capacity in each county or planning area, and specific plans to cure any capacity shortfall." *Id.* at 7 (citing MICH. COMP. LAWS ANN. § 299.430(1)).

117. *See* Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2022 (1992).

118. MICH. COMP. LAWS ANN. §§ 299.413a, 299.430(2) (West. Supp. 1991).

Section 299.413a states:

> A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

MICH. COMP. LAWS ANN. § 299.413a (West Supp. 1991).

Section 299.430(2) states:

> In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county.

In February of 1989, the Landfill submitted an application to the St. Clair County Solid Waste Planning Committee (Planning Committee) requesting permission to dump 1750 tons of daily waste imported from outside the county.[119] The Landfill guaranteed to reserve enough space to meet the needs of the waste generated in St. Clair County over the next twenty years,[120] yet, the Planning Committee denied the application.[121] In so doing, the Planning Committee noted that St. Clair County's waste management plan did not provide for the accommodation of out-of-county waste.[122]

Upon denial, the Landfill sought a declaratory judgment, claiming that the Waste Import Restriction amendments to the MSWMA violated the Commerce Clause of the United States Constitution.[123]

B. *Procedural History*

The Federal District Court for the Eastern District of Michigan denied the Landfill's request for a declaratory judgment.[124] The Court initiated its analysis of the constitutional issue by distinguishing between the two types of statutes a state could enact: an economic protectionist measure or a regulation addressing legitimate local concerns.[125] It then posed the question "whether the MSWMA amendments, either through their means or their ends, serve an economic protectionist purpose."[126] Concluding that the amendments did not discriminate through their means, the court noted that "the requirement that importers appear in a county waste disposal plan applies equally to

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MICH. COMP. LAWS ANN. §§ 299.430(2) (West Supp. 1991).

119. Bill Kettlewell Excavating, Inc. v. Michigan Dep't Natural Resources, 732 F. Supp. 761, 762 (E.D. Mich. 1990) [hereinafter *Kettlewell I*].

120. *Id.*

121. *Id.* The Planning Committee is just an advisory board and was the first step for the Landfill. *Kettlewell II*, 931 F.2d 413, 414 (6th Cir. 1991). The application, after passing the Planning Committee, must then be approved by the County Board of Commissioners and two-thirds of the communities within the county. *Id.* After this, final approval must be obtained from the MDNR. *Id.* The Board of Commissioners and the MDNR, however, did not act on this application because the Landfill commenced this judicial action after refusal by the Planning Committee. *Id.* at 415.

122. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2022 (1992).

123. *Kettlewell I*, 732 F. Supp. at 762. See *supra* note 21 and accompanying text for a description of Commerce Clause.

124. *Kettlewell I*, 732 F. Supp. at 766.

125. *See supra* text accompanying note 60.

126. *Kettlewell I*, 732 F. Supp. at 763. If the amendments discriminated against interstate commerce on their face or in their effects, they would be found unconstitutional unless Michigan could show they "serve[d] a 'legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Id.* at 763-64 (quoting Maine v. Taylor, 477 U.S. 131, 138 (1986)).

Michigan counties outside of the county adopting the plan as well as to out-of-state entities."[127] Additionally, since each county has broad discretion in deciding whether to include out-of-county waste in its waste management plan, the court concluded as well that the amendments did not discriminate through their ends.[128]

The court, therefore, found that the amendments concerned legitimate local interests and imposed only "incidental effects upon interstate commerce, and [thus] may . . . be upheld unless the burden imposed 'is clearly excessive in relation to the putative local benefits.'"[129] Declaring the "requirement that all out-of-state waste generators appear on a county's plan prior to disposal . . . an insubstantial burden,"[130] the court ruled that the amendments were not in conflict with the Constitution.[131]

On appeal, the Federal Court of Appeals for the Sixth Circuit proceeded in the same fashion as the District Court.[132] It acknowledged the two constitutional tests[133] and also found the MSWMA amendments to be facially nondiscriminatory.[134] The court stated as well that the amendments were nondiscriminatory as applied.[135] Finally, the court agreed with the District Court in that the burden placed on interstate commerce was in accord with the putative local benefits received.[136]

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127. *Id.* at 764.

128. *Id.* "[T]he MSWMA does not place the authority to issue a blanket preclusion against the importation of all out-of-state waste . . . . Instead . . . each county [has] discretion in accepting or denying importation of waste from any outside source, including other counties within the State." *Id.*

129. *Id.* at 765 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

130. *Id.*

131. *Id.* The court stated that "the [Landfill] does not posit that appearance on a county plan, while ostensibly an insubstantial burden, nevertheless is a practical impossibility for any out-of-state waste generator seeking to utilize Michigan's landfills." *Id.*

132. *Kettlewell II*, 931 F.2d 413 (6th Cir. 1991).

133. *See supra* text accompanying note 60.

134. *Kettlewell II*, 931 F.2d at 417. "[The amendments] place[] in-county and out-of-county waste in separate categories, but [they do] not treat out-of-county waste from Michigan any differently than waste from other states." *Id.*

135. *Id.* at 418. The court stated:

> If, in fact, it were alleged or proven that all counties in Michigan, pursuant to MSWMA or MDNR direction or policy, banned out-of-state waste, we would be facing a different and difficult problem under *City of Philadelphia v. New Jersey*. Instead, we are now concerned with the policy in one Michigan county, authorized by state statute, which effectively bars importation of solid waste *into* the county.

Id.

136. *Id.* "MSWMA does, indeed, as found by . . . the district court, provide a 'comprehensive plan for waste disposal, through which appropriate planning for such disposal can result.'" *Id.* (quoting *Kettlewell I*, 732 F. Supp. 761, 765 (E.D. Mich.

The Supreme Court granted certiorari[137] in order to resolve the conflict the lower court decisions presented with *Philadelphia v. New Jersey*.[138] In a seven to two decision,[139] the Court held "the Waste Import Restrictions unambiguously discriminate against interstate commerce and are appropriately characterized as protectionist measures that cannot withstand scrutiny under the Commerce Clause."[140] By so deciding, the Court adhered to its holding in *Philadelphia v. New Jersey*.[141]

C. *The Majority Opinion*

Justice Stevens, writing for the majority,[142] remarked that the sole issue to be decided in this case was whether the Waste Import Restriction amendments to the MSWMA could withstand a Commerce Clause challenge.[143] Consequently, he concluded that the resolution of this question paralleled the Court's analysis in *Philadelphia v. New Jersey*.[144] The underlying premise, as recognized by the *Philadelphia* Court, was that "[s]olid waste, even if it has no value, is an article of commerce."[145] As such, states are prevented by the Commerce Clause

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1990)).

The court also mentioned that because the Landfill did not exhaust its administrative remedies provided for by the Michigan statute, its resort to the court system might have been premature. *Id.*

137. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 857 (1992) (granting certiorari).

138. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2023 (1992).

139. *Id.* at 2021.

140. *Id.* at 2028.

141. *Id.* at 2021. *See supra* notes 73-89 and accompanying text (discussing *Philadelphia v. New Jersey*).

142. Justice Stevens was joined by Justices White, O'Connor, Scalia, Kennedy, Souter, and Thomas. *Fort Gratiot*, 112 S. Ct. at 2021.

143. *Id.* at 2023.

> Before discussing the rather narrow issue that is contested, it is appropriate to identify certain matters that are not in dispute. Michigan's comprehensive program of regulating the collection, transportation, and disposal of solid waste, as it was enacted in 1978 and administered prior to the 1988 Waste Import Restrictions, is not challenged. No issue relating to hazardous waste is presented, and there is no claim that petitioner's operation violated any health, safety, or sanitation requirement. Nor does the case raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities.

Id.

144. *Id. See also supra* notes 73-89 and accompanying text.

145. *Fort Gratiot*, 112 S. Ct. at 2023. The Court noted the rationale of *Philadelphia*:

from restricting the free flow of goods across their borders to enhance their own economic posture.[146]

The amendments to the MSWMA concern out-of-state garbage and thus fall under the Commerce Clause. The Court went so far as to note that the Waste Import Restrictions actually authorized each Michigan county to "isolate itself from the national economy."[147] When a state statute clearly discriminates against interstate commerce,[148] either on its face or in its effects, it will be determined unconstitutional unless the state can prove it "further[s] health and safety concerns that cannot be adequately served by nondiscriminatory alternatives."[149] The Court, therefore, looked to settle whether the MSWMA amendments survived this constitutional test.

Though Justice Stevens considered various arguments offered by Michigan and St. Clair County,[150] he initiated his deliberation comparing the Michigan statute to the New Jersey statute which was struck down in *Philadelphia*.[151] He found that both laws distinguished out-of-state waste solely because of its origin, and that neither suggested any other reason for treating the waste differently.[152] "'The Court has consistently found parochial legislation of this kind to be constitutionally invalid . . . .'"[153] Justice Stevens admitted, as did the Court in *Philadelphia*, that the state is entitled to protect the economy and environment of its citizens, but both concluded that these two laws

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> "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. In the [quarantine cases], the Court held simply that because the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines. Hence, we reject the [lower] court's suggestion that the banning of 'valueless' out-of-state wastes . . . implicates no constitutional protection. Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement."

Id. at n.3 (quoting Philadelphia v. New Jersey, 437 U.S. 617, 622-23 (1978)).

146. *Id.* at 2023.

147. *Id.* at 2024. Justice Stevens mentioned that the amendments require each county to specifically make allowances for out-of-county garbage imported to its landfills. *Id.* If they fail to do so, he added, the amendments would allow the counties the freedom to prohibit foreign waste and, likewise, outside competition. *Id.*

148. *Id.*

149. *Id.* at 2027. *See, e.g., supra* notes 59-69 and accompanying text.

150. *See infra* notes 156-73 and accompanying text.

151. *Fort Gratiot*, 112 S. Ct. at 2024. However, the Michigan statute, unlike the New Jersey statute, applies to in-state as well as out-of-state waste. *Id. See supra* note 75 (containing text of New Jersey statute).

152. *Fort Gratiot*, 112 S. Ct. at 2024.

153. *Id.* (quoting Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978)).

facially and effectively discriminate against interstate commerce.[154] This declaration shifted to Michigan and St. Clair County the burden of showing that the Waste Import Restrictions promoted health or safety objectives which could not be achieved by nondiscriminatory alternatives.[155]

Before addressing this responsibility, however, the majority discounted Michigan and St. Clair County's claim that the statute was not facially or effectively discriminatory because it "regulate[d] evenhandedly to effectuate local interests and [therefore] should be upheld because the burden on interstate commerce is not clearly excessive in relation to the local benefits."[156] The majority, in refusing to accept this approach to the constitutional issue, drew upon analogies of prior cases to reason that "a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."[157] The fact that the Michigan statute tolerated a county's refusal to import waste from other counties within the state was irrelevant to the majority's resolution of the issue.[158]

The Court also negated the relevancy of the Michigan statute permitting counties to adopt a waste management plan which would allow acceptance of out-of-state waste.[159] It is the discrimination itself, the Court decided, not the degree of discrimination, which was illegitimate.[160] The Court found it insignificant that, while St. Clair County had a complete ban on imported waste, other counties had made

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154. *Id.* "'But whatever New Jersey's ultimate purpose, it may not be accompanied by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently.'" *Id.* (quoting *Philadelphia*, 437 U.S. at 626-27).

155. *See supra* notes 55-56 and accompanying text.

156. *Fort Gratiot*, 112 S. Ct. at 2024.

157. *Id.* The Court looked to Brimmer v. Rebman, 138 U.S. 78 (1891), where a Virginia statute required the meat of animals slaughtered over 100 miles from where it was sold to pass special inspections, and noted that "'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.'" *Fort Gratiot*, 112 S. Ct. at 2025 (quoting *Brimmer*, 138 U.S. at 82).

The Court also applied the rationale in Dean Milk Co. v. Madison, 340 U.S. 349 (1951), which dealt with a local ordinance preventing the sale of milk not pasteurized within five miles of the city, and noted "it was 'immaterial that Wisconsin milk from outside the Madison area . . . [was] subjected to the same proscription as that moving in interstate commerce.'" *Fort Gratiot*, 112 S. Ct. at 2025 (quoting *Dean Milk*, 340 U.S. at 354 n.4).

158. *Fort Gratiot*, 112 S. Ct. at 2024.

159. *Id.* at 2025.

160. *Id.* at 2025 & n.4 (citing Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)).

different concessions.[161] Therefore, the Court concluded that Michigan and St. Clair County's assertions of evenhanded regulation were immaterial and did not displace their burden of abrogating the discrimination charge.[162]

In his discussion of Michigan and St. Clair County's burden of proof, Justice Stevens placed primary attention on Michigan and St. Clair County's resort to the Court's opinion in *Sporhase v. Nebraska*.[163] He stated that Michigan and St. Clair County's reliance on the principle, that the Waste Import Restrictions were legitimate because they preserved landfill capacity and thus protected the health and environment of its citizens, was inaccurate.[164] Justice Stevens explained that *Sporhase* dealt with the specific situation of ground water control and that there was "no analogous *traditional* legal expectations regarding state regulation of private landfills."[165] He noted that a "confluence of factors could justify a State's efforts to conserve and preserve [a vital resource] for its own citizens in times of severe shortage,"[166] but further inferred that these were particular to a state's interest in its ground water.[167]

The Court did accept Michigan and St. Clair County's contention that health and safety regulations are distinguishable from economic protectionism,[168] but failed to recognize this attachment to the Waste Import Restriction amendments.[169] The Court concluded that the amendments "unambiguously discriminate against interstate commerce" and that Michigan and St. Clair County did not meet their burden of proof in the matter.[170] The Court's analysis of the burden focused solely on Michigan and St. Clair County's dependence on *Sporhase*.[171] And since it was not prepared to draw a comparison between groundwa-

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161. *Id.* at 2025. Justice Stevens reasoned that merely reducing the scope of the discrimination, by offering a choice to the counties whether to exclude out-of-county waste, is equally discriminatory. *Id.*

162. *Id.* at 2026.

163. 458 U.S. 941 (1982). The Court, in *Sporhase*, questioned the validity of a state statute that restricted removal of Nebraskan ground water to other states. *Id.* at 943.

164. *Fort Gratiot*, 112 S. Ct. at 2026.

165. *Id.* at 2027 n.7 (emphasis added). Justice Stevens connoted that ground water is publicly owned and thus treated differently than the landfill in the present case. *Id.* The relation, however, would be different if this case concerned publicly-owned landfills. *See supra* note 91.

166. *Fort Gratiot*, 112 S. Ct. at 2026.

167. *Id.*

168. *Id.* at 2027.

169. *Id.* Justice Stevens admitted that the MSWMA incorporated health and safety measures aside from economic protectionism but he concluded that the same interpretation could not constitutionally be given to the Waste Import Restriction amendments. *Id.*

170. *Id.*

171. *See id.* at 2026-27.

ter and private landfills,[172] the Court rejected Michigan and St. Clair County's argument.[173]

The Court stated that Michigan and St. Clair County's desire to appropriate future waste in accordance with the MSWMA could be achieved without discriminating against out-of-county waste,[174] and added that limits on out-of-county waste versus in-county waste afforded no legitimate health or safety justifications.[175] In this regard, the Court alluded to its reasoning in *Maine v. Taylor*.[176] It admitted that its "conclusion [in the present case] would be different if the imported waste raised health or other concerns not presented by Michigan waste."[177] Unlike the situation in *Taylor*, however, "'this is . . . a case of arbitrary discrimination against interstate commerce.'"[178] The Court found no convincing argument that waste generated outside of St. Clair County posed any health problems above and beyond waste generated inside the county.[179]

The Court, without finding any proof that the MSWMA amendments furthered putative local interests which could not be accomplished through nondiscriminatory means, held the Waste Import Restrictions in express violation of the Commerce Clause.[180]

D. *The Dissent*

Chief Justice Rehnquist,[181] like the majority, approached this constitutional issue by deciding whether the MSWMA "is basically a protectionist measure, or whether it can be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are

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172. *See supra* notes 164-67 and accompanying text.

173. *Fort Gratiot*, 112 S. Ct. at 2027. The Court dismissed the request brought up by the dissent to remand the case to allow Michigan and St. Clair County to prove that the Waste Import Restrictions presented legitimate health and safety concerns; Michigan and St. Clair County did not ask for the request nor imply that they would be able to establish such. *Id.* at n.8.

174. *Id.* at 2027. The Court stated that "Michigan could, for example, limit the amount of waste that landfill operators may accept each year." *Id. But see infra* notes 301-03 and accompanying text.

175. *Fort Gratiot*, 112 S. Ct. at 2027.

176. 477 U.S. 131 (1986). The Court, in *Taylor*, concluded that since importation of baitfish into Maine would endanger the native species, a ban on such shipments was a valid health/environmental concern which could not be met by nondiscriminatory alternatives. *Id.* at 151-52. *See supra* notes 59-69 and accompanying text.

177. *Fort Gratiot*, 112 S. Ct. at 2027.

178. *Id.* at 2028 (quoting *Taylor*, 477 U.S. at 151).

179. *Id.*

180. *Id.*

181. Chief Justice Rehnquist wrote for himself and Justice Blackmun. *Id.* (Rehnquist, C.J., dissenting).

only incidental."[182] Chief Justice Rehnquist, however, maintained the opposite view of the majority[183] and suggested the case be remanded to permit Michigan and St. Clair County an opportunity to show that the amendments promoted legitimate local concerns.[184]

The dissent addressed the grave problem that solid waste causes the country.[185] Chief Justice Rehnquist expressed health, safety, and environmental concerns recognizing that although most states were anxious to produce waste, not all were willing to cope with the task of disposal.[186] Yet, he acknowledged Michigan's enterprise, delineated the specific goals of the MSWMA,[187] and concluded that it was "quite unlike the simple outright ban that [was] confronted in *Philadelphia*."[188]

The dissent, in proclaiming that the Waste Import Restrictions were facially neutral, noted that they applied equally to in-state and out-of-state waste.[189] Because waste from other counties within Michigan, as well as from other states, was treated the same, the dissent refused to agree with the majority's interpretation of this statute as economic protectionism.[190]

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182. *Id.* (Rehnquist, C.J., dissenting) (citation omitted).

183. *Id.* (Rehnquist, C.J., dissenting).

184. *Id.* (Rehnquist, C.J., dissenting).

185. *Id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted that since his dissent in *Philadelphia*, the solid waste problem had dramatically increased. *Id.* (Rehnquist, C.J., dissenting). The volume of wastes had increased by at least 50 million tons from 1975 to 1988 and about 45% of the country's solid waste landfills were expected to reach capacity by the early 1990s. *Id.* (Rehnquist, C.J., dissenting).

186. *Id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted "[i]t is no secret why capacity [of landfill space] is not expanding sufficiently to meet demand–the substantial risks attendant to waste sites make them extraordinarily unattractive neighbors." *Id.* (Rehnquist, C.J., dissenting) (citing Swin Resource Systems, Inc. v. Lycoming County., 883 F.2d 245, 253 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990)).

187. *Id.* at 2029 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist noted:

> The legislation challenged today is simply one part of a broad package that includes a number of features: a state-mandated state-wide effort to control and plan for waste disposal . . . requirements that local units of government participate in the planning process . . . restrictions to assure safe transport . . . a ban on the operation of waste disposal facilities unless various design and technical requirements are satisfied and appropriate permits obtained . . . and commitments to promote source separation, composting, and recycling.

Id. (Rehnquist, C.J., dissenting) (citations omitted).

188. *Id.* (Rehnquist, C.J., dissenting).

189. *Id.* (Rehnquist, C.J., dissenting).

190. *Id.* (Rehnquist, C.J., dissenting). Chief Justice Rehnquist remarked, "I cannot agree that such a requirement, when imposed as one part of a comprehensive approach to regulating in this difficult field, is the stuff of which economic protectionism is made." *Id.* (Rehnquist, C.J., dissenting).

Further, Chief Justice Rehnquist failed to understand how the majority could perceive this policy as protectionist when in fact the statute placed relative economic burdens upon Michigan's own citizens.[191] To dispatch the Dormant Commerce Clause concerns of the majority, the dissent concluded that "'[Michigan's] own political processes will serve as a check against unduly burdensome regulations'"[192] which have been delegated by the statute.

Chief Justice Rehnquist believed the majority confused[193] the analogies it created with *Brimmer* and *Dean Milk*. He observed that these cases prohibited discriminatory bans on objects of commerce which presented no health or safety concerns.[194] However, the issue before the Court, he continued, was whether such bans could legitimately be placed upon articles which are not "entirely sound and fit" or "wholesome."[195] Chief Justice Rehnquist stated that the majority's reliance on *Brimmer* and *Dean Milk* was inaccurate because these cases addressed discriminatory attacks on virtually unharmful goods, yet did not suggest that a state would be prevented from erecting barriers to promote health, safety, and environmental interests.[196] He concluded by indicating, again, that Michigan and St. Clair County should be given the chance to demonstrate the legitimacy of their acts.[197]

Chief Justice Rehnquist also questioned the Court's analysis of *Sporhase*.[198] The majority was hesitant to apply the conclusion in *Sporhase* to anything but groundwater transfer restrictions.[199] Chief

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191. *Id.* (Rehnquist, C.J., dissenting). The dissent also pointed to the fact that each county within the state is given the opportunity to allocate for out-of-state waste in its waste management plan. *Id.* at 2030 (Rehnquist, C.J., dissenting). It considered this feature of the MSWMA as an exoneration of the protectionist claim. *Id.* (Rehnquist, C.J., dissenting).

192. *Id.* at 2029 (Rehnquist, C.J., dissenting) (citations omitted). Since Michigan's own citizens would not tolerate such restrictive legislation without voicing an opinion, those out-of-state who are affected would receive ample representation in Michigan's legislature. *Id.* (Rehnquist, C.J., dissenting).

193. *Id.* (Rehnquist, C.J., dissenting). The majority noted that a state, by applying prohibitions of commerce inside its borders as well as outside its borders, could not avoid the strictures of the Commerce Clause. *Id.* at 2024. It reasoned that *Brimmer* and *Dean Milk* aimed to avoid just this type of disguised discrimination. *Id.* at 2025. Although these two cases do stand for this broad proposition, Chief Justice Rehnquist interpreted them somewhat differently. *Id.* at 2029-30 (Rehnquist, C.J., dissenting).

194. *Id.* at 2030 (Rehnquist, C.J., dissenting).

195. *Id.* (Rehnquist, C.J., dissenting).

196. *Id.* (Rehnquist, C.J., dissenting).

197. *Id.* (Rehnquist, C.J., dissenting).

198. *See supra* notes 163-67.

199. *Fort Gratiot*, 112 S. Ct. at 2030 (Rehnquist, C.J., dissenting). The majority concluded that the legal history has treated a state's interest in its water resources uniquely and that there has, therefore, developed a distinct situation when an issue

Justice Rehnquist considered the Court's analysis inappropriate and noted that *Sporhase* proposed "that a State's effort to adopt a comprehensive [plan] to address a major environmental threat or threat to natural resources need not run afoul of the Commerce Clause."[200] He reiterated that the Michigan statute restricted its own citizens from freely disposing of solid waste and thus did not frustrate the Commerce Clause's intentions by imposing the same burden on out-of-state residents.[201]

Finally, Chief Justice Rehnquist reexamined the health and environmental concerns of solid waste and concluded: "I see no reason in the Commerce Clause . . . that requires cheap-land States to become the waste repositories for their brethren, thereby suffering the many risks that such sites present."[202]

VII. ANALYSIS

The Supreme Court declared at the outset that its holding in *Philadelphia v. New Jersey*[203] controlled the present deliberation.[204] After quoting a substantial passage from *Philadelphia*, which professed that a state could not discriminate "'against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently,'"[205] the Court concluded that "the foregoing reasoning would appear to control the disposition of this case."[206] In addition, since the Court believed that Michigan's only explanation for the differential treatment of out-of-state waste was its origin, it noted that this type of legislation has consistently been found unconstitutional.[207] It should be noted, however, that the New Jersey law was an outright ban on the importation of garbage, while the Michigan legislation addresses intrastate as well as interstate garbage.[208]

A. *Has the Court Lost Sight of the Appropriate Standard?*

In *Philadelphia*, the Court distinguished between state legislation which is simple outright economic protectionism[209] and that which is "credibly advanced" by objectives relating to the health and safety of the

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arises involving groundwater transfers. *Id.* at 2026 n.6.

200. *Id.* at 2030 (Rehnquist, C.J., dissenting).

201. *Id.* (Rehnquist, C.J., dissenting).

202. *Id.* (Rehnquist, C.J., dissenting).

203. 437 U.S. 617 (1978).

204. *Fort Gratiot*, 112 S. Ct. at 2019. The Court stated that "*Philadelphia v. New Jersey* provides the framework for our analysis of this case." *Id.* at 2023.

205. *Id.* at 2024 (quoting *Philadelphia*, 437 U.S. at 627).

206. *Id.*

207. *Id.*

208. *See supra* notes 75, 118.

209. *Philadelphia*, 437 U.S. at 624.

state's citizens.[210] When the statute is of the latter type, there are two different constitutional standards to which the Court will subject the legislation.[211] The tougher standard, to which the present majority applied the Michigan law[212] and which is triggered when a statute affirmatively discriminates against interstate commerce, imposes upon the state the burden of showing that the legislation promotes health and safety concerns which could not adequately be met by nondiscriminatory alternatives.[213] The "more flexible approach,"[214] which applies when there is evenhanded regulation, will uphold the legislation unless the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits."[215]

The *Fort Gratiot* Court concluded that there was no evenhanded regulation.[216] Yet, the Supreme Court appears to be ambivalent as to what evenhanded regulation entails. The majority explained that "a State . . . may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."[217] Chief Justice Rehnquist in his dissent, however, suggested that the Michigan legislation is a "facially neutral restriction (i.e., it applies equally to both interstate and intrastate waste)"[218] that imposes only incidental burdens upon interstate trade. This was the same rationale the federal court applied in *Evergreen Waste Systems v. Metropolitan Service District*,[219] to uphold a local law similar to the present one.[220] The circuit court defined evenhanded regulation as a statute which "requires simply that out-of-state waste be treated no

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210. *Id.* The *Philadelphia* Court observed that the opinions of the Supreme Court "have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *Id.*

211. *See supra* text accompanying note 60.

212. *Fort Gratiot*, 112 S. Ct. at 2027. On the same day the Court decided *Fort Gratiot*, it handed down its opinion in Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992). The Alabama law at issue affirmatively discriminated against out-of-state waste. *Id.* at 2012. Therefore, the Court applied strict scrutiny. *Id.* at 2014.

213. *See supra* notes 55-56 and accompanying text.

214. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

215. *See supra* text accompanying note 41. One federal court has expressed the following: "The *Pike* test asks whether the state law (1) regulates evenhandedly; (2) accomplishes a legitimate local public purpose; and (3) has only an incidental effect on interstate commerce." Washington State Bldg. & Const. Trades v. Spellman, 684 F.2d 627, 631 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

216. *Fort Gratiot*, 112 S. Ct. at 2024.

217. *Id.*

218. *Id.* at 2029 (Rehnquist, C.J., dissenting).

219. 820 F.2d 1482 (9th Cir. 1987).

220. *See supra* notes 92-101 and accompanying text.

differently from *most* [in-state] waste."[221] In *Hunt v. Washington State Apple Advertising Commission*,[222] for example, the North Carolina regulation on apples applied to apple growers out-of-state as well as growers in North Carolina.[223] The Court, nevertheless, applied the stricter constitutional test to label the state statute as unconstitutional.[224] Even in *Pike v. Bruce Church, Inc.*,[225] where the Supreme Court established the evenhanded standard, the Court went so far as to insinuate that the Arizona statute, which affected in-state as well as out-of-state interests, was of the type that "has been declared to be virtually *per se* illegal."[226]

The present majority justified its application of the stricter scrutiny through comparisons with *Brimmer v. Rebman*[227] and *Dean Milk Co. v. Madison*.[228] In these two cases, the Supreme Court struck down local laws which applied to those in-state as well as those out-of-state.[229] The Court, however, had not yet developed a standard to apply to those statutes that regulated evenhandedly.[230] Furthermore, as Chief Justice Rehnquist noted in his dissent, the Court in *Brimmer* and *Dean Milk* "simply rejected the notion that there could be a noneconomic protectionist reason for the bans at issue, because the objects being banned presented no health or environmental risk."[231] These two cases were concerned with the ban on "wholesome" commodities, and as Chief Justice Rehnquist stated, "neither [of these cases] prohibits a

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221. *Evergreen*, 820 F.2d at 1484 (emphasis added). It was argued that the ban on imported waste did not regulate evenhandedly because waste from outside the district was treated differently than waste from inside the district. *Id.* The court, however, concluded that evenhanded regulation requires only that those out-of-state be treated no differently from *most* of those in-state. *Id.*

222. 432 U.S. 333 (1977).

223. *See supra* text accompanying note 48.

224. *Hunt*, 432 U.S. at 353. The Court could have achieved the same result if it had utilized the *Pike* test. For, even though the statute regulated evenhandedly (it applied to in-state and out-of-state apples), the Court could have justified its unconstitutionality by proclaiming that its burden on interstate commerce outweighed its benefits to the public. *See supra* note 41 and accompanying text.

225. 397 U.S. 137 (1970).

226. *Id.* at 145. *See supra* note 46 and accompanying text.

227. 138 U.S. 78 (1891). *See supra* note 157.

228. 340 U.S. 349 (1951). *See supra* notes 32-38 and accompanying text.

229. *See supra* note 157.

230. The *Pike* standard was not developed until 1970. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

231. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2029-30 (1992) (Rehnquist, C.J., dissenting). Garbage, on the other hand, is not necessarily environmentally sound or healthy. *See infra* note 298 and accompanying text.

State from adopting health and safety regulations that are directed to legitimate local concerns."[232]

The majority, quoting from the *Brimmer* opinion, explained that the Virginia statute at issue would essentially prevent *all* meat from outside the state from entering the state.[233] It also observed that the Madison ordinance in *Dean Milk* excluded *all* out-of-state milk from being sold in Madison.[234] The Michigan statute is unlike either of these because the practical effect of the Waste Import Restrictions is not to exclude all out-of-state waste from entering Michigan. Each county may choose to accept out-of-state waste or may refuse to accept out-of-county waste.[235] "There is no prohibition to the importation of out-of-state waste into Michigan. In fact, Michigan is receiving out-of-state waste in accordance with the state solid waste management plan and the plans of the receiving counties."[236]

As the *Fort Gratiot* dissent reasoned, the requirement that each county decide whether their current landfill capacity is capable of supporting foreign waste "when imposed as one part of a comprehensive approach to regulating in this difficult field, [cannot be] the stuff of which economic protectionism is made."[237] The majority, nonetheless, concluded that the effect of the vote by some Michigan counties to allow the dumping of out-of-county waste "merely reduce[d] the scope of the discrimination . . . ."[238] But, even a statute which regulates evenhandedly will have *some* "scope of discrimination."[239]

In *Evergreen Waste Systems*, the federal court approved a local ordinance similar to the Michigan legislation in question.[240] Because the ban on importation applied to both in-state and out-of-state garbage, the court concluded that the ordinance was not an act of affirmative discrimination and employed the *Pike* standard.[241] The court stated that the burden imposed on interstate commerce was only incidental

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232. *Fort Gratiot*, 112 S. Ct. at 2030 (Rehnquist, C.J., dissenting).

233. *Id.* at 2025. "'If the object of Virginia had been to obstruct the bringing into that state, for use as human food, of all beef, veal and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced.'" *Id.* (quoting Brimmer v. Rebman, 138 U.S. 78, 83 (1891)).

234. *Id.*

235. *See supra* note 118 (containing text of Waste Import Restrictions).

236. *Brief for Respondents*, *supra* note 113, at 22-23.

237. *Fort Gratiot*, 112 S. Ct. at 2029 (Rehnquist, C.J., dissenting).

238. *Id.* at 2025.

239. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (suggesting a statute that regulates evenhandedly can have incidental effects on interstate trade).

240. Evergreen Waste Systems, Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482, 1485 (9th Cir. 1987).

241. *Id.* at 1484-85.

because other landfills in-state were available.[242] Moreover, the court determined that the benefits to the district outweighed the burden placed upon interstate commerce.[243]

Because the Michigan statute is not pure economic protectionism,[244] and applies to both intrastate and interstate waste, the Supreme Court in *Fort Gratiot* should have followed the example set forth in *Evergreen Waste Systems* and employed the *Pike* standard of evenhanded regulation.[245] However, the Court concluded that the *Hunt* test was more appropriate.[246] Under *Hunt*, when a statute affirmatively discriminates against interstate commerce, either on its face or in its effect, the burden shifts to the state to demonstrate the validity of the law.[247] But how can the Michigan statute be considered an affirmative discrimination against interstate commerce?[248] Each county decides whether to accept imported waste, and in fact some have made such provisions.[249] Even in those counties that refused, counties which were affected by this action were afforded the opportunity to be heard and challenge the county's plan.[250] Such a statute may have some detrimental effect on interstate commerce, but this effect cannot be classified as an affirmative discrimination.

Simply because a state statute affects interstate commerce does not necessarily mean there is affirmative discrimination. If the *Fort Gratiot* Court considered the burdens the Michigan statute placed on interstate commerce excessive in relation to the benefits presented, or if it appeared that reasonable alternatives were available, the *Pike* standard would have assured an equally adequate redress. When this type of statute is negated, it is done so because its burdens outweigh its benefits,[251] not because it affirmatively discriminates against interstate

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242. *Id.* at 1485.

243. *Id.*

244. Chief Justice Rehnquist concluded that the amendments do not "appear to protect 'a major local industry against competition from without the State.'" Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Res., 112 S. Ct. 2019, 2030 (1992) (Rehnquist, C.J., dissenting) (quoting Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951)). *Cf. supra* notes 233-34 and accompanying text.

245. The Court conceded that Michigan had a legitimate health and safety concern, but concluded that the amendments to the MSWMA "unambiguously discriminate[d] against interstate commerce . . . ." *Fort Gratiot*, 112 S. Ct. at 2027. Chief Justice Rehnquist, unsatisfied with the Court's analysis and conclusion, stated that the statute is "quite unlike [a] simple outright ban" on out-of-state waste. *Id.* at 2029 (Rehnquist, C.J., dissenting).

246. *Id.* at 2023-24.

247. *See supra* notes 54-55 and accompanying text.

248. *See supra* notes 228-37 and accompanying text.

249. *See supra* note 235-36 and accompanying text.

250. *See supra* note 115.

251. *See supra* note 41 and accompanying text.

commerce.[252] The very concept of the Michigan legislation is repugnant to that of affirmative discrimination. As Chief Justice Rehnquist observed:

> Commerce Clause concerns are at their nadir when a state act works in this fashion–[imposing burdens on] all the State's consumers, and working to the substantial disadvantage of other segments of the state's population–because in these circumstances "'a State's own political processes will serve as a check against unduly burdensome regulations.'"[253]

The majority, nevertheless, refused to oblige the dissent's request that the case be remanded in order for Michigan to demonstrate the validity of its law.[254]

Although the Supreme Court has expressed two different constitutional tests pertinent to Dormant Commerce Clause concerns, it has placed primary emphasis on the stricter standard.[255] Even in the *Fort Gratiot* opinion, the Court relied principally on the burden-shifting standard. As evidenced by the dissent's disagreement with the majority's interpretation that the Michigan statute does not regulate evenhandedly, the Supreme Court is still uncertain as to what constitutes evenhanded regulations and, subsequently, when and if it should apply the *Pike* test.[256] The essential difference between the two standards is the burden-shifting. And if a statute influences interstate trade, the Court appears to prefer to have the state demonstrate the statute's validity rather than exercising a simple balancing test, even though the balancing test can provide similar results.

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252. *See supra* note 60 and accompanying text.

253. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2029 (1992) (Rehnquist, C.J., dissenting) (citations omitted). In fact, when a county's waste management plan works to exclude imported garbage, the plan is submitted to those Michigan counties that are affected by the exclusion. *See Brief for Respondents*, *supra* note 113, at 11 (citing MICH. COMP. LAWS ANN. § 299.427(d)). Subsequently, those counties are afforded an opportunity to challenge the county plan at public hearings. *See id.* (citing MICH. COMP. LAWS ANN. § 299.428(3)).

254. *Fort Gratiot*, 112 S. Ct. at 2027 n.8.

255. *See, e.g.*, Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2015 (1992); Wyoming v. Oklahoma, 112 S. Ct. 789, 801 (1992); New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 272 (1988); Maine v. Taylor, 477 U.S. 131, 151 (1986); Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 958 (1982); Hughes v. Oklahoma, 441 U.S. 322, 337 (1979); Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977). One commentator has suggested that political and economic influences have led the Court to favor the burden-shifting standard. *See* Maltz, *supra* note 31, at 522-23.

256. *See supra* notes 216-26 and accompanying text. Even where the Court upheld a ban on importation in *Maine v. Taylor*, the state had to show that the law was constitutionally sound. *See supra* notes 59-69 and accompanying text.

B. *The Pertinence of the Quarantine Cases*

During its deliberation, the *Fort Gratiot* Court declined to comment on the quarantine cases.[257] The *Philadelphia* Court, to which the present majority analogized, only alluded to those cases in a final reference in its opinion.[258] However, as the *Philadelphia* dissent observed: "[Those] cases are dispositive of the present one."[259] The Supreme Court has long considered objects "that are diseased or decayed, or otherwise, from their condition and quality, unfit for human use or consumption . . . [illegitimate] subjects of trade and commerce."[260] Solid waste, by its very nature, fits within this category.[261] The essence of a state quarantine law, while noncommercial in nature, is to protect the health and safety of the state's inhabitants.[262] And as the Supreme Court has recognized, "quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce."[263]

The *Philadelphia* Court emphasized that "quarantine laws banned the importation of articles such as diseased livestock . . . because *their very movement* risked contagion and other evils."[264] The quarantine cases did not stand for such a proposition. None of the state laws at issue in the quarantine cases dealt solely with the *transportation* of diseased cattle. Each statute that was invalidated in these cases concerned only the *importation* of such cattle.[265] The Supreme Court consistently held throughout its opinions that a "State may enact laws for the inspection of animals coming from other States with the purpose of *excluding* those . . . which are diseased."[266] The quarantine cases simply provided that

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257. Even Chief Justice Rehnquist, whose dissent in *Philadelphia* concentrated on the quarantine issue, made no reference in the present case to those laws. *See Philadelphia*, 437 U.S. at 629-33 (Rehnquist, C.J., dissenting).

258. *Id.* at 628-29.

259. *Id.* at 632 (Rehnquist, J., dissenting).

260. Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465, 489 (1888).

261. As one commentator notes, garbage is quite unlike other items of trade because there is no beneficial use which flows from it (of course this is reference only to that waste which is deposited in landfills). *See* Cox, *supra* note 91, at 828.

262. *See supra* notes 102-07 and accompanying text.

263. Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

264. *Id.* at 628-29 (emphasis added). The *Philadelphia* Court decided "[t]hose laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin." *Id.* at 629.

265. *See, e.g.*, Mintz v. Baldwin, 289 U.S. 346, 348 (1933); Asbell v. Kansas, 209 U.S. 251, 253-54 (1907); Reid v. Colorado, 187 U.S. 137, 138-39 (1902).

266. Asbell v. Kansas, 209 U.S. 251, 256 (1907) (emphasis added). The Supreme Court, in Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465 (1888), stated that "when [an unhealthy article] is about to *enter the state* . . . then the state power may *exclude its introduction*." *Id.* at 490 (emphasis added) (citation omitted).

a state may ban the *importation* of unhealthy material.[267] Therefore, contrary to what the *Philadelphia* Court implied, a state may prevent items, whose presence within the state pose legitimate health and safety dangers, from entering its borders, regardless of their dangers while in transit.[268]

The *Philadelphia* Court properly recognized that the "harms caused by waste are said to arise after its disposal in landfill sites."[269] Consequently, it reasoned that once it has been dumped, there is no distinction between in-state and out-of-state garbage.[270] The basic truth is that all waste, whether intra- or interstate, is innately undesirable. Michigan is not distinguishing between its garbage and out-of-state garbage after the dumping has occurred. On the contrary, Michigan enacted legislation regulating waste prior to its disposal in order to curtail the harms caused by solid waste before they materialize.[271] The state, in an attempt to "address waste problems generated by its own populace,"[272] has sought to effectuate a nondiscriminatory plan controlling the amount of waste each county could feasibly accommodate. "A state that bans the importation of paupers or diseased cattle probably does not do so out of affection for its local paupers and diseased cattle. The hostility is to the thing itself, not to merely interstate shipment of the thing; and an undiscriminating hostility is at least nondiscriminatory."[273]

The Supreme Court has intimated that one state could conceivably become the nation's waste receptacle.[274] The present majority concurred: "[t]here is . . . no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount that the operator may accept from inside the

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267. *See, e.g., Asbeil,* 209 U.S. at 254. "The obvious purpose of the law was to guard against the *introduction* into the State of cattle infected with a communicable disease." *Id.* (emphasis added).

268. The *Philadelphia* Court concluded that the quarantine laws "banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils." Philadelphia v. New Jersey, 437 U.S. 617, 628-29 (1978). However, the Kansas law that was deemed constitutional in *Asbell v. Kansas* allowed for the importation of livestock which required "immediate slaughter." *Asbell,* 209 U.S. at 253.

269. *Philadelphia,* 437 U.S. at 629.

270. *Id.*

271. The Waste Import Restrictions provide that each planning area shall determine, prior to disposal, whether it has the landfill capacity to accept out-of-county waste. *See supra* note 118.

272. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2029 (Rehnquist, C.J., dissenting).

273. Illinois v. General Elec. Co., 683 F.2d 206, 214 (7th Cir. 1982).

274. Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978).

State."[275] Yet, the Michigan legislation does provide for limitations on in-state waste. A county may reject in-state waste if its capacity will not accommodate it. Nonetheless, the Court conceded to the invalidity of the Waste Import Restrictions.[276] However, in order for a county plan to be effective under the constitutionally valid MSWMA, the county must be able to predict the amount of waste it will generate and the amount of waste for which it has the capacity to provide.[277] If a county predetermines that it will only have the capacity to dispose of its own waste, then in order to comply with the MSWMA (even before the Waste Import Restrictions were added), it would have to refuse to accept out-of-county waste.[278] But, as the Court indicated, a county cannot simply do this. Therefore, the end result will be that the county's waste management plan is ineffective. Chief Justice Rehnquist, however, stated that the Constitution does not require a state to accept the refuse generated by others.[279] He concluded: "The Court today penalizes the State of Michigan for what to all appearances are its good-faith efforts, in turn encouraging each State to ignore the waste problem in the hope that another will pick up the slack."[280]

C. *The Court Sacrifices Principles for Facts*

The majority refused to compare *Sporhase v. Nebraska*[281] to the present situation.[282] The Court stated that its reasoning in *Sporhase* was "related to the special role that States have traditionally played in the ownership and control of ground water . . . ."[283] The *Sporhase* Court noted: "[o]bviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State."[284] Michigan's attempt to regulate the disposal of waste within its borders is consistent with this rationale. As the dissent

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275. *Fort Gratiot*, 112 S. Ct. at 2027. This statement, which followed the Court's discussion of *Dean Milk* and *Brimmer* (*see supra* notes 227-29 and accompanying text) contradicts that discussion. Does it mean to suggest that Michigan may advance a legitimate health and safety reason for limiting the amount of waste a landfill may accept from within the state as well as without the state?

276. *Fort Gratiot*, 112 S. Ct. at 2027.

277. *See supra* note 116 and accompanying text.

278. Of course, the county may create additional landfill space to accommodate the foreign waste. But as Chief Justice Rehnquist stated, "such a result is not constitutionally mandated." *Fort Gratiot*, 112 S. Ct. at 2030 (Rehnquist, C.J., dissenting).

279. *Id.* (Rehnquist, C.J., dissenting).

280. *Id.* at 2030-31 (Rehnquist, C.J., dissenting).

281. 458 U.S. 941 (1982).

282. *See supra* notes 163-67 and accompanying text.

283. *Fort Gratiot*, 112 S. Ct. at 2027 n.7.

284. *Sporhase*, 458 U.S. at 955-56.

in *Fort Gratiot* noted, "[s]ubstitute 'attractive and safe environment' for 'water' and one has the present case."[285]

The *Sporhase* Court was "reluctant to condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage."[286] The present majority acknowledged the increasing dangers this country's landfills harbor,[287] yet it was unwilling to attribute to the landfills the "indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."[288] The proclaimed reason for this refusal was the "*traditional* legal expectations" afforded to ground water.[289] The Court stated that only one aspect of the *Sporhase* opinion, "[the] reference to the well-recognized difference between economic protectionism . . . and health and safety regulation,"[290] was relevant to its present concern.[291] The Court thus implies that tradition prevents Michigan's efforts from withstanding constitutional attacks. By the time "traditional legal expectations" are attached to solid waste management, however, the health and safety of Michigan's citizens may have already been compromised.[292]

The *Fort Gratiot* majority emphasized the relation of a principle to the particular set of facts in *Sporhase*, rather than emphasizing the principle itself. That principle declares that "a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce . . . ."[293]

D. *The Teachings of Maine v. Taylor*

In *Maine v. Taylor*,[294] the Court upheld a ban on the importation of baitfish, noting:

> Even overt discrimination against interstate trade may be justified where, as in this case, out-of-state goods . . . are particularly likely for some reason to threaten the health and safety of a State's citizens . . . and

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285. *Fort Gratiot*, 112 S. Ct. at 2030 (Rehnquist, C.J., dissenting).
286. *Sporhase*, 458 U.S. at 956. The *Sporhase* Court concluded that water is an article of commerce. *Id.* at 954.
287. *Fort Gratiot*, 112 S. Ct. at 2028.
288. *Id.*
289. *Id.* at 2027 n.7 (emphasis added).
290. *Id.* at 2027.
291. *Id.*
292. *See supra* note 185.
293. *Id.* at 2026 (quoting Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 955-56 (1982)).
294. 477 U.S. 131 (1986). *See supra* notes 59-69 and accompanying text.

> where "outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecti[on]."[295]

If a Michigan county has only the capacity to provide for the disposal of its own waste, by accepting out-of-county waste the county will be overburdened with garbage and the result may create health and safety dangers. Out-of-state waste is arguably no different than Michigan waste. But, what the Court failed to recognize is that once a county's landfill has sustained its limit and has accounted for all in-county waste, the addition of out-of-county waste may create *different* problems.[296]

Though there may be no health or safety risks presented by dumping out-of-state in an adequate landfill (and in fact those counties that have the landfill space accept out-of-state waste),[297] the disposal of waste in an overburdened landfill *may* present problems.[298] "As long as a State does not *needlessly* obstruct interstate trade or attempt to 'place itself in a position of economic isolation' . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."[299] Michigan's statute authorizes counties to receive out-of-state waste, but only if the county has properly determined that it will be capable of entertaining such waste.[300] In this respect, the

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295. *Taylor*, 477 U.S. at 148-49 n.19. In *Taylor*, there was some evidence presented at the trial proceedings indicating that the threats posed to Maine's native baitfish were not critical and could be addressed by nondiscriminating alternatives. *See id.* at 142-43. *See also supra* note 65. The Court, nevertheless, held that the state "has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible." *Taylor*, 477 U.S. at 148.

296. Some might argue that Michigan's efforts will become futile once its own landfills have been completely exhausted. But as the Court in *Taylor* has concluded:

> the "abstract possibility" of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make these procedures an "[a]vailabl[e] . . . nondiscriminatory alternativ[e]" for the purposes of the Commerce Clause. A State . . . is not required to develop new and unproven means of protection at an uncertain cost.

Taylor, 477 U.S. at 151 (citations omitted).

297. *See Brief for Respondents, supra* note 113, at 23-24.

298. "The Congress finds with respect to the environment and health, that . . . inadequate and environmentally unsound practices for the disposal . . . of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health . . . ." 42 U.S.C. § 6901 (b)(3) (1988). In essence, the dumping of out-of-county waste in Michigan counties which only have the landfill capacity to maintain their own waste will create the risks to which Congress alluded.

299. *Taylor*, 477 U.S. at 151 (citation omitted) (emphasis added).

300. *Brief for Respondents, supra* note 113, at 23-24.

> The Solid Waste Management Act is directed at assuring environmentally safe disposal capacity to meet current and future needs . . . . Although it may have incidental effects on interstate commerce by preventing out-of-county waste from being disposed of in a particular county, its primary motivation is not to benefit in-state economic interests . . . .

statute only imposes burdens upon interstate commerce that are unavoidable for preserving the population's health and safety.

In an attempt to demonstrate the availability of nondiscriminatory means for addressing Michigan's solid waste management problem, the Supreme Court proposed that the state could simply "limit the amount of waste that landfill operators may accept each year."[301] However, this alternative would not necessarily guarantee the satisfaction of each county's waste management plan.[302] A landfill could reach its authorized limit without accounting for all of the county's waste because it accepted out-of-county waste in its place. And as the Court stated in *Taylor*, "the 'abstract possibility' of developing acceptable [alternatives], particularly when there is no assurance as to their effectiveness, does not make those procedures an '[a]vailabl[e] . . . nondiscriminatory alternativ[e],' . . . for purposes of the Commerce Clause."[303]

VIII. CONCLUSION

The *Fort Gratiot* decision moves the Court one step further in the direction of abandoning the *Pike* standard governing evenhanded regulations. Even though this test accounts for excessive burdens on interstate commerce and the availability of nondiscriminatory alternatives, the Supreme Court insinuates that when state legislation affects interstate activities in any manner (including evenhanded regulations), the law will be subjected to the burden shifting standard delineated in *Hunt*. Although there exists a presumption of validity in state statutes, once interstate trade is afflicted it will *always* be the state's responsibility to demonstrate the validity of its actions.

Nonetheless, the *Fort Gratiot* Court refused to afford Michigan the opportunity to support the Waste Import Restrictions to its Solid Waste Management Act. The Court predisposed of any valid health and safety arguments Michigan might have offered and reaffirmed its holding in *Philadelphia v. New Jersey*: no state may prevent the importation of foreign waste. The Court does not seem likely to retreat from *Philadelphia*, and consequently informs the states that if they do not wish

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Id.

301. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2027 (1992). *But see supra* note 35.

302. *See Brief for Respondents, supra* note 113, at 23-24. "[A]n unregulated free flow of waste into Michigan . . . would be disruptive of efforts to plan for the proper disposal of future waste due to incoming waste from sources not accounted for during the planning process." *Id.* The Court's proposal would regulate the flow of waste into the landfills but not the flow of waste into the State. *Id.*

303. *Taylor*, 477 U.S. at 147 (citations omitted).

to worry about their own garbage problems, the Constitution will assign someone else the duty.

Shaun Anderson

Modernizing Public Welfare Offenses in Massachusetts (Go to Jail—Go Directly to Jail)

I. INTRODUCTION

In *Commonwealth v. Alvarez*,[1] the Massachusetts Supreme Judicial Court upheld the validity of Massachusetts General Laws chapter 94C, section 32J,[2] which establishes a mandatory two-year minimum jail term for violation of certain provisions of Massachusetts General Laws Chapter 94C[3] within one thousand feet of a school.[4] Section 32J does not require independent criminal intent, *mens rea*,[5] as to the school zone element for a conviction.

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1. 413 Mass. 224, 596 N.E.2d 325 (1992).

2. Section 32J provides the following penalties for controlled substance violations in, on, or near school property:

> Any person who violates the provisions of section . . . thirty-two A . . . while in or on, or within one thousand feet of the real property comprising a public or private elementary, vocational, or secondary school whether or not in session shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than fifteen years or by imprisonment in a jail or house of correction for not less than two nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of two years. A fine of not less than one thousand nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum two year term of imprisonment as established herein. In accordance with the provisions of section eight A of chapter two hundred and seventy-nine such sentence shall begin from and after the expiration of the sentence for violation of section . . . thirty-two A, ...
>
> Lack of knowledge of school boundaries shall not be a defense to any person who violates the provisions of this section.

MASS. GEN. L. ch. 94C, § 32J (1992) [hereinafter § 32J].

3. A conviction for a violation of MASS. GEN. L. ch. 94C, §§ 32, 32A-F, or 32I [hereinafter ch. 94C], which involves the possession, manufacture, or distribution of certain controlled substances, is a prerequisite for a conviction under the school zone statute.

4. *Alvarez*, 413 Mass. at 227, 596 N.E.2d at 327.

5. *Mens rea* is defined as: "A guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness." BLACK'S LAW DICTIONARY 889 (5th ed. 1979) (citing United States v. Greenbaum, 138 F.2d 437, 438 (3d Cir. 1943)).

At common law, however, all criminal offenses required proof of the concurrence of *mens rea* and *actus reus* (criminal act) for a conviction.[6] Over time, an exception to the general rule was created for public welfare offenses.[7] Public welfare offenses are offenses against public policy, as opposed to offenses against particular people.[8] Traditionally, public welfare offenses do not have a *mens rea* requirement and are punished by monetary fines.[9]

One significant difference between true crimes (also called *mala in se*) and civil offenses or public welfare offenses (also called *mala prohibita*), therefore, is the traditional punishment that might be imposed.[10] The punishment imposed for a criminal offense may or may not be severe, depending upon the extent and nature of the crime.[11] The penalty for a public welfare offense, in contrast, should never be severe.[12] Rather, the maximum penalty for a public welfare offense should be limited to a modest fine or its equivalent.[13] Due to the high value placed on individual freedom, the penalty for a crime which does not require proof of a *mens rea* element should not be imprisonment.[14] The Massachusetts Supreme Judicial Court's decision in *Alvarez* is significant because it notably expands public welfare offenses to combat drug presence in school zones by increasing penalties associated with these offenses.[15]

This Comment explains the historical background and development of public welfare offenses in Part II. Part III emphasizes the facts, judicial analysis, and decision in *Commonwealth v. Alvarez*.[16] Focus will then shift to Alvarez's theories regarding due process, double jeopardy, and cruel or unusual punishment in Part IV. Part V analyzes opposing arguments to the judicial resolution of these issues. Part V also

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6. Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 n.4 (1933). *Actus reus* is defined as: "A wrongful deed which renders the actor criminally liable if combined with mens rea; a guilty mind." BLACK'S LAW DICTIONARY 34 (5th ed. 1979).

7. Sayre, *supra* note 6, at 56.

8. *Id.* at 72.

9. *Id.*

10. *Id.* at 70.

11. *Id.*

12. *Id.* at 72.

13. *Id.*

14. *Id.* *See also* Morissette v. United States, 342 U.S. 246, 256-58 (1952); Commonwealth v. Jackson, 369 Mass. 904, 916, 344 N.E.2d 166, 175 (1976); Commonwealth v. Crosscup, 369 Mass. 228, 234-35, 339 N.E.2d 731, 735 (1975); Commonwealth v. Buckley, 354 Mass. 508, 511-12, 238 N.E.2d 335, 337 (1968); Commonwealth v. Dellamano, 17 Mass. App. Ct. 156, 157, 456 N.E.2d 481, 482-83 (1983); Commonwealth v. Wallace, 14 Mass. App. Ct. 358, 363-64, 439 N.E.2d 848, 852 (1982).

15. *See infra* note 160.

16. 413 Mass. 224, 596 N.E.2d 325 (1992).

addresses various public policy concerns and possible misapplication of legislative intent. Finally, this Comment concludes that Section 32J is a valid public welfare offense.

II. HISTORICAL DEVELOPMENT OF PUBLIC WELFARE OFFENSES

Mens rea was an element of all common-law crimes.[17] At common law, one's state of mind distinguished innocent acts from criminal acts.[18] By the middle of the nineteenth century, however, a group of offenses punishable without any mental element appeared (public welfare offenses).[19] These offenses were designed to protect the public welfare and carried minimal penalties.[20] During the mid-1900s, the number of public welfare offenses expanded considerably.[21] This increase can be attributed to a growing population and problems associated with living in a complex modern society.[22] The Massachusetts courts were on the forefront of the expansion movement.[23]

As public welfare offenses expanded, individual interests were subordinated to social objectives due to the fact that in the context of criminal justice administration, generally, individual interests are in

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17. Sayre, *supra* note 6, at 56.

18. *Id.*

19. *Id.* The first case to uphold a public welfare offense statute was Regina v. Woodrow, 15 M & M (Ex. Ch. 1846), which upheld the conviction of a tobacco dealer for having adulterated tobacco in his possession, even though the dealer proved that he purchased the tobacco as genuine and had no knowledge or cause to suspect that it was otherwise. *Id.* Examples of later public welfare offenses include: selling intoxicating liquor to a common drunkard (knowledge that buyer was a common drunkard not required) (Barnes v. State, 19 Conn. 398 (1849)); selling adulterated milk (knowledge of adulterated character not required) (Commonwealth v. Farren, 9 Mass. 489 (1864)); and being a common seller of intoxicating liquor (knowledge of intoxicating nature of beverage not required) (Commonwealth v. Boynton, 2 Mass. 160 (1861)).

20. Sayre, *supra* note 6, at 72. The usual penalty was a slight monetary fine. *Id.*

21. JEROME HALL, PRINCIPLES OF CRIMINAL LAW 330 (2d ed. 1960).

22. Sayre, *supra* note 6, at 67.

> The decisions permitting convictions of light police offenses without proof of a guilty mind came just at the time when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt; the movement also synchronized with the trend of the day away from nineteenth century individualism toward a new sense of the importance of collective interests.

Id.

23. *Id.* at 66. It is noteworthy that Massachusetts has historically been the leader in expanding public welfare offenses to serve social objectives. *Alvarez* is the modern-day example of how Massachusetts has paved the way for social objectives where the potential harm to individual interests is minimal. *See infra* notes 108-12 and accompanying text.

strong opposition to social interests.[24] On the one hand are public demands to be kept safe from injury and menace, while on the other hand are individual demands for autonomy and independence.[25]

Two events paved the way for the public welfare offense expansion.[26] First, there was a general shift away from emphasis on protection of individual interests and towards the protection of public and social interests.[27] Second, criminal law mechanisms were used to enforce new twentieth-century regulatory measures in addition to classic common-law crimes.[28] The desire to contend with modern societal problems resulted in increased convictions for crimes without *mens rea*.[29] Public welfare offenses were expanded to include such acts as the sale of narcotics,[30] the sale of adulterated food, the possession or transportation of gambling devices, the transportation of intoxicating liquor, the sale of intoxicating liquor to habitual drunkards, traffic offenses, and violation of building regulations.[31]

These new public welfare offenses exhibited the typical reaction to a variety of social injuries, in that they imposed a penalty without requiring the traditional corresponding guilty intent.[32] Conditions of life came to require regulation to an unprecedented extent to protect the society as a whole.[33] Increased litigation accompanies increased regulation, and as a result, examining the intent of every defendant becomes difficult if not impossible.[34] In consideration of the harm avoided by public welfare statutes and the superficial penalty traditionally associated with them, courts could afford to "disregard the individual in protecting the social interest."[35]

The United States Supreme Court officially accepted the public welfare offense theory in *United States v. Balint*[36] and in *United States v.*

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24. Sayre, *supra* note 6, at 68.
25. *Id.*
26. *Id.* at 67.
27. *Id.*
28. *Id.* Public welfare offenses were treated as criminal matters and enforced by established criminal law mechanisms, despite their lack of a *mens rea* requirement.
29. *Id.*
30. The sale of narcotics in this instance refers to adulterated or mislabeled narcotics, as in United States v. Dotterweich, 320 U.S. 277 (1943). *See infra* note 37 and accompanying text. *See also* United States v. Balint, 258 U.S. 250 (1922); *see infra* note 36 and accompanying text.
31. HALL, *supra* note 21, at 330.
32. Sayre, *supra* note 6, at 68.
33. *Id.*
34. *Id.* at 69.
35. *Id.* at 69-70.
36. 258 U.S. 250, 251-52 (1922) (holding that if a federal criminal statute is silent as to state of mind for an element, then no state of mind need be proven for that element). The defendant was convicted for selling derivatives of opium and coca leaves despite lack of knowledge about the nature of the drugs. *Id.*

Dotterweich.[37] In *Balint*, the Court held that criminal statutes which do not contain a state of mind element should be interpreted as not requiring *mens rea*.[38] In arriving at their decisions to uphold the respective public welfare offenses, the *Balint* and *Dotterweich* Courts relied heavily on deference to legislative intent. The United States Supreme Court in both cases reasoned that the legislature could have weighed the possible benefits of the law to society against the difficulty of enforcing the law with a *mens rea* element.[39]

III. FACTS, JUDICIAL ANALYSIS, AND THE DECISION OF *COMMONWEALTH V. ALVAREZ*

A. *Facts*

On August 24, 1989, officers from the New Bedford Police Department executed a warrant to search the first-floor apartment at 305 South Second Street, New Bedford, Massachusetts, for drugs and drug-related paraphernalia.[40] At 8:30 that evening, an undercover officer approached the rear door of the apartment and observed another man knocking on the door.[41] When a voice from inside asked what he wanted, the man at the door replied, "a half."[42] The man slipped currency through a hole in the bottom of the door and received a clear plastic bag containing a white powdery substance.[43] After the man at the door left, the undercover officer approached the door and knocked.[44] When asked what he wanted, the undercover officer replied: "a half" and slid $40.00 in marked bills under the door and then received a bag containing 0.73 grams of cocaine.[45] After the officer informed his colleagues that he had made the purchase, teams of officers broke down the front and rear doors of the residence with battering rams and entered the apartment.[46] The officers observed that the doors were secured by two-by-four pieces of wood, which were affixed to the doors with metal brackets.[47]

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37. 320 U.S. 277 (1943) (holding that state of mind need not be proven as to the mislabeled character of drugs to constitute a violation of 21 U.S.C. § 331(a) (1938)).

38. *Balint*, 258 U.S. at 251-52.

39. *Id.* at 254; *Dotterweich*, 320 U.S. at 284-85.

40. Commonwealth v. Alvarez, 413 Mass. 224, 226, 596 N.E.2d 325, 327 (1992).

41. *Id.*

42. *Id.* Testimony indicated that "a half" is a quantity of cocaine with a street value of approximately $40.00. *Id.*

43. *Alvarez*, 413 Mass. at 226, 596 N.E.2d at 327.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

Upon entering the house, officers observed Alvarez and three other men running towards a bedroom.[48] While Alvarez and two of the other men impeded the police officers in the bedroom doorway, the fourth man went into the adjoining bathroom and flushed a clear bag, which contained several smaller bags of a white powdery substance, down the toilet.[49] A search of the apartment revealed 0.55 grams of cocaine, a small amount of cash[50] (both of which were hidden inside beer cans with false tops),[51] and other drug paraphernalia.[52] The parties stipulated that the apartment was located within 1,000 feet of a public school.[53] Detective Al Pacheco, the officer in charge of the warrant execution, stated that based on his experience and observations he believed that this location was a "point house."[54]

Alvarez was charged with possession of a class B controlled substance with intent to distribute and possession of a class B controlled substance with intent to distribute within one-thousand feet of a school under Massachusetts General Laws chapter 94C, sections 32A and 32J, respectively, and was subsequently found guilty of both charges by a jury.[55] The superior court judge denied Alvarez's pretrial motion to dismiss the section 32J charge.[56] Alvarez unsuccessfully argued that the "lack of knowledge of school boundaries" provision of section 32J deprived him of due process.[57]

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48. *Id.* at 227, 596 N.E.2d at 327.

49. *Id.*

50. Brief of the Commonwealth at 5, Commonwealth v. Alvarez, 413 Mass. 224, 596 N.E.2d 325 (1992) (No. 5879). Among the currency seized were the marked bills used earlier by the undercover officer to purchase cocaine. *Id.*

51. *Id.*

52. *Alvarez*, 413 Mass. at 227, 596 N.E.2d at 327.

53. *Id.*

54. Telephone Interview with Al Pacheco, Detective, New Bedford Police Department (Sept. 18, 1992). Detective Pacheco explained that a "point house" is a retail drug distribution location. Usually, only smaller quantities of drugs are stored here for distribution in anticipation of police raids. Larger quantities are protected at "holding houses." A "holding house" is a bulk narcotics storage facility. *Id.* Addicts and users purchase drugs at the "point house"; as a result, there is frequently a great deal of visible drug activity in the neighborhood where a "point house" is located. *Id.*

Detective Pacheco believed that this location was a "point house" due to the steel bracket and wooden beam barricades on the front and rear doors, the absence of any furniture, and the presence of various drug paraphernalia. *Id.*

55. *Alvarez*, 413 Mass. at 227, 596 N.E.2d at 327.

56. *Id.*

57. *Id.*

Alvarez received a ninety-day sentence in connection with the section 32A[58] violation and a two-year consecutive term for the related section 32J violation.[59] Alvarez later moved to dismiss his conviction under section 32A on the grounds that it was a lesser included offense[60] of the section 32J charge, and that motion was also denied.[61] Subsequently, Alvarez brought an appeal to the Massachusetts Supreme Judicial Court, which affirmed both convictions.[62]

The Massachusetts Supreme Judicial Court analyzed three issues in upholding the validity of section 32J. First, the court focused on due process.[63] The court reasoned that a statute is not invalid solely because the legislature chose not to impose a *mens rea* requirement.[64] The court further reasoned that section 32J is not completely devoid of a *mens rea* requirement.[65] The court then turned its attention to double jeopardy and the same evidence rule issue addressed in *Commonwealth v. Morey*.[66] The court held that the same evidence rule expressed in *Morey* was merely a rule of statutory construction.[67] Finally, the court

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58. MASS. GEN. L. ch. 94C § 32A(a) (1992) [hereinafter § 32A] provides:

> Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class B of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years, or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars, or both such fine and imprisonment.

Id.

59. *Alvarez*, 413 Mass. at 227, 596 N.E.2d at 327.

60. A lesser included offense is defined as:

> One composed of some, but not all, of the elements of the greater crime, and which does not have any element not included in the greater offense . . . . One which includes some of the elements of the crime charged in the information without the addition of any element irrelevant to the original charge . . . . When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a 'lesser included offense.'

BLACK'S LAW DICTIONARY 812 (5th ed. 1979).

61. *Alvarez*, 413 Mass. at 227, 596 N.E.2d at 327. The consecutive term provision of § 32J requires the convicted to complete his or her sentence for the underlying offense before beginning the mandatory two-year term for the § 32J violation. *Id.* This is embodied in the "from and after" clause of § 32J. *See supra* note 2.

62. *Alvarez*, 413 Mass. at 227, 596 N.E.2d at 327.

63. *Id.* at 228, 596 N.E.2d at 328.

64. *Id.*

65. *Id.* at 229-30, 596 N.E.2d at 328-29.

66. Morey v. Commonwealth, 108 Mass. 433 (1871); *Alvarez*, 413 Mass. at 231, 596 N.E.2d at 329.

67. *Alvarez*, 413 Mass. at 232, 596 N.E.2d at 330.

examined cruel or unusual punishment issues and held that the penalty posed by section 32J does not constitute cruel or unusual punishment.[68]

B. *Judicial Analysis*

1. Due Process

On appeal, Alvarez argued that section 32J violates the state constitutional due process provisions which articles I,[69] X,[70] and XII[71]

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68. *Id.* at 233-34, 596 N.E.2d at 530-31.

69. MASS. CONST. art. I provides:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

MASS. CONST. pt. 1, art. I, *amended by* MASS. CONST. amend. art. CVI.

70. MASS. CONST. art. X provides:

> Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently to contribute his share to the expense of the protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of the Commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore.

MASS. CONST. pt. I, art. X.

71. MASS. CONST. art. XII provides:

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his properties, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.
>
> And the legislature shall not make any law, that shall subject any person to capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

MASS. CONST. pt. 1, art. XII.

of the Massachusetts Constitution protect, by excluding guilty minds, an element of the offense.[72]

Alvarez based his argument on precedent which imposed a *mens rea* requirement for criminal statutes compelling severe penalties for *actus reus* alone.[73] In each of the cases Alvarez cited, the courts based their decisions on the fact that the statutes involved were silent as to whether *mens rea* was required to obtain a conviction.[74] The Massachusetts Supreme Judicial Court noted that in each of these cases, the reviewing court inferred a *mens rea* requirement to avoid possible due process issues.[75] The court acknowledged that clear legislative language indicating that *mens rea* was not required could produce a different result.[76] The court further acknowledged that section 32J contains such clear language by explicitly indicating that lack of knowledge of school zone boundaries is not a valid defense.[77] The court also held that the legislature has broad power to define and limit the *mens rea* element of criminal offenses in this manner.[78] The court continued by saying that even absent specific language excluding *mens rea* as an element of a given offense, public welfare offenses which authorize imposition of serious sentences without requiring proof of *mens rea* have previously been upheld.[79] The court stated "[s]trict criminal liability is not necessarily a denial of due process of law."[80]

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72. *Alvarez*, 413 Mass. at 228, 596 N.E.2d at 327-28 (Alvarez argued that the punishment imposed by § 32J was cruel or unusual because of the lack of a knowledge/scienter element).

73. *Id.* at 228-29, 596 N.E.2d at 328. Petitioner cited to the following cases: Commonwealth v. Jackson, 369 Mass. 904, 916, 344 N.E.2d 166, 175 (1976); Commonwealth v. Crosscup, 369 Mass. 228, 234-35, 339 N.E.2d 731, 735 (1975); Commonwealth v. Buckley, 354 Mass. 508, 511-12, 238 N.E.2d 335, 337 (1968); Commonwealth v. Dellamano, 17 Mass. App. Ct. 156, 157, 456 N.E.2d 481, 482-83 (1983); Commonwealth v. Wallace, 14 Mass. App. Ct. 358, 363-64, 439 N.E.2d 848, 850 (1982).

74. *Alvarez*, 413 Mass. at 229, 596 N.E.2d at 328.

75. *Id.*

76. Commonwealth v. Buckley, 354 Mass. 508, 511-12, 238 N.E.2d 335, 337-38 (1968). In Commonwealth v. Miller, 385 Mass. 521, 524, 432 N.E.2d 463, 465 (1982), the Massachusetts Supreme Judicial Court noted that the legislature has the power to create a strict liability offense which does not require a guilty mind for punishment.

77. *Alvarez*, 413 Mass. at 229, 596 N.E.2d at 328.

78. *Id.* (citing Commonwealth v. Tart, 408 Mass. 249, 264, 557 N.E.2d 1123, 1133 (1990); Simon v. Solomon, 385 Mass. 91, 103, 431 N.E.2d 556, 565 (1982)).

79. *Alvarez*, 413 Mass. at 229, 596 N.E.2d at 328.

80. *Id.* (quoting Commonwealth v. Miller, 385 Mass. 521, 525, 432 N.E.2d 463, 466 (1982)). The court cited to the following cases to support its position: Commonwealth v. Knap, 412 Mass. 712, 715, 592 N.E.2d 747, 748 (1992) (holding that an honest belief by the accused that the female was over 16 years old is not a defense to a statutory rape charge); Commonwealth v. Dunne, 394 Mass. 10, 18-19, 474 N.E.2d 538, 544-45 (1985) (holding that an honest belief by the accused that the

The court also relied in part on the fact that section 32J is not completely devoid of *mens rea* requirements,[81] noting that section 32J only imposes liability on an individual who is knowingly dealing drugs.[82] The statute leaves it to the individual distributing drugs to proceed at his or her own peril as to the location of his or her activity.[83] The court reasoned that section 32J resembles other criminal statutes which consider an underlying offense committed with *mens rea* intensified by some aggravating factor despite the fact that the defendant may not have knowledge of the particular aggravating factor.[84] In light of the above considerations, the court rejected Alvarez's claim and concluded that his right to due process was not violated.[85] The court also rejected Alvarez's second argument, that his right against being punished twice for the same offense (double jeopardy) was being violated based on the same evidence rule adopted in *Morey v. Commonwealth*.[86]

2. Double Jeopardy

The same evidence rule, which the court applied in *Morey*, states that where a conviction is obtained under two statutes, consecutive sentences may not be imposed unless each statute requires proof of some fact that the other statute does not.[87] Alvarez claimed that the same evidence rule expresses a right against multiple punishments, which is implicit in

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female was over 16 years old is not a defense to a statutory rape charge); Commonwealth v. Baker, 17 Mass. App. Ct. 40, 43, 455 N.E.2d 642, 643 (1983) (holding that prosecution did not need to offer evidence that defendant knew or should have known of prostitute's age to obtain a conviction for receiving support from child prostitution); Nelson v. Moriarty, 484 F.2d 1034, 1035-36 (1st Cir. 1973) (holding that an honest belief by the accused that the female was over 16 years old is not a defense to a statutory rape charge).

81. *Alvarez*, 413 Mass. at 229, 596 N.E.2d at 328.

82. *Id.* at 229-30, 596 N.E.2d at 328-29. It is interesting to note that the court's opinion uses the word "dealing" drugs. In fact, § 32J imposes punishment on an individual who is knowingly distributing drugs (a much broader category). *See supra* note 2.

83. *Id.* at 230, 596 N.E.2d at 329.

84. *Id.* The court cited to the following two statutes in support of its position: MASS. GEN. L. ch. 269 § 12E (1990) (discharge of a firearm within 500 feet of a dwelling; no requirement of knowledge of the distance); MASS. GEN. L. ch. 94C, § 32E (1990) (increasing the mandatory minimum terms based on weight of the controlled substance; no requirement of knowledge of weight of substance).

85. *Alvarez*, 413 Mass. at 230, 596 N.E.2d at 329.

86. 108 Mass. 433 (1871); *Alvarez*, 413 Mass. at 230, 596 N.E.2d at 329.

87. *Alvarez*, 413 Mass. at 230, 596 N.E.2d at 329 (quoting *Morey*, 108 Mass. at 434).

articles I,[88] X[89] and XII[90] of the Massachusetts Constitution, and proscribes the punishment imposed by section 32J.[91]

The court examined the evolution of the same evidence rule in *Morey* and reasoned that it is a rule of Massachusetts common law.[92] The court noted that the decisions applying the same evidence rule, as expressed in *Morey*, have not relied on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution or on any comparable principle in the Constitution of the Commonwealth of Massachusetts.[93] The court concluded that the sole fact that section 32A is a lesser included offense of 32J does not automatically make consecutive sentencing unlawful.[94] Legislatures have broad power to define crimes and may use this power to impose consecutive punishments as they deem appropriate.[95] The court concluded that the same evidence rule is merely a principle of statutory construction to be employed where the legislature has not expressed an intent regarding consecutive punishments.[96] As a rule of statutory construction, the same evidence rule is designed to aid judicial interpretation of criminal statutes where the legislature has not clearly expressed its intent.[97] Where the legislature expressly authorizes cumulative punishment under two statutes, the court's job of statutory interpretation ends, and the court must enforce the legislature's mandates.[98]

The court concluded that section 32J does not offend double jeopardy concerns because the mandatory two-year sentence was precisely the punishment that the legislature intended to impose for the offense.[99] The legislature provided for the 32J sentence to begin after the sentence for the underlying offense has been served.[100] Legislative intent is clearly expressed within the four corners of the statute and, as a result, the court is bound to uphold this intent.[101]

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88. *See supra* note 69 (containing text of MASS. CONST. art. I).
89. *See supra* note 70 (containing text of MASS. CONST. art. X).
90. *See supra* note 71 (containing text of MASS. CONST. art. XII).
91. *Alvarez*, 413 Mass. at 231, 596 N.E.2d at 329.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* (citing Missouri v. Hunter, 459 U.S. 359, 368 (1983)).
96. *Alvarez*, 413 Mass. at 231, 596 N.E.2d at 330. *See also* Commonwealth v. Crocker, 384 Mass. 353, 359-60, 424 N.E.2d 524, 529 (1981).
97. *Alvarez*, 413 Mass. at 232, 596 N.E.2d at 330.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*

3. Cruel or Unusual Punishment

Alvarez argued that section 32J constitutes cruel or unusual punishment in violation of article XXVI[102] of the Massachusetts Constitution.[103] The court responded by saying that "'[t]he function of the legislature is primary,'" and the courts should not lightly question the legislature's judgment about the appropriateness of the penalty imposed for a particular crime.[104] The court specified that in order to constitute cruel or unusual punishment, the punishment must be so disproportionate to the crime as to "shock[] the conscience and offend[] fundamental notions of human dignity."[105] The court determined that the sentence rendered by section 32J was not such a punishment.[106] In making this determination, the court examined three objective factors: "(1) the nature of the offender and offense in light of the degree of harm to society; (2) sentencing provisions in other jurisdictions for similar offenses; and (3) sentences for more severe offenses within the Commonwealth."[107]

By examining the nature of the offender and the offense in light of the degree of harm to society, the court determined that the legislature, in weighing the danger to the public and particularly the danger to young children, could have determined that the two-year mandatory minimum prison term would be a suitable deterrent.[108] The court noted that it is generally well recognized that "traffic in narcotics creates serious social concerns and is at the root of other crimes."[109] The court also noted that drugs "tend[] to trap [individuals] at an early age

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102. MASS. CONST. art. XXVI provides:

> No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments. No provision of the Constitution however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

MASS. CONST. pt. 1, art. XXVI, *amended by* MASS CONST. amend. art. CXVI.

103. *Alvarez*, 413 Mass. at 233, 596 N.E.2d at 330.

104. *Id.* at 233, 596 N.E.2d at 330-31 (quoting Weems v. United States, 217 U.S. 349, 379 (1910)).

105. *Id.* at 233, 596 N.E.2d at 331 (quoting *In re* Lynch, 8 Cal. 3d 410, 424 (1972)). *See also* Commonwealth v. Bianco, 390 Mass. 254, 260-62, 454 N.E.2d 901, 905 (1983); Commonwealth v. Jackson, 369 Mass. 904, 910, 344 N.E.2d 166, 170 (1976).

106. *Id.* at 233, 596 N.E.2d at 331.

107. *Id.* at 234, 596 N.E.2d at 331.

108. *Id.* In United States v. Falu, the Second Circuit expressed concern over the possible dangers of exposing school-age children to drugs. United States v. Falu, 776 F.2d 46, 50 (2d Cir. 1985).

109. *Alvarez*, 413 Mass. at 234, 596 N.E.2d at 331.

in a life of anti-social behavior, poverty, despair and crime."[110] The court's opinion was that the enhanced penalty imposed by section 32J was an appropriate deterrent to those who distribute or traffic in drugs.[111] The court emphasized the point that an individual is only punished under section 32J if that individual is found guilty of possessing with intent to distribute or actually distributing a controlled substance.[112]

The court also examined the punishment imposed for similar offenses in other jurisdictions and determined that the punishment imposed by section 32J was reasonable in comparison to these punishments.[113] For example, the court compared section 32J to the Federal School Zone Act, a statute which provides for up to twice the penalty imposed for the underlying drug offense.[114]

The court further determined that the two-year mandatory sentence imposed by section 32J was not clearly excessive when compared to punishments for other narcotic offenses in the Commonwealth.[115] Additionally, the sentencing judge retains discretion with respect to imposing a sentence for the underlying offense.[116] The judge will be able to utilize this discretion to assure that the defendant receives a just and fair punishment.[117] If, for example, a particular judge felt that the "from and after" provision of section 32J would produce a disproportionate penalty in a certain case, the judge could mitigate the impact of section 32J by imposing a lighter sentence for the underlying of-

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110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.* at 235, 596 N.E.2d at 332. "The Federal School Zone Act provides for up to twice the penalty imposed for the underlying drug offense. 21 U.S.C. § 860 (1992) (possible forty year sentence). At least twenty-three states and territories have also enacted criminal statutes which penalize in various ways the sale or distribution of controlled substances on or near school grounds." *Id.* at 235-36, 596 N.E.2d at 332. Data provided by the National Coalition for Drug Free School Zones suggests that this number is presently closer to 40 states.

Some of the states and territories that have enacted similar statutes are: Alabama, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, New Jersey, North Dakota, Oklahoma, Puerto Rico, Rhode Island, South Carolina, Virginia, the Virgin Islands, and Wyoming. *Id.* at n.8.

114. *Id.* at 235, 596 N.E.2d at 332 (quoting 21 U.S.C. § 860 (Supp. IV 1992) (possible forty-year sentence)).

115. *Id.*, 596 N.E.2d at 331-32. "See, e.g., G.L. c. 94C, § 32E (b) (4) (fifteen-year minimum mandatory sentence for trafficking over 200 grams of cocaine); G.L. c. 94C, § 32A (d) (five-year minimum mandatory sentence for distribution of cocaine following previous drug conviction)." *Id.*

116. *Id.* at 234, 596 N.E.2d at 331.

117. *Id.*

fense.[118] While the court recognized the possible imprudence of imposing a mandatory minimum sentence upon another mandatory minimum sentence, it concluded that the total time of incarceration imposed in this case was not constitutionally disproportionate to sentences regularly imposed for other similarly severe offenses in the Commonwealth and elsewhere.[119]

C. *Decision*

In summary, the court rejected all three of Alvarez's arguments on appeal and affirmed both convictions. The court held that the Massachusetts legislature was acting within its authority when it enacted section 32J without a *mens rea* element.[120] The court also dismissed Alvarez's same evidence rule argument as a rule of statutory construction.[121] Finally, the court determined that the punishment imposed by section 32J was not so disproportionate to the offense as to "'shock[] the conscience and offend fundamental notions of human dignity.'"[122]

IV. DEFENDANT'S THEORY OF THE CASE

A. *Due Process*

Alvarez argued that the Massachusetts Superior Court's denial of his motion to dismiss the section 32J charge violated his fundamental due process rights by impermissibly removing guilty knowledge as an element of the offense.[123] Alvarez's primary argument was that section 32J does not distinguish an individual who sells narcotics to a school-age child inside a schoolhouse from an individual who shares a marijuana cigarette with a consenting adult in a private home while school is not in session.[124]

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118. *Id.* It is noteworthy that the defendant in *Alvarez* only received a ninety-day sentence for his conviction under MASS. GEN. L. ch. 94C, § 32A.

119. *Id.* at 235-36, 596 N.E.2d at 332. The court cited to two statutes in support of this point: MASS. GEN. L. ch. 94C, § 32E(b)(4) (fifteen-year minimum mandatory sentence for trafficking over two-hundred grams of cocaine), and MASS. GEN. L. ch. 94C, § 32A(d) (five-year minimum mandatory sentence for distributing cocaine following a previous drug conviction).

120. *Alvarez*, 413 Mass. at 229, 596 N.E.2d at 330.

121. *Id.* at 232, 596 N.E.2d at 330.

122. *Id.* at 233, 596 N.E.2d at 331 (quoting *In re* Lynch, 8 Cal. 3d 410, 424 (1972)).

123. Brief and Record Appendix for the Defendant on Appeal from the Bristol County Superior Court at 13, Commonwealth v. Alvarez, 413 Mass. 224, 596 N.E.2d 325 (1992) (No. 5964) [hereinafter Defendant's Brief].

124. *Id.* In illustration of this theory, Alvarez made reference to United States v. Jones, 779 F.2d 121, 123 (2d Cir. 1985) (holding that the federal schoolyard statute's strict liability attributes applied to the sale of drugs to an adult at night inside a bar).

Alvarez further argued that strict liability statutes are generally disfavored because separating guilty knowledge from blameworthy behavior risks serious injustices.[125] The Massachusetts courts have generally upheld strict liability statutes only if the statutes are valid public welfare offenses.[126] Alvarez argued that the substantial penalty imposed for a violation of section 32J should take the statute out of the public welfare offense realm and require a showing of *mens rea*.[127] Alvarez relied upon *Commonwealth v. Jackson*[128] for the premise that a mandatory two-year incarceration is too severe to be treated as a public welfare offense and punished without proof of some intent.[129] In *Jackson*, the court held that a one-year incarceration was sufficiently severe to require proof of *mens rea*.[130]

In the alternative, Alvarez argued that "[d]ue process 'should not be abandoned simply because there is a drug problem in this country.'"[131] If the legislature perceives a behavior such as drug dealing to be particularly harmful and deserving of especially harsh punishment, it may not simultaneously seek to reduce the burden of proof by declaring that an individual's knowledge that he or she was engaging in that precise behavior is irrelevant.[132] In summary, Alvarez argued that the school zone statute violates due process by requiring that an "individual's criminal liability for a particular act be apportioned to his or her moral culpability for that act . . . but not for a fortuitous result merely because the act was unlawful."[133] Alvarez also argued that his right not to be punished twice for the same crime was violated by the provisions of section 32J.

B. *Double Jeopardy*

Alvarez's principal contention under his double jeopardy theory was that applicable Massachusetts law precludes the Commonwealth from

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125. Defendant's Brief, *supra* note 123, at 16.

126. *Id.*

127. *Id.* at 16-17.

128. 369 Mass. 904, 916-17, 344 N.E.2d 166, 174 (1976) (holding that a statute creating a mandatory minimum sentence of one year incarceration for unlawfully carrying a firearm must be construed to contain a scienter requirement, and the accused must have at least known that he or she was carrying a firearm).

129. Defendant's Brief, *supra* note 123, at 19.

130. *Id.* (citing *Jackson*, 369 Mass. 904, 916, 344 N.E.2d 166, 170). It is noteworthy that the "intent" that the *Jackson* Court relied on was the mere intent (expressed as knowledge) to possess a firearm. *Jackson*, 369 Mass. at 916, 344 N.E.2d at 174.

131. Defendant's Brief, *supra* note 123, at 19 (quoting Guiney v. Police Comm'r of Boston, 411 Mass. 328, 333, 582 N.E.2d 523, 526 (1991)).

132. *Id.* at 19-20.

133. *Id.* at 20 (quoting Commonwealth v. Catalina, 407 Mass. 779, 785-86, 556 N.E.2d 973, 977 (1990) (quoting State v. Pray, 378 A.2d 1322, 1324 (Me. Sup. Ct. 1977))).

punishing a defendant under two separate statutes for the same act unless each statute requires proof of a fact which the other does not.[134] In this respect, Alvarez pointed out that all of the elements required to obtain a conviction for possession of cocaine with intent to distribute[135] are also required to obtain a conviction under section 32J.[136] Alvarez concluded that by committing essentially one act, he was convicted under two statutes.[137] The school zone statute expressly requires proof that the defendant committed the underlying offense plus proof of the additional element that the underlying offense occurred within one-thousand feet of a school.[138] Therefore, according to *Alvarez*, under the classic test enunciated in *Commonwealth v. Morey*, section 32A should be treated as a lesser included offense of section 32J.[139]

Alvarez argued that under Massachusetts double jeopardy principles, if two crimes do not satisfy the same evidence test, they are one offense for constitutional analysis purposes, and convictions for both offenses implicate constitutional double jeopardy concerns.[140] Alvarez further argued that although federal law recognizes the same evidence test as a rule of statutory construction, Massachusetts should not follow its lead.[141] The federal law in this area has become "so unacceptably permissive as to require its rejection."[142] In the absence of *Morey*, the legislature would be free to subject a defendant to separate and multiple punishments for every lesser included offense embodied by a single criminal act.[143] Under federal standards, such action would be valid based on legislative prerogative.[144] Such a scheme, however, "would plainly jeopardize a defendant more than once for the same offense."[145]

Alvarez further argued that the "from and after" provision of the school zone statute is unnecessary.[146] The legislature could have simply required more punishment for crimes committed under certain circumstances without "pyramiding sentences for greater and lesser

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134. *Id.* at 21 (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)). *See also* Blockburger v. United States, 284 U.S. 299, 304 (1932).
135. MASS. GEN. L. ch. 94C, § 32A(a) (1992).
136. Defendant's Brief, *supra* note 123, at 22.
137. *Id.*
138. *Id.*
139. *Id.* at 22-23.
140. *Id.* at 27.
141. *Id. See, e.g.*, Missouri v. Hunter, 459 U.S. 359 (1983).
142. Defendant's Brief, *supra* note 123, at 26-27.
143. *Id.* at 28-29.
144. *Id.* at 29.
145. *Id.*
146. *Id.*

included offenses."[147] Alvarez argued that the legislature overstepped its bounds by requiring that the sentence under section 32J be served "from and after" the sentence for the underlying conviction.[148]

C. *Cruel or Unusual Punishment*

Alvarez argued that the mandatory penalty imposed by the school zone statute constitutes cruel or unusual punishment in violation of article XXVI of the Massachusetts Constitution.[149] The school zone statute mandates a two-year minimum incarceration upon an underlying offense, which may involve a mandatory sentence of up to fifteen-years, without any proof that the defendant knew of the circumstances warranting such severe punishment.[150] Alvarez argued that the "'mandatory minimum' feature of the statute insures that there can be no proportionality or tailoring of an appropriate sentence to the facts of a particular case or to the background of the defendant. The 'from and after' provision insures that the punishment will be especially harsh and duplicitous."[151]

Despite Alvarez's assertions that section 32J violates due process, double jeopardy, and the right to be free from cruel or unusual punishment,[152] section 32J survives scrutiny as a public welfare offense because of its substantial benefit to society.[153] As a public welfare offense, section 32J does not require proof of *mens rea* for conviction.[154] The Massachusetts Supreme Judicial Court correctly rejected all three of Alvarez's arguments and ruled that section 32J is constitutional as written.

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147. *Id.* Alvarez cited MASS. GEN. L. ch. 265 § 13D (amended 1990) as an example of how the legislature has provided for more severe punishment for crimes committed under aggravating circumstances (ninety-day minimum sentence for assault and battery when committed upon a police officer or other public employee). *Id.*

148. Defendant's Brief, *supra* note 123, at 31. Alvarez argued that in other situations the legislature had provided greater punishments for offenses without violating the same evidence rule. *Id.* For example, MASS. GEN. L. ch. 265, § 18B imposes an additional penalty upon an individual who uses a firearm during the commission of a felony. Section 18B excludes felonies that already involve the use of a dangerous weapon from the statute's scope. Defendant's Brief, *supra* note 123, at 29-30.

149. *Id.* at 34-35. *See supra* note 102 for the text of MASS. CONST. art. XXVI.

150. Defendant's Brief, *supra* note 123, at 35-36.

151. *Id.* at 36. The defendant relied on Judge Hennessey's concurring opinion in Commonwealth v. Colon-Cruz, 393 Mass. 150, 178, 470 N.E.2d 116, 133 (1984) (Hennessey, J., concurring), for the premise that criminal penalties may be unconstitutionally excessive absent intentional wrongdoing.

152. *See supra* notes 123-51 and accompanying text.

153. *See infra* notes 157-69 and accompanying text.

154. *See supra* note 5 and accompanying text.

V. ANALYSIS

A. *Due Process*

The court correctly concluded that section 32J does not violate due process merely by excluding *mens rea* as an element of the offense. There is a long line of precedent to support the principle that a legislature does not need to impose a *mens rea* element on a public welfare offense.[155] These cases suggest that if a regulated activity is a valid public welfare offense, a legislature may omit a mens rea requirement without offending due process.[156] The first step in analyzing *Alvarez*, therefore, should be to ascertain whether or not section 32J is a valid public welfare offense.

The court should employ a bifurcated test to determine whether a statute is a valid public welfare offense.[157] First, the court should look to the purpose of the statute to determine whether it has a social objective.[158] If the statute has a social objective, then the court should look for clear legislative language to indicate that no knowledge is required for conviction.[159] The United States Court of Appeals for the Second Circuit, for example, has previously upheld the Federal School Zone Statute by relying on strong social objectives, despite the fact that the statute (like section 32J) does not require that the accused have knowledge of the proximity to the school.[160]

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155. *See, e.g.*, United States v. Balint, 258 U.S. 250 (1922); Nelson v. Moriarty, 484 F.2d 1034, 1035 (1st Cir. 1973); Commonwealth v. Knap, 412 Mass. 712, 714-15, 592 N.E.2d 747, 749 (1992); Commonwealth v. Tart, 408 Mass. 249, 264-65, 557 N.E.2d 1123, 1134 (1990); Commonwealth v. Dunne, 394 Mass. 10, 18-19, 474 N.E.2d 538, 544-45 (1985); Simon v. Solomon, 385 Mass. 91, 102-03, 431 N.E.2d 556, 565 (1982); Commonwealth v. Baker, 17 Mass. App. Ct. 40, 42-43, 455 N.E.2d 642-43 (1983).

156. *See supra* notes 76-80 and accompanying text.

157. Brief of the Attorney General as Amicus Curie at 13-14, Commonwealth v. Alvarez, 413 Mass. 224, 596 N.E.2d 325 (1992) (No. 5879) [hereinafter Attorney General's Brief].

158. *Id.* at 13 (citing Commonwealth v. Baker, 17 Mass. App. Ct. 40, 455 N.E.2d 642 (1983) (safeguarding against the victimization of a minor is a legitimate social objective)).

159. Attorney General's Brief, *supra* note 157, at 13-14 (citing Commonwealth v. Buckley, 354 Mass. 508, 238 N.E.2d 335 (1968) (upholding the conviction of an individual for being present where an illegal narcotic drug was being kept)).

160. United States v. Falu, 776 F.2d 46, 50 (2d Cir. 1985). In reaching its determination, the court relied on strong public policy theories. The court focused on legislative intent to create drug-free school zones. *Id.* (citing 130 CONG. REC. S559 (daily ed. January 31, 1984)). One hundred and thirty CONG. REC. S559 provides:

> Whether or not a child is involved in or otherwise present during any particular sale of narcotics within one thousand feet of a school, subjecting the seller to enhanced penalties reasonably may be expected to deter the

As stated above, the first stage of analysis is to determine the purpose of the statute.[161] One purpose of section 32J and similar school zone legislation is to protect school age children from exposure to dangerous narcotics and the dangers inherent in narcotic transactions near schools. Another purpose is to send a strong message to drug dealers that society will not tolerate drugs in the presence of its schools.[162] Section 32J and school zone drug legislation generally, therefore, appear to be enacted with a strong social objective in mind, keeping drugs out of school zones.[163] The United States Congress has facilitated application of this objective by stating that judicial notice may be taken of the dangers of drug addiction.[164]

The second step in determining whether a statute qualifies as a valid public welfare offense is to consider legislative language that may indicate culpability regardless of knowledge.[165] In section 32J, the legislature explicitly stated that lack of knowledge of school boundaries will not eradicate culpability.[166] Therefore, under the two-step test set forth above, section 32J qualifies as a public welfare statute.[167] Furthermore, it should be noted that in *United States v. Balint*,[168] the United States Supreme Court held that statutes punishing the unlawful sale of drugs to minimize addiction and use of poisonous drugs are valid public welfare offenses.[169]

> seller and other illicit dealers from conducting their operations near school property in the future . . . . Indeed judicial notice may be taken of the destructive results of drug addiction, the source of which Congress clearly intended to keep out of the reach of school age children.

Id.

161. *See supra* note 158 and accompanying text.

162. *Falu*, 776 F.2d at 48 (citing 130 CONG. REC. S559 (daily ed. January 31, 1984)). One hundred and thirty CONG. REC. S559 provides, in pertinent part:

> The purveying of drugs in and around schools which children frequent before, during and after school hours may not be as immediate and dramatic a victimization of children as child sexual abuse, but its long range effects can be considered as insidious and as threatening to the health and welfare of school children.

Id.

163. *See supra* notes 160, 162.

164. *See supra* note 160.

165. *See supra* note 159 and accompanying text.

166. *See supra* note 2. When the Massachusetts legislature passed § 32J, it included explicit language indicating that *mens rea* was not a necessary element of the offense: "[l]ack of knowledge of school boundaries shall not be a defense to any person who violates the provisions of this section." *Id.* In contrast, the Federal School Zone Statute does not expressly dispense with *mens rea* within the four corners of the statute; and therefore, the *Falu* Court had to examine legislative history to ascertain this intent. United States v. Falu, 776 F.2d 46, 49-50 (2d Cir. 1985).

167. *See supra* notes 158-59 and accompanying text.

168. 258 U.S. 250 (1922).

169. *Id.* at 253-54.

Although both the two-part test referenced above and the *Balint* language support treating section 32J as a valid public welfare offense, section 32J still appears vulnerable to attack because it carries a severe penalty[170] as opposed to traditional public welfare offenses.[171] The severity of punishment attack fails, however, because an individual can be convicted under section 32J only after that individual is found guilty of another offense which requires proof of *mens rea*.[172] The fact that section 32J does not punish otherwise innocent conduct can be neither ignored nor forgotten.[173] An individual must have the requisite intent for a conviction under certain sections of chapter 94C of the Massachusetts General Laws[174] before that individual can be convicted and punished under section 32J.[175]

B. *Double Jeopardy*

Despite the fact that an individual must be convicted of one of certain enumerated offenses which share many common elements with section 32J, the same evidence rule is not implicated.[176] The Massachusetts Supreme Judicial Court noted that the common law protection against multiple punishment is not a restraint upon the legislature.[177] The same evidence rule[178] has evolved into a rule of statutory construction.[179] The United States Supreme Court has stated: "[w]hether punishment prescribed in a statute violates the principles of double jeopardy is determined by legislative intent."[180] The same evidence rule does not apply when the legislature demonstrates its intent within

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170. Section 32J provides for a mandatory minimum two-year prison term and a fine of not less than $1,000 but not more than $10,000.

171. *See supra* notes 20, 35 and accompanying text.

172. MASS. GEN. L. ch. 94C, §§ 32, 32A-F, and 32I make it unlawful for one to manufacture, distribute or possess with intent to distribute certain controlled substances.

173. *Id.*

174. *See supra* note 3 and accompanying text.

175. In this respect, § 32J is similar to the offense of statutory rape. MASS. GEN. L. ch. 265 § 24B (1992) defines statutory rape as: "Whoever assaults a child under sixteen with intent to commit a rape . . . shall be punished by imprisonment in the state prison for life . . . whoever over the age of eighteen commits a subsequent such offense shall be punished . . . not less than five years." *Id.* Section 32J and statutory rape are similar in that an individual who engages in certain illegal activity (rape or the sale of illegal drugs) takes the risk that factors unknown to that individual (the age of the victim or the proximity to a school) may elevate the seriousness and corresponding punishment for the underlying illegal behavior which requires an intent.

176. *See supra* notes 87-101 and accompanying text.

177. Commonwealth v. Crocker, 384 Mass. 353, 360, 424 N.E.2d 524, 529 (1981).

178. *See supra* note 87 and accompanying text.

179. *See supra* notes 92-98 and accompanying text.

180. Ohio v. Johnson, 467 U.S. 493, 499 (1984).

the four corners of the statute.[181] Double jeopardy does nothing more than prevent sentencing greater than the legislature intended.[182] The Massachusetts legislature specified that lack of knowledge of proximity to a school would not be an available defense for an individual facing a section 32J charge.[183] Double jeopardy principles are not implicated, therefore, because the court is merely enforcing the legislature's intent.[184]

C. *Cruel or Unusual Punishment*

Examination of punishment for similar offenses in other jurisdictions and for other serious offenses in the Commonwealth reveals that the punishment that the Massachusetts legislature intends to impose for a violation of section 32J is not so disproportionate to the crime as to shock the conscience and offend fundamental notions of human dignity; therefore, it does not constitute cruel or unusual punishment.[185] Despite Alvarez's arguments, the sole fact that the punishment imposed for a violation of section 32J (mandatory two-year incarceration) begins after any sentence for the underlying conviction does not constitute cruel or unusual punishment. Various Massachusetts courts have stated that in order to constitute cruel or unusual punishment, the punishment must be so disproportionate to the crime as to shock the conscience and offend fundamental notions of human dignity.[186] Examination of section 32J reveals a significant liberty deprivation without any criminal intent.[187] The underlying offense in this case, however, is very serious.[188]

In enacting the Federal School Zone Act, the United States Congress expressed concern about the detrimental effects of drugs in and around schools on the health and welfare of school children.[189] Traffic in narcotics is a blemish on society that incubates other crime and pulls youngsters into a life of crime.[190] Society needs a suitable deterrent to combat these evils. In the court's opinion, section 32J provides such a deterrent.[191]

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181. Missouri v. Hunter, 459 U.S. 359, 367 (1983).
182. *Id. See also supra* notes 95-101 and accompanying text.
183. *See supra* note 2.
184. *See supra* notes 96-101 and accompanying text.
185. *See supra* notes 102-19 and accompanying text.
186. Commonwealth v. Alvarez, 413 Mass. 224, 233, 596 N.E.2d 325, 331 (1992); *see supra* note 108 and accompanying text; *see also* Commonwealth v. Bianco, 390 Mass. 254, 260-62, 454 N.E.2d 901, 905 (1983); Commonwealth v. Jackson, 369 Mass. 904, 910, 344 N.E.2d 166, 170 (1976).
187. *See supra* note 2.
188. *See supra* note 162 and accompanying text.
189. *See supra* note 162 and accompanying text.
190. *See supra* notes 109-10 and accompanying text.
191. *See supra* note 111 and accompanying text.

The court analyzed similar statutes enacted by other jurisdictions and found that the penalty imposed by section 32J was proportionate to penalties imposed by those statutes.[192] Growing numbers of states continue to enact similar school zone drug legislation.[193] For example, the Federal School Zone Statute carries a possible forty-year prison term by providing for up to twice the penalty imposed for the underlying drug offense.[194] After reviewing similar statutes in other jurisdictions (such as the Federal School Zone Statute) and the penalties accompanying those statutes, the court correctly determined that the mandatory two-year sentence imposed by section 32J is reasonable and does not shock the conscience.[195]

Furthermore, the punishment imposed by section 32J is not overly burdensome when compared to punishments imposed for other serious offenses in the Commonwealth.[196] Alvarez argued that section 32J constituted cruel or unusual punishment because it does not require *mens rea* as to the school zone element, and as a result, an individual is subjected to enhanced punishment for an act without knowledge of the escalating factors.[197] The Massachusetts legislature has enacted other statutes which involve punishment despite lack of knowledge.[198] There is no compelling evidence that section 32J should be treated differently from these statutes. For example, *Alvarez* is more consistent with *Commonwealth v. Jackson*[199] than Alvarez admits. In *Jackson*, the court relied on the fact that an individual must at least have knowledge that he or she is in possession of a firearm.[200] Similarly, in *Alvarez*, the court relied on the fact that to be convicted under section 32J, an individual must at least have intent to distribute drugs.[201] The *Jackson* Court held that an individual's knowledge that he or she was in possession of a firearm was sufficient to justify the mandatory one-year incarceration.[202]

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192. Commonwealth v. Alvarez, 413 Mass. 224, 235-36, 596 N.E.2d 325, 332 (1992).

193. *See supra* note 113 and accompanying text.

194. *See supra* note 114 and accompanying text.

195. *See supra* notes 113-14 and accompanying text.

196. *See supra* note 115 and accompanying text.

197. *See supra* notes 149-51 and accompanying text.

198. *See supra* notes 80, 175 and accompanying text.

199. 369 Mass. 904, 344 N.E.2d 166 (1976). *See supra* notes 128-30 and accompanying text (discussing the court's holding).

200. *Jackson*, 369 Mass. at 916, 344 N.E.2d at 174.

201. Commonwealth v. Alvarez, 413 Mass. 224, 229-30, 596 N.E.2d 325, 328-29 (1992).

202. Commonwealth v. Jackson, 369 Mass. 904, 916-17, 344 N.E.2d 166, 174 (1976).

D. *Legislative Intent*

Section 32J is a logical expansion of public welfare offenses to combat drug addiction, which poses a severe threat to society.[203] While some critics argue that the court failed to adequately safeguard the legislature's intent and alternatively, that section 32J is subject to abuse on a number of levels,[204] preliminary data suggest that, despite the above-referenced concerns, school zone drug statutes are an effective means of reducing the presence of drugs in and around schools.[205]

The first criticism is that in deciding the due process issue in *Alvarez*, the court failed to adequately safeguard against significant impacts and unforeseeable results.[206] Section 32J does not distinguish between one who sells cocaine to a high school student in the school gymnasium while school is in session from one who shares marijuana with a friend while in the privacy of his or her own home during summer vacation (both are distributing narcotics in violation of chapter 94C within a school zone).[207] If the purpose of the school zone drug statutes is to reduce the availability of drugs to youngsters in or around schools and provide them with a safe area, then an individual distributing drugs inside a school should be held to be more culpable than an individual distributing drugs in a private home.[208] Section 32J does not, however, distinguish between these two offenders.[209]

The distinction between one who shares marijuana with an adult guest near a school and one who sells cocaine near a school may not be as significant as it first appears. Both of the underlying offenses are violations of chapter 94C,[210] and both actions contribute to drug presence around schools. Law makers have determined that a minimum penalty is needed to deter individuals from engaging in a particular conduct (drug distribution) in particularly sensitive areas (school zones).[211] Arguably, almost any statute is inherently unfair if it is applied arbitrarily and without the guidance of human reason. In the

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203. *See supra* notes 32, 109-11, 160, 162 and accompanying text.

204. Interview with Benjamin H. Keehn, Appellate Attorney, Committee for Public Counsel Services, in Boston, Mass. (Sept. 9, 1992) [hereinafter Keehn].

205. *See infra* notes 246-52.

206. Defendant's Reply Brief at 2-3, Commonwealth v. Alvarez, 413 Mass. 224, 596 N.E.2d 325 (1992) (No. 5879) [hereinafter Defendent's Reply Brief].

207. Keehn, *supra* note 204.

208. *See supra* note 160.

209. The language of § 32J indicates that any possession with intent to distribute within 1,000 feet of a school is sufficient for a conviction; *see supra* note 2.

210. *See supra* note 3.

211. *See supra* notes 109-11, 160 and accompanying text.

case of section 32J, the judge is empowered to adjust the penalty for the underlying offense to ensure that equity prevails.[212]

The Massachusetts Supreme Judicial Court had occasion to reconsider the application of section 32J after *Alvarez* was decided, in *Commonwealth v. Snyder*.[213] In *Snyder*, the defendant was an eighteen year old high school senior.[214] Based on a tip from a faculty member, school administrators conducted a search of the defendant's locker and uncovered a quantity of marijuana.[215]

Snyder is significant because it demonstrates that a trial judge can utilize his or her discretionary sentencing power vis a vis the underlying offense to offset the punishment imposed by section 32J on a given defendant.[216] In *Snyder*, the defendant stated he had not sold drugs before, expressed remorse, and admitted to selling one bag of marijuana upon questioning by the school principal.[217] The defendant further said he became uneasy and that he called the owner of the drugs to come and remove them.[218] In light of this testimony, the trial judge sentenced the defendant to one day for the underlying offense of possession of marijuana with intent to distribute and two years under the school zone statute.[219]

An examination of the *Snyder* decision weakens the argument that section 32J deprives a judge of his or her sentencing discretion.[220] While the judge in *Snyder* did not have discretion with respect to the section 32J violation, the judge was able to use judicial discretion to limit the sentence for the underlying offense to one day in light of the mitigating factors involved.[221] The judge, therefore, does maintain discretion in imposing a sentence. As stated above, the proximity to a school is an aggravating factor that escalates the punishment for distributing drugs. There is a strong inference that the Massachusetts legislature has determined that an individual who distributes drugs within a school zone should be subjected to a predetermined minimum punishment due to the location of the activity and the accompanying threat of danger to children.[222]

A separate but related argument is that section 32J is susceptible to abuse on multiple levels. For example, prosecutors may employ the

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212. *See supra* notes 116-18 and accompanying text.
213. 413 Mass. 521, 597 N.E.2d 1363 (1992).
214. *Id.* at 522, 597 N.E.2d at 1364.
215. *Id.* at 523-24, 597 N.E.2d at 1364-65.
216. *Id.* at 525, 597 N.E.2d at 1365.
217. *Id.* at 524, 597 N.E.2d at 1365.
218. *Id.*
219. *Id.* at 525, 597 N.E.2d at 1365.
220. *Id.*
221. *Id.*
222. *See supra* notes 83-84, 110-11, 160, 162 and accompanying text.

statute as a plea bargaining leverage device if conviction is questionable on the underlying offense.[223] Employing section 32J as a plea bargaining leverage device does not serve the purpose of enhancing penalties for an individual who is convicted of distributing narcotics within a school zone.[224] Using section 32J in this manner is particularly intrusive if the charge for the underlying offense was weak as to the intent element.[225] Abuse by law enforcement officials presents another concern.[226] A police officer might lure a suspect into a school zone or wait until the suspect enters a school zone to stop him or her.[227] A police officer might then induce the particular defendant to sell drugs within the proscribed area.[228]

If the legislature remains free to impose cumulative punishments for an offense which constitutes the same crime under *Morey*, there is potential for abuse on this level as well.[229] There are infinite combinations of penalties that could be imposed. It is logical to speculate that the legislature could impose an even greater penalty for distributing narcotics within a school zone to a student or for distributing narcotics within a school zone to a student while school is in session. *Alvarez* says that there is no constitutional boundary so long as the legislature clearly expresses itself.[230] Despite speculation about limitless possibilities, the fact remains that the legislature has expressed clear intent in section 32J, and that intent is in accordance with statutes enacted in a majority of other jurisdictions.[231] In the case of section 32J, public policy is benefitted throughout the year. The benefits to society will outweigh all of the above concerns.[232] Schoolyards are favorite places for children to gather and play even when school is not in session.[233] Drug presence in this environment threatens to inflict destructive results upon

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223. Keehn, *supra* note 204. For example, it would seem unfair if a prosecutor employed the two year mandatory sentence provision of § 32J to strike a plea bargain with an individual who was sharing a marijuana cigarette with a consenting adult in a private home that happened to be located within one thousand feet of a school.

224. *See supra* note 160.

225. *See supra* note 160.

226. *See, e.g.*, State v. Moore, 782 P.2d 497 (Utah Super. Ct. 1989) (defendant was induced to sell narcotics to undercover officer in defendant's home); State v. Ogar, 551 A.2d 1037 (N.J. Super. Ct. 1989) (police followed defendant for two miles before stopping him within a school zone).

227. *Moore*, 782 P.2d at 504-05.

228. *Ogar*, 551 A.2d at 1039-42.

229. Keehn, *supra* note 204.

230. Defendant's Reply Brief, *supra* note 206, at 5.

231. *See supra* notes 113-14. Furthermore, preliminary data indicates that this legislation has been effective in combating narcotics problems in the vicinity of schools. *See infra* notes 246-52 and accompanying text.

232. *See supra* notes 160, 162; *see also infra* notes 246-52 and accompanying text.

233. *See supra* note 162.

youngsters.[234] In light of the above social considerations, the court was correct to uphold the validity of section 32J despite its potent sentencing provisions.[235]

E. *Public Policy*

The court properly exhibited a strong public policy rationale and high respect for legislative discretion in upholding the validity of section 32J.[236] Section 32J takes a long stride for public welfare offenses by imposing a suitable penalty for an activity that endangers children.[237] Severe measures need to be taken to effectively combat drug problems in today's society.[238] Section 32J represents a modernization of the traditional public welfare offense, which held an individual liable for selling mislabeled drugs regardless of knowledge of their character, and its progeny.[239] There is a significant harm avoided which outweighs the penalty imposed.[240] Furthermore, as society changes and crimes change it is logical that the corresponding punishments should also change.[241]

Section 32J is the result of focusing on injurious conduct rather than individual intentions.[242] Drug presence near schools carries high risk to children and high profit to drug dealers.[243] When analyzing section 32J, it is important to be mindful that before an individual can be convicted and punished under the statute, that individual must first be convicted of a separate underlying offense.[244] Since the conduct involved in that underlying offense carries severe danger to young children,[245] the corresponding penalty must be harsh enough to outweigh any possible benefit to drug dealers. Otherwise the deterrent would not be strong enough and the injurious conduct would continue.

Preliminary police and school community reports from across the nation reveal the effectiveness of establishing school zone drug legislation and rigorously enforcing it.[246] For example, when Flowing

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234. *See supra* notes 108-10, 162 and accompanying text.
235. *See supra* notes 157-67 and accompanying text.
236. *Alvarez*, 413 Mass. at 233-34, 596 N.E.2d at 330-31.
237. *See supra* notes 32-35, 162 and accompanying text.
238. *See supra* note 162.
239. See *supra* note 19 and accompanying text for a discussion of these offenses.
240. *See supra* notes 160, 162 and accompanying text. *See also infra* notes 246-52 and accompanying text.
241. *See also supra* note 160.
242. *See supra* notes 24-31 and accompanying text.
243. *See supra* notes 160, 162.
244. *See supra* notes 81-84 and accompanying text.
245. *See supra* notes 108-10, 162.
246. *See* Severin Sorensen, *DFSZs work again! Tuscon Principal reveals DFSZ success*, SAFE HAVEN (Newsl. of the Nat'l Coalition for Drug-Free School Zones) Fall 1990, at 1.

Wells High School in Tucson, Arizona formed a partnership with the Tucson Police Department and endorsed a philosophy of "zero tolerance," initial evaluations revealed success.[247] Statistics indicated that there was a 43% decrease in the number of school based drug and alcohol violations and a 36% decrease in the number of school-based marijuana incidents.[248] A preliminary study in Broward County, Florida revealed equally impressive results.[249] The Florida study focused on the effectiveness of the Broward County Sheriff's increased enforcement effort in and around schools.[250] Within six months residents perceived declines in drug usage.[251] New Jersey has reported similar success with its school zone drug legislation. New Jersey Assistant Attorney General Ron Susswein reported that in 1989, 47% of all state drug law cases litigated were for drug-free school zone violations; 9,383 New Jersey defendants were charged with distributing drugs within a school zone, and 635 of these were charged with engaging a juvenile in a drug distribution scheme.[252]

VI. CONCLUSION

Commonwealth v. Alvarez was the first opportunity that the Massachusetts Supreme Judicial Court had to rule on the validity of section 32J (the Massachusetts School Zone Statute).[253] This statute is significant because although it possesses many qualities of a public welfare offense,[254] it carries a mandatory jail term.[255] The court made important holdings with respect to due process, double jeopardy, and cruel and unusual punishment in determining that section 32J was constitutional.[256]

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247. *Id.*

248. *Id.*

249. *See* Severin Sorensen, *DFSZs Work! Broward County study reveals effectiveness of Drug-Free School Zones*, SAFE HAVEN, (Newsl. of the Nat'l Coalition for Drug-Free School Zones) Spring 1990, at 1.

250. *Id.*

251. *Id.*

> While the statistical appropriateness of data, analysis and collection methods of the Broward County study may be refuted, it is harder to refute Commander Linda DiSanto's professional observation that within Dillard High School's Drug-Free School Zone overall crime dropped, drug related crimes reduced, drug arrests decreased, and open air drug markets dispersed.

Id. at 8.

252. NAT'L COALITION FOR DRUG-FREE SCHOOL ZONES, IMPLEMENTATION MANUAL FOR DRUG-FREE SCHOOL ZONES 8 (1993).

253. *See supra* notes 1-4 and accompanying text.

254. *See supra* notes 7-15 and accompanying text.

255. *See supra* notes 2, 170-71.

256. *See supra* notes 69-119 and accompanying text.

By holding that section 32J does not violate constitutional due process rights and allowing incarceration without requiring *mens rea* for this offense, the court has expanded the application of public welfare offense theory to its next logical stage. Once again, Massachusetts has placed itself on the forefront of public welfare offense theory.[257] Section 32J is an effective weapon against drugs in school zones.[258] The facts of *Alvarez* indicate that the New Bedford Police Department raided a point house,[259] which presented particular danger due to increased drug traffic in the area where such facilities are located.[260] By subjecting those individuals creating increased drug traffic in the area to caustic statutes like section 32J, society is sending a strong message to drug dealers: stay out of our school zones. By validating the penalty imposed by section 32J, the court has expanded public welfare offenses and reinforced the legislative and social messages that society will not tolerate drugs near its schools.[261] Consistent with traditional public welfare offense theory, the Massachusetts Supreme Judicial Court and the Massachusetts legislature have balanced the benefit to society and the infringement on individual interests.[262]

By holding that section 32J does not violate double jeopardy principals, the court correctly interpreted the same evidence rule addressed in *Commonwealth v. Morey*[263] and confirmed the broad legislative discretion to deal with drug problems by promulgating rules and appropriate penalties for violations of those rules.[264] On a separate but related issue, the decision implicitly confirms that the Massachusetts legislature wisely exercised its discretion in promulgating section 32J. Preliminary results indicate initial success in achieving the legislative objective of reducing/eradicating the amount of drug activity in and around schools.[265]

By holding that the mandatory two-year jail term imposed for a conviction under section 32J does not constitute cruel or unusual punishment, the court has modernized the traditional penalties associated with public welfare offenses to combat drug offenses.[266] If the potential for extreme reward exists, punishments must be equally extreme in order to make the possible reward less appealing. The penalties imposed by section 32J are in accordance with penalties

257. *See supra* note 23 and accompanying text.
258. *See supra* notes 246-52 and accompanying text.
259. *See supra* note 54 and accompanying text.
260. *See supra* notes 40-54 and accompanying text.
261. *See supra* note 160.
262. *See supra* notes 32-35 and accompanying text.
263. 108 Mass. 433 (1871).
264. *See supra* notes 87-98 and accompanying text.
265. *See supra* notes 246-52 and accompanying text.
266. *See supra* notes 32-35, 102-19, 160 and accompanying text.

imposed for similar offenses in other jurisdictions and for similarly serious offenses in the Commonwealth.[267] The court determined that the enhanced penalty imposed by section 32J would be a suitable deterrent to drug dealers.[268] Preliminary data indicates that other jurisdictions have promulgated and enforced similar statutes to effectively reduce drug presence in school zones.[269] Presumably, strict enforcement and application of section 32J will bring the same encouraging news to Massachusetts in the future.

David M. Turchetta[*]

267. *See supra* notes 114-19 and accompanying text.
268. *See supra* note 111 and accompanying text.
269. *See supra* notes 246-52 and accompanying text.

* This article is dedicated to youngsters everywhere facing difficult times and hard choices. Special thanks to my wife, Darlene, for her patience and love.

Simon & Schuster v. New York State Crime Victims Board: Should The Supreme Court Have Invalidated New York's *Son of Sam* Statute?

> No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong . . . . These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.[1]

I. INTRODUCTION

In recent years, the public has developed an increasing fascination with crime and with those who commit crimes. To profit from this substantial public interest, publishers, authors, movie producers, and television executives have worked with criminals to exploit their stories and transmit them to the public.[2] The criminal who takes advantage of this public desire can create a financial windfall for him or herself, leaving the victims of these crimes without adequate compensation.

In an attempt to compensate the victims of these crimes, the New York legislature enacted Executive Law section 632-a in 1977,[3] more commonly known as the *Son of Sam* law.[4] The purpose of the law was

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1. Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889).

2. *See* Martin S. Goldberg, Note, *Publication Rights Agreements In Sensational Criminal Cases: A Response to the Problem*, 68 CORNELL L. REV. 686 n.2, 687 n.4 (1983) (discussing books, articles, and movies in which publishers paid large sums of money to criminals for their stories) (among the convicted criminals whose stories have been bought and offered to the general public in various forms include: Jean Harris, convicted of killing "The Scarsdale Diet" inventor, Doctor Herman Tarnower; Mark David Chapman, convicted of assassinating John Lennon; R. Foster Winans, the former *Wall Street Journal* columnist convicted of insider trading; Susan Atkins, involved in the murder of Sharon Tate; Reverend Thomas Bird, convicted for killing his wife; David Berkowitz, the *Son of Sam* murderer; Charles Manson, responsible for the Tate and LaBianca murders).

3. N.Y. EXEC. LAW § 632-a (McKinney Supp. 1982). See *infra* app. 1 for the text of the complete statute.

4. N.Y. EXEC. LAW § 632-a was enacted after David Berkowitz, nicknamed the "*Son of Sam*" murderer, was arrested and offered money for selling the rights to his story. As a result, the law became commonly known as the "*Son of Sam*" statute. *See infra* notes 27-31 and accompanying text.

to ensure that criminals would not profit from their crimes until the victims of these crimes had received restitution.

On December 10, 1991, the United States Supreme Court's decision in *Simon & Schuster, Inc. v. New York State Crime Victims Board*[5] unanimously overturned New York's Executive Law Section 632-a. In reversing the district court[6] and the court of appeal's[7] decisions, the Supreme Court held that the statute was presumptively inconsistent with the First Amendment[8] and was not narrowly tailored[9] to achieve the state's objective of compensating victims from profits of crime.[10]

The Supreme Court, in determining that the statute violated the First Amendment, held that the statute placed a content-based restriction on speech by imposing a financial burden on speakers because of the substance of their speech, thereby establishing a disincentive to speak.[11] The Court determined that, although the state has a compelling interest in compensating victims of crime,[12] the "[g]overnment's ability to impose content-based burdens on speech raises the specter that [g]overnment may effectively drive certain ideas or viewpoints from the marketplace."[13] Believing that the *Son of Sam* statute would prohibit

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5. 112 S. Ct. 501 (1991) [hereinafter *Simon & Schuster II*].

6. Simon & Schuster v. Members of the New York State Crime Victims Bd., 724 F. Supp. 170 (S.D.N.Y. 1989) [hereinafter *Simon & Schuster I*]. The district court found for the State Crime Victims Board by determining that the statute was consistent with the First Amendment. On appeal, the district court applied the test developed in United States v. O'Brien, 391 U.S. 367 (1968), which held that "a statute is constitutional if it had been enacted within the constitutional power of the government, furthers an important or substantial governmental interest unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedom is no greater than is essential to that governmental interest." *Simon & Schuster I*, 724 F. Supp. at 179 (citing *O'Brien*, 391 U.S. at 376). For further discussion of the *O'Brien* test, see *infra* Part III(B)(3).

7. Simon & Schuster v. Fischetti, 916 F.2d 777 (2d Cir. 1990). The court of appeals affirmed the lower court's decision, applying a test of strict scrutiny. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 637 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978). For a statute to survive this test, the state "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Fischetti*, 916 F.2d at 782 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45). See *infra* notes 118-30 and accompanying text for a discussion of the strict scrutiny test.

8. *Simon & Schuster II*, 112 S. Ct. at 508-12. The First Amendment to the United States Constitution reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

9. The "narrowly tailored" term used by the Court is an element of the test of strict scrutiny. *See Fischetti*, 916 F.2d at 782; *see also infra* notes 118-30.

10. *Simon & Schuster II*, 112 S. Ct. at 508-12.

11. *Id.* at 508.

12. *Id.* at 509.

13. *Id.* at 508 (quoting Leathers v. Medlock, 499 U.S. 439, 448 (1991)).

criminals from engaging in protected expressive activity, the Court deemed the statute unconstitutional.[14]

This Comment examines the erred analysis used by the Supreme Court in invalidating the *Son of Sam* statute.[15] While the holding protects profit-making rights of criminals, it leaves crime victims with limited ability to be compensated for their suffering.[16] In overturning the statute, the Court disregarded the reasoning of the New York legislature,[17] the federal government,[18] the numerous legislatures across the country with similar *Son of Sam* statutes,[19] the decisions of many state and federal courts,[20] and the general public welfare.

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14. *Id.* at 508-12.

15. This Comment limits its discussion to the First Amendment issue involved in the *Son of Sam* statute.

For a detailed discussion on the due process issue, see Angela Cartwright, Note, *Crime Doesn't Pay: Authors and Publishers Cannot Profit From a Criminal's Story:* Fashing v. Kallinger, 55 U. CIN. L. REV. 831, 848-50 (1987); Joel Rothman, *In Cold Type: Statutory Approaches to the Problem of the Offender as Author*, 71 J. CRIM. L. & CRIMINOLOGY 255, 271-73 (1980) [hereinafter *In Cold Type*]; Note, *Alabama's Anti-Profit Statute: A Recent Trend in Victims Compensation*, 33 ALA. L. REV. 109, 135-39 (1981).

16. In *Simon & Schuster II*, the Supreme Court indicated that victims of crimes may be compensated through the particular state's tort law for prejudgment remedy and orders of restitution. *Simon & Schuster II*, 112 S. Ct. at 509-10 (citing N.Y. CIV. PRAC. L. & R. §§ 6201-26 (McKinney 1980 & Supp. 1991); N.Y. PENAL LAW § 60.27 (McKinney 1987)). However, these statutes would make it more difficult for a victim to recover. For example, the provisional remedy in § 6201(1)-(3) allows the plaintiff to attach a criminal's property only if the court first determines that the plaintiff is likely to win his case and that the defendant is a non-domiciliary or a resident who cannot be served, or someone who has attempted to get rid of property to frustrate a judgment. Similarly, restitution under N.Y. PENAL LAW § 60.27 would be inadequate because restitution only applies to convicted criminals and not to unconvicted persons. *See* Respondent's Brief at 34-35, Simon & Schuster v. Members of New York State Crime Victims Board, 112 S. Ct. 501 (1991) (No. 90-1059) [hereinafter Respondent's Brief].

17. *See* N.Y. EXEC. LAW § 632-a (McKinney 1982).

18. *See* VICTIMS OF CRIME ACT, Pub. L. No. 98-473, § 1406(2), 98 Stat. 2175 (1984). This federal statute contains the provisions, codified as amended at 18 U.S.C. §§ 3681-82 (1988), that resemble N.Y. EXEC. LAW § 632-a.

19. *See* app. II (listing "*Son of Sam*" statutes enacted in other states).

20. The following cases discuss the importance of preventing criminals from profiting from their crimes before their victims, and the need for an incidental restriction of First Amendment rights: Simon & Schuster v. Fischetti, 916 F.2d 777 (2d Cir. 1990) (upholding the constitutionality of § 632-a); Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 724 F. Supp. 170 (S.D.N.Y. 1989) (discussing the constitutionality of § 632-a); Heath v. Warner Communications, No. 85 Civ. 1269 (S.N.D.Y. May 27, 1986), *cert. denied*, 484 U.S. 932 (1987) (state statute requiring any funds a defendant receives from the literary depiction of his or her crime to be turned over to a crime victims board is conditional); Fasching v. Kallinger, 510 A.2d 694 (N.J. 1986) (discussing the constitutionality of New Jersey's criminal antiprofit statute); Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889) (discussing the

Through an analysis of the legislative history and the court proceedings, this Comment argues that the Supreme Court erred in its holding and should have affirmed the decisions of the district court[21] and court of appeals.[22]

Part II examines the legislative history of the *Son of Sam* statute.[23] Part III examines the district court, the appeals court majority opinion and dissenting opinion, and the Supreme Court decision overturning the statute.[24] Part IV analyzes the reasoning and policy rationales set forth in those opinions on the statute surviving the *O'Brien* and strict scrutiny tests.[25] Part V discusses the public policy dilemma imposed by overturning the *Son of Sam* law and the likely ramifications on the nation.[26]

II. BACKGROUND OF SECTION 632-A--THE *SON OF SAM* STATUTE

A. *Legislative History*

In 1977, serial murderer David Berkowitz, commonly known as *Son of Sam*, terrorized New York.[27] The manhunt and eventual capture of Berkowitz generated huge publicity in New York and throughout the United States.[28] Berkowitz was offered a huge sum of money for selling the rights to his story.[29]

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theory that no one should profit from his or her own wrongdoing); Children of Bedford, Inc. v. Petromelis, 541 N.Y.S.2d 894 (N.Y. Sup. Ct. 1989) (discussing the constitutionality of the escrow account established by § 632-a); *In Re* Johnson, 430 N.Y.S.2d 904 (N.Y. Sup. Ct. 1979) (discussing the distribution of money generated by the sale of David Berkowitz's crime story); Barrett v. Wojtowicz, 414 N.Y.S.2d 350 (N.Y. App. Div. 1979) (discussing that the profits generated from the sale of the story DOG DAY AFTERNOON were not barred by the one year statute of limitations for a civil tort).

21. *Simon & Schuster I*, 724 F. Supp. at 170.

22. *Fischetti*, 916 F.2d at 777.

23. *See infra* notes 27-64 and accompanying text.

24. *See infra* notes 65-157 and accompanying text.

25. *See infra* notes 158-235 and accompanying text.

26. *See infra* notes 236-37 and accompanying text.

27. *Simon & Schuster II*, 112 S. Ct. 501, 504 (1991). Berkowitz terrorized New York City for over a year, killing six people and wounding seven. *Id.*

28. *In re* Johnson, 430 N.Y.S.2d 904 (N.Y. Sup. 1979). "When the *New York Post* ran a story about the arrest of David Berkowitz . . . the paper sold one million copies compared to its regular daily sales of about 600,000." Sue S. Okuda, Comment, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 CAL. L. REV. 1353, 1353-54 (1988) (*citing* Fred Fedler, *When Headlines Are Bought*, BARRISTER, Fall 1980, at 14) [hereinafter *Criminal Antiprofit Laws*].

29. *Johnson*, 430 N.Y.S.2d at 904. "McGraw-Hill Book Company . . . bought the rights to Berkowitz's story in a deal that included a $250,000 advance, $150,000 profit to the ghost writer, and $75,000 to Berkowitz through his court-appointed conservator, Doris Johnsen." *Criminal Antiprofit Laws*, *supra* note 28, at 1354 (citing

The New York legislature, concerned that Berkowitz would profit greatly while the surviving victims and relatives of victims of his crimes suffered, enacted New York Executive Law section 632-a,[30] the *Son of Sam* law.[31] The statute was intended to "ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering."[32] Senator Emmanuel Gold, the law's sponsor, summed up the necessity and importance of the law, stating:

> It is abhorrent to one's sense of justice and decency that an individual, such as [Berkowitz], the forty-four caliber killer, can expect to receive large sums of money for his story once he is captured–while five people are dead, [sic] other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.[33]

Ironically, the statute was never applied to Berkowitz himself because he was found incompetent to stand trial, and the first draft of the statute applied only to criminals who had actually been convicted.[34]

B. *Interpretation of Section 632-a*

The foundation for the *Son of Sam* law was developed in the Crime Victims Board Statute, New York Executive Law, article 22, sections 620-35.[35] Section 620 contains a "Declaration of policy and legislative intent," which reads:

> The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent upon public assistance. The legislature finds and

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Court to Rule on 'Son of Sam' Book, WASH. POST, Jan. 28, 1979, at A22).

30. *See* app. I.

31. *See supra* note 4.

32. ASSEMBLY BILL MEMORANDUM RE: A 9019, JULY 22, 1977, *reprinted in* LEGISLATIVE BILL JACKET, 1977 N. Y. LAWS ch. 823.

33. Memorandum of Sen. Emmanuel R. Gold, 1977 NEW YORK STATE LEGISLATIVE ANNUAL 267.

34. Dennis Hevesi, *Cases Under 'Sam' Law: Notorious but Few,* N.Y. TIMES, Feb. 20, 1991, at B8. Berkowitz requested that all of the proceeds from any movie or book go to the Crimes Board to compensate his victims. The book that was eventually written, SON OF SAM, by Lawrence Klausner, was published in 1981 by McGraw-Hill Book Company. Klausner wrote that "[h]alf of my royalties–the money David Berkowitz would receive–will go to repay, as much as money can repay, survivors of Berkowitz's attacks and the families of those who did not." Respondent's Brief, *supra* note 16, at 12 (quoting LAWRENCE KLAUSNER, SON OF SAM 8 (1981)). Berkowitz's profits, amounting to $118,433.36, and fees he received for interviews were distributed to the twelve victims or their estates, allocating as much as $45,000.00 to a victim who was shot in the spine and paralyzed. Respondent's Brief, *supra* note 16, at 12.

35. N.Y. EXEC. LAW, art. 22, §§ 620-35 (1966).

> determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.[36]

The *Son of Sam* statute, section 632-a, entitled "Distribution Of Moneys Received As A Result Of The Commission Of Crime,"[37] was added to article 22 in 1977.[38] The new section provided that victims of crime should be compensated by money gained from the criminal selling his or her crime story and not from the state's funds.[39] Any party contracting with the criminal was required to pay the New York Crime Victims Board the money that was due under the contract to the criminal.[40] The Board then deposited the funds into an escrow account to satisfy any civil judgments for the benefit of the victims.[41] Victims of the retold crime were allowed five years from the creation of the escrow account in which to bring a civil action and recover a money judgment against the criminal or his representatives.[42] If, after five years from the creation of the escrow account, no actions were pending, the criminal or his or her representative were allocated the remaining funds in the escrow account.[43]

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36. *Id.*

37. N.Y. EXEC. LAW § 632-a (McKinney Supp. 1977).

38. Barrett v. Wojtowicz, 66 A.D.2d 604, 607 (1979).

39. *Id.* The legislature defined the criminal's profit as any money received "with respect to the reenactment of such crime by way of a movie, book, magazine article, radio or television presentation, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions or emotions regarding such crime." N.Y. EXEC. LAW § 632-a (McKinney Supp. 1977).

40. *Barrett*, 66 A.D.2d at 607.

41. *Id.*

42. *Id.*

43. N.Y. EXEC. LAW § 632-a(4) (McKinney Supp. 1977). *Barrett* discusses the important issue of whether the statute of limitations on making a civil claim ran for five years from the date of the crime or five years from the establishment of the escrow account. The original language of § 632-a(1) maintained that to be eligible for the money in the escrow account, the victim must bring a civil action "*within five years of the date of the crime* . . . and recover[] a money judgment against [the criminal] or his representatives." N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1977) (emphasis added). The confusion, however, arose because § 632-a(4) indicated that the statute of limitations did "not begin to run until an escrow account has been established." *Id.* During the proceedings, the New York legislature amended § 632-a(1) to read: "provided that such victim, within five years of the date of the *establishment of the escrow account, brings a civil action.*" *Id.* (emphasis added). The *Barrett* Court determined that, even though the plaintiff's action was barred under the original wording of § 632-a(1), the action was revived under the amendment. *Barrett*, 414 N.Y.S.2d. at 356. The justices stated that "if there were any ambiguity . . . public policy would require that the law should be . . . interpreted in favor of the victim . . . . It would be ironic to hold that a victim . . . is to be left remediless while the felon could reap the 'fall-out' rewards of the victim's injuries." *Id.* at 357.

The Board is required to publicize in newspapers of general circulation that monies are available in the escrow account to satisfy any judgments obtained by victims of the crime.[44] Additionally, the Board is authorized to then satisfy any judgments out of the account.[45] The statute sets out priorities of payments to ensure that the victims are paid before the criminal, as well as before other judgment creditors.[46] However, a percentage of the account is available to the criminal for legal fees in his criminal case and to a representative who may assist the criminal in producing the criminal's speech.[47] Furthermore, the state is reimbursed for any money paid out from state funds to the victims.[48]

On June 19, 1978, the *Son of Sam* law was amended to clarify an ambiguity relating to the statute of limitations.[49] The statute of limitations regarding the time period to bring a civil suit now did not begin to run until the escrow account had been initiated.[50] The statute was amended several more times to correct spelling mistakes, clarify further ambiguities, and set forth priorities for paying out the money in the escrow account.[51]

C. *The Nationwide Effect of Section 632-a*

Since its enactment, the federal government, along with forty-two states, have enacted victim compensation schemes modeled after New York's *Son of Sam* law.[52] The federal statute[53] was enacted in an effort to compensate victims of crimes from the funds generated from a

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44. N.Y. EXEC. LAW § 632-a(2) (McKinney Supp. 1977).

45. *Id.* § 632-a(1).

46. *Id.* § 632-a(11). The order of priority is as follows: (1) attorney's fees granted by a court of competent jurisdiction for representation of the accused at any stage of the criminal proceedings and expenses allowed by the Victims Board for the production of monies paid into the escrow account, the total of such fees and expenses not to exceed one-fifth of the account; (2) subrogation claims of the state for payments made to a victim, not to exceed one-half of the civil judgment obtained by a victim; (3) victims' civil judgments; (4) judgments of other creditors and claims of persons presenting lawful demands through the person accused or convicted of the crime, including the demands of tax authorities; and, (5) the claims of the person accused or convicted of the crime. *Id.* § 632-a(11)(a)-(e).

47. *Id.* § 632-a(8).

48. *Id.*

49. Barrett v. Wojtowicz, 66 A.D.2d 604, 612 (1979). The amendment changed subdivision 1 from "'provided further that such victim, within five years of the date of the crime, brings a civil action'" to "'provided that such victim, within five years of the date of the *establishment of such escrow account*, brings a civil action.'" *Id.*

50. The issue of the statute of limitations is fully discussed and analyzed in *Barrett*, 66 A.D.2d at 604.

51. *Simon & Schuster I*, 724 F. Supp. 170, 174 (S.D.N.Y. 1989) (citation omitted).

52. In the past 14 years, 42 states have enacted statutes modeled after New York's law. *See infra* app. II.

53. 18 U.S.C. § 3681 (1988).

criminal's story-telling profits.[54] Congress formulated the basis of the statute from the New York *Son of Sam* statute.[55] The federal statute, unlike the New York statute, is invoked only when a criminal is convicted for his crime, upon a motion from the United States Attorney, and only for specific crimes against the United States such as spying and crimes involving physical harm to individuals.[56] Furthermore, relief is not automatic and is available only if "the court determines that the interest of justice . . . so requires" or if "an order of restitution under this title so requires."[57] The federal statute contains an escrow account provision which provides for holding the proceeds for five years to satisfy any federal judgments.[58]

In an attempt to redress the inequity of criminals profiting from their crimes, most states have enacted similar antiprofit legislation.[59] For example, California's anti-profit legislation "places in a constructive trust the proceeds one receives from the sale of the story of a felony for which he has been convicted."[60] Victims are then compensated from the trust funds for their injuries.[61] Florida's statute places a lien on the proceeds of certain accounts of felonious crimes.[62] Some statutes provide relief for crime victims by placing all or a portion of the funds remaining after satisfaction of judgments against the perpetrator in general funds for victims of crimes.[63] Other statutes only apply when the criminal has been convicted, as opposed to admissions of guilt outside of the courtroom.[64]

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54. Brief for the United States as Amicus Curiae at 5, Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 112 S. Ct. 501 (No. 90-1059) (1991).

55. *Id.*

> The federal statute . . . was passed with strong bipartisan support . . . after more than a decade of congressional debate regarding the need for the federal government to provide compensation and assistance to the victims of crime. In response to the perceived unfairness of leaving victims uncompensated while allowing criminals to profit from reports of their misdeeds, Congress included in the Act a narrowly tailored program derived from the New York statute at issue in this case.

Id. (citations omitted).

56. *Id.* at 5-6.

57. *Id.* at 5 (citations omitted).

58. *See supra* note 53.

59. *Criminal Antiprofit Laws, supra* note 28, at 1354-55; *see also supra* note 52.

60. CAL. CIV. CODE § 2225 (West 1988 & Supp. 1993).

61. *Id.*

62. *See* FLA. STAT. ANN. ch. 944.512 (West 1985 & Supp. 1993).

63. Brief for the United States as Amicus Curiae, *supra* note 54, at 7 (*citing* WASH. REV. CODE ANN. § 7.68.240 (West Supp. 1991) (50% returns to the criminal; 50% goes to the fund)).

64. *Id.* (citing WIS. STAT. ANN. § 949.165(2)(b) (West Supp. 1990)).

Although some of the statutes differ slightly from New York's law, the foundation of the legislation arises from the same concern: criminals should not profit from the story of their crimes while victims remain uncompensated.

III. HISTORY OF THE PROCEEDINGS

A. *Facts: Henry Hill, "Wiseguy," and "Goodfellas"*

The *Simon & Schuster* case arose as a result of the Crime Victims Board attempt to exercise the regulations set out in the *Son of Sam* statute.[65] In 1980, Henry Hill was arrested and charged with six counts of conspiracy to sell drugs.[66] A member of an organized crime family for twenty-five years, Hill had been involved in numerous criminal activities, including the six million dollar Lufthansa Airlines theft at Kennedy International Airport and the 1978-79 Boston College basketball point-shaving scandal.[67] In an attempt to avoid prosecution, Hill testified against his former colleagues and entered the Federal Witness Protection Program.[68]

Believing that Hill's life story would make a successful book, the publishers at Simon & Schuster sought to contract with Hill.[69] "The idea of the book was to demonstrate the pedestrian activities of a low-level member of a criminal enterprise and to dispel commonly-held romantic notions about life in a crime 'family.'"[70] Simon & Schuster sought out the assistance of Sterling Lord, a literary agent in New York to find an author for the book.[71] Nicholas Pileggi, an experienced crime writer, was hired to work with Hill, and on August 21, 1981, a contract was entered into for the creation of a book.[72] After more than three hundred hours of interviews with Hill, Pileggi wrote and Simon & Schuster published, *Wiseguy: Life in a Mafia Family*.[73] The book became a best-seller, and within nineteen months more than one million copies were in print.[74] In 1990, the book was made into a film entitled *Goodfellas*.[75]

The New York State Crime Victims Board, believing that the published work could be subject to the *Son of Sam* statute, directed

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65. *Simon & Schuster I*, 724 F. Supp. 170, 172 (S.D.N.Y. 1989).
66. *Id.*
67. *Simon & Schuster II*, 112 S. Ct. 501, 506 (1991).
68. *Id.*
69. Simon & Schuster v. Fischetti, 916 F.2d 777, 779 (2d Cir. 1990).
70. *Id.*
71. *Simon & Schuster I*, 724 F. Supp. at 172.
72. *Id.*
73. *Id.*
74. *Simon & Schuster II*, 112 S. Ct. at 507.
75. *Id. See also* GOODFELLAS (Warner Bros., Inc. 1990).

Simon & Schuster to provide it with a copy of the contract and to suspend all payments to Hill.[76] Because the book "contained Hill's thoughts, feelings, opinions and emotions about and admissions to his participation in criminal activities,"[77] the Court held it was therefore subject to the provisions of section 632-a.[78] The Board described *Wiseguy* as:

> Henry Hill's life story from 1955 when he first became involved with organized crime until May 1980 when he joined the Federal Witness Protection Program. It is a veritable catalog of crimes in which Henry Hill admits to the commission of various crimes and expresses his feelings[,] opinion or emotions regarding such crimes.[79]

The Board found that publisher Simon & Schuster had violated the regulations of section 632-a by not giving a copy of the contract to the Board at the time it was entered into and by paying Hill his share of advances.[80] The Board ordered that Hill turn over the $96,250.00 for placement into an escrow account to satisfy civil judgments for the victims of his crimes.[81] If Hill did not comply with that order, the publishers were to pay that amount to the Board.[82] Furthermore, the publishers were ordered not to pay any of the money they owed to Hill "including any future royalties payable to Hill or his representatives under the contract."[83]

Simon & Schuster brought an action against the Board seeking an order declaring that the *Son of Sam* law violated the First Amendment guarantee of freedom of speech.[84] The publishers asserted that the statute interfered with their ability to enter into publishing contracts.[85] Furthermore, Simon & Schuster alleged that when the statute is applied, books concerning crime will not be published due to a chilling effect on criminals' freedom of expression.[86]

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76. *Id.*
77. *Simon & Schuster I*, 724 F. Supp. at 172.
78. *Simon & Schuster II*, 112 S. Ct. at 507.
79. *Simon & Schuster I*, 724 F. Supp. at 172-73 (citation omitted).
80. Simon & Schuster v. Fischetti, 916 F.2d 777, 780 (2d Cir. 1990).
81. *Simon & Schuster I*, 724 F. Supp. at 173.
82. *Id.*
83. *Id.*
84. *Id.* Simon & Schuster also sought an order declaring that the law was unnecessarily vague and overbroad in violation of the Fourteenth Amendment. *Id.*
85. *Id.*
86. *Id.*

B. *District Court*

1. Proceedings

Simon & Schuster sought declaratory and injunctive relief in the Federal District Court for the Southern District of New York.[87] The issues that the court faced were whether the *Son of Sam* statue was the proper method of compensating victims of crime and whether the law was constitutional on its face and as applied.[88]

Simon & Schuster argued that the statute was "content based, speaker-based, that the press gets differential treatment under the statute, and that section 632-a forces editors to alter books in order to avoid the statute's restrictions, thus resulting in self-censorship."[89] The publisher asserted that the statute created a direct infringement on free speech and to survive must meet a test of strict scrutiny.[90] Simon & Schuster contended that "the mere fact that the law was passed for a beneficent purpose of compensating crime victims, [indicates that it] does not fit the strict scrutiny test."[91]

The Crime Victims Board maintained that the statute did not prevent criminals from speaking, therefore, there was no direct encroachment on the First Amendment.[92] Criminals could relate their story in any fashion that they wished–they were only prevented from immediately profiting from their story.[93] The Board further asserted that the law created only an "indirect burden on the press' ability to publish or upon an individual's decision to express his views."[94]

2. District Court Opinion

The district court denied Simon & Schuster's motion for summary judgment, granted the Board's cross-motion for summary judgment, and declared the New York *Son of Sam* law to be constitutional.[95] The court initially cautioned that the legislature should be allowed great deference in its law-making function.[96] The court reasoned that because the

87. *Id.*
88. *Id.*
89. *Id.* at 174.
90. *Id.* The test requires that the government show a compelling interest which is narrowly tailored to fit that interest. *Id.*
91. *Id.*
92. *Id.* at 175.
93. *Id.*
94. *Id.*
95. *Id.* at 180.
96. *Id.* at 175. *See* Regan v. Time, Inc., 468 U.S. 641 (1984). The Supreme Court stated: "In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the

legislature was elected by the people, its policies should be viewed as those that benefit the public.[97]

In its ruling, the district court determined that the statute did not directly infringe upon a criminal's right of free speech; rather, the statute created an indirect effect upon speech.[98] The court stated that freedom of speech "'presupposes a willing speaker,'"[99] and therefore, "although it may be more difficult for publishers and authors to create books with the cooperation of a criminal source, it is not impossible nor is such cooperation proscribed by section 632-a. The statute merely diverts the criminal source's proceeds for a time to ensure that victims may be compensated."[100] However, this procedural hurdle did not constitute a direct burden on criminals' free speech.[101]

The court maintained that the statute was aimed at the criminal's profit from his speech, not the speech itself.[102] Therefore, any restriction on the criminal's free speech was merely incidental.[103] The court relied on the test for incidental restrictions on free speech that was developed in *United States v. O'Brien*.[104]

3. The *O'Brien* Test

In *O'Brien*, the Supreme Court upheld a statute which criminalized the destruction of a draft card.[105] The Court determined that the act of burning a draft card was symbolic speech, possessing "speech" and "non-speech" elements.[106] The Court held that "a sufficiently

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intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary." *Id.* at 652. *But see* Erznoznick v. City of Jacksonville, 422 U.S. 205, 218-19 (1975) (recognizing that legislature must be clear and precise when drafting legislation regarding the First Amendment); Sable Communications of Cal., Inc. v. Federal Communications Comm'n, 492 U.S. 115, 129 (1989) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'" (quoting Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)).

97. *Simon & Schuster I*, 724 F. Supp. at 175.

98. *Id.*

99. *Id.* at 176 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976)).

100. *Id.* (citing Children of Bedford, Inc. v. Petromelis, 541 N.Y.S.2d 894, 899 (Sup. Ct. 1989)).

101. *Id.*

102. *Id.* at 177.

103. *Id.*

104. *Id.* at 177-79 (citing United States v. O'Brien, 391 U.S. 367 (1968)); *see also infra* notes 105-11 and accompanying text.

105. *O'Brien*, 391 U.S. at 375. O'Brien and others burned their draft cards in public as part of a protest against the war in Vietnam. They were convicted of violating an amendment to the draft laws making it a crime to "knowingly destroy[] [or] . . . mutilate" a draft card. *Id.* at 370.

106. *Id.* at 376.

important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms."[107] To survive a test of constitutionality, a statute implicating such limitations must: be content-neutral; be within the constitutional power of the government to enact; further a substantial interest of government not related to suppression of free speech; and not impose incidental limitations greater than are essential to the governmental interest.[108] In *O'Brien*, the Court found that all of these requirements were satisfied.[109]

Applying the *O'Brien* test in *Simon & Schuster*, the district court determined that the statute was enacted within the constitutional power of the government; the government had a compelling interest in compensating victims before criminals, and this interest was unrelated to the suppression of free speech, and the district court determined that this interest outweighed any incidental restrictions on free speech.[110] Because the statute did not prohibit expressive activity but merely prevented the criminal from directly profiting from his or her crime story, it was held to be constitutionally valid.[111]

C. *Appeals Court Proceedings*

1. Majority Opinion

On appeal, the majority of the Second Circuit Justices affirmed the holding of the lower court and upheld the constitutionality of the statute.[112] The federal court, however, adopted a different approach, arguing that the district court had erred in applying the less rigid *O'Brien* test.[113] The Second Circuit determined that the statute was a content-

107. *Id.*

108. *Id.* In his treatise on constitutional law, Laurence Tribe explained the requirement that the governmental interest be "unrelated to the suppression of free expression" is an ambiguous way of saying that the harm which the regulation seeks to avoid must not stem from the communicative content of the conduct. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 992 (2d ed. 1988).

109. *O'Brien*, 391 U.S. at 377.

110. *Simon & Schuster I*, 724 F. Supp. 170, 178-79 (S.D.N.Y. 1989). The court also concluded that if § 632-a incidentally restricted free speech, that restriction was no greater than necessary to promote the government's interest in compensating victims. *Id.* at 179. The law was "drawn not to prohibit expressive activit[ies], but to garnish the proceeds so that they will be used in a productive manner . . . . The statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from directly profiting from his or her crime." *Id.*

111. *Id.* at 179.

112. Simon & Schuster v. Fischetti, 916 F.2d 777, 784 (2d Cir. 1990).

113. *Id.* at 781.

based restriction of free speech, and was therefore subject to the more rigid test of strict scrutiny.[114]

The Second Circuit Court further found that the statute placed a direct burden on speech because it created a disincentive for a criminal to speak.[115] The court determined that:

> The possibility of a payday five years or more down the road, depending upon claims against the escrow fund, can hardly be seen as providing an adequate financial incentive. Without a financial incentive motivating them to relate their criminal activities, most would-be storytellers will decline to speak or write. It is now settled that the denial of payment for expressive activity constitutes a direct burden on that activity.[116]

Furthermore, the court asserted that the statute singled out the media for differential treatment based on expressive content.[117]

2. The Strict Scrutiny Test

The majority argued that the *O'Brien* test was insufficient because in order for the test to be satisfied, "'the governmental interest in question [must] be unconnected to expression . . . .'"[118] In this instance, the effect of the statute restricted criminal authors from writing about their crimes.[119] If a state is to prohibit expression based upon its content, it must show that the regulation is narrowly tailored to achieve a compelling state interest.[120] Furthermore, the Second Circuit maintained that the statute singled out the media for differential treatment based on content "since no assets other than those derived from the recounting of the criminal's story are subject to attachment in the manner provided by the statute."[121] Therefore, both the content-based exclusion and the differential treatment resulting from the statute must survive the narrowly tailored test of strict scrutiny.[122]

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114. *Id.* at 781-82.

115. *Id.* at 781.

116. *Id.* (citing Meyer v. Grant, 486 U.S. 414, 422-24 (1988)). The statute examined in *Meyer* placed proposals to amend the Colorado constitution on the ballot at a general election if a sufficient number of people signed an initiative petition. *See* COLO. REV. STAT. § 1-40-110 (1980). The statute also made it a felony to pay people to circulate the petitions. The Supreme Court, after concluding that the *Meyer* case involved a restriction subject to "exacting scrutiny," held that "[t]he Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State has failed to justify." *Id.* at 420, 428.

117. *Fischetti*, 916 F.2d. at 782.

118. *Id.* at 781 (quoting Texas v. Johnson, 491 U.S. 397, 407 (1989)).

119. *Id.* at 782.

120. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

121. *Fischetti*, 916 F.2d. at 782 (citing Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227-31 (1987)).

122. *Id.*

The Second Circuit determined that the state had met its burden under the strict scrutiny test.[123] The court characterized compelling state interest as "assuring that a criminal [did] not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization."[124] Furthermore, the court stated that the purpose of the statute was not to prohibit speech but to "assure that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited."[125] The majority held that the statute sufficiently satisfied the compelling state interest.[126]

The appeals court further determined that the statute was narrowly tailored to the state's compelling interest because it "recognizes that the only way a criminal can profit . . . is by writing or talking about or reenacting [the crime]."[127] Furthermore, most criminals' sole assets are derived from the sale of his or her story.[128] The only effect of the statute is to hold the proceeds of the story until the victim is compensated.[129] Thus, because the statute had survived the test of strict scrutiny, the Second Circuit upheld its constitutionality.[130]

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123. *Id.* at 782-83.

124. *Id.* at 782.

125. *Id.* at 783.

The Second Circuit noted that the statute had other important purposes besides preventing a criminal's unjust enrichment. The statute: "(1) decreases the likelihood that society will have to support victims of crime through social programs; (2) satisfies victims' sense of justice and desire for retribution; and (3) increases the criminal's awareness of the consequences of his crime." *Id.* (citing *Criminal Antiprofit Laws*, *supra* note 28, at 1367).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* As to Simon & Schuster's argument that victims can be compensated through New York's tort remedies, New York Civil Practice Law & Rules article 62, the Second Circuit maintained that they are limited and insufficient.

> [A]rticle 62 . . . is restricted to situations where the defendant: is a nondomiciliary residing outside New York or a foreign corporation not qualified to do business in New York; is a resident or domiciliary who cannot be served despite diligent efforts to do so; has disposed of, removed or secreted property or is about to do so, with intent to defraud creditors or frustrate a possible judgment entitled to full faith and credit.

N.Y. CIV. PRAC. L. & R. 6201 (McKinney 1980 & Supp. 1990). Recovery through Article 62 would leave many crime victims without compensation. Simon & Schuster v. Fischetti, 916 F.2d. 777, 781 (2d Cir. 1990).

130. *Fischetti*, 916 F.2d at 784.

3. Dissent

The dissent similarly asserted that the statute imposed a direct burden on free expression.[131] In applying the strict scrutiny test, however, the dissenting judge determined that the statute failed because it was not narrowly tailored to serve the compelling government interest.[132] The dissenting judge argued that the statute was underinclusive because it only applied to monies generated from a criminal's communication about his or her crime and did not attempt to garnish other income.[133] Furthermore, the dissent found that the statute was unsatisfactory in achieving its intended goal, noting that only five escrow accounts were established in the statute's first eleven years.[134] Justice Newman noted that "what little benefit to a handful of victims has . . . been achieved is more than offset by the royalties that would have been earned on books that were not published because of this statute."[135] The justice argued that these royalties could have been available for attachment under New York's restitution statute.[136] Finally, the dissenting judge argued that the statute should have been invalidated because it could prevent the publication of numerous materials that would otherwise be published but for the statute.[137]

D. *Supreme Court Proceedings*

1. The Majority Opinion

In the majority opinion written by Justice O'Connor, the Supreme Court reversed the lower courts' holdings.[138] The Court maintained that the "statute was presumptively inconsistent with the First Amendment, and . . . [the] statute was not narrowly tailored to achieve the

131. *Id.* (Newman, J., dissenting).
132. *Id.* at 784-87 (Newman, J., dissenting).
133. *Id.* at 785 (Newman, J., dissenting).
134. *Id.* at 787 (Newman, J., dissenting).
135. *Id.* (Newman, J., dissenting).
136. *Id.* (Newman, J., dissenting).
137. *Id.* (Newman, J., dissenting).
138. *Simon & Schuster II*, 112 S. Ct. 501, 512 (1991). Justice O'Connor delivered the opinion of the Court, in which Chief Justice Rehnquist, Justices White, Stevens, Scalia, and Souter joined. Justices Blackmun and Kennedy filed concurring opinions. Justice Thomas took no part in the consideration or decision of the case.

In his short concurring opinion, Justice Blackmun indicated that he agreed with the majority's reasoning. He added that the statute was both underinclusive and overinclusive. He maintained that the Court should indicate this to provide guidance to the other states with similar "*Son of Sam*" legislation. *Id.* (Blackmun, J., concurring).

State's objective of compensating victims from the profits of their crime."[139] The Court first reaffirmed the Second Circuit's determination that the *Son of Sam* law was content-based: "It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[140] The Court was concerned that criminals were less likely to publish books without compensation, and therefore, the statute created an unconstitutional disincentive to speak.[141]

The Court applied the strict scrutiny test and determined that the statute could not be upheld.[142] It agreed that New York has a compelling interest in compensating victims of crime before allowing a criminal to profit from his or her crime.[143] The Court, however, was not satisfied that the State has a compelling interest in compensating victims from the criminal's "storytelling" profits but not from the criminal's other assets.[144] The statute therefore failed the first prong of the strict scrutiny test.

Additionally, the Court considered the statute significantly overinclusive.[145] The Court was concerned that the reach of the statute could include numerous works by authors "provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally."[146] Furthermore, the statute allows funds

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139. *Id.* at 508-12.

140. *Id.* at 508. The specified content that the Court discussed were the works containing the author's thoughts or recollections about his or her crime. N.Y. EXEC. LAW § 632(a)(1) (McKinney 1982).

141. *Simon & Schuster I,* 112 S. Ct. at 508. The Court wrote:

> [w]hether the First Amendment 'speaker' is . . . Henry Hill, whose income the statute places in escrow . . . or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute . . . imposes a financial disincentive only on speech of a particular content.

Id.

142. *Id.* at 509-12.

143. *Id.* at 509-10.

144. *Id.* at 510. The Court further warned that the New York legislature took the effect of the statute—that of compensating victims of crime from the criminal's storytelling profits—and claimed that effect as the state's interest. *Id.* The Court was concerned that this circular reasoning could make all legislation look narrowly tailored, thereby avoiding any judicial scrutiny. *Id.* The Court noted that "such an argument 'eliminates the entire inquiry concerning the validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech.'" *Id.* at 510-11 (quoting Simon & Schuster v. Fischetti, 916 F.2d. 777, 785 (2d Cir. 1990) (Newman, J., dissenting)).

145. *Id.* at 511.

146. *Id.* (citation omitted). According to the Supreme Court, the works that would have been subject to the statute include: ARTHUR HALEY & MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X (1964) (describing the crimes committed by

to be placed in escrow regardless of whether the author was ever accused or convicted.[147] The Court was concerned that this overinclusiveness would prevent the writing or publication of a wide range of literature, while the victim would remain uncompensated.[148]

> Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years, and would make that income available to all of the author's creditors, despite the fact that the statute of limitations for this minor incident had long since run.[149]

Therefore, the Court held that the statute was not narrowly tailored to achieve the state's interest in compensating victims of crime.[150]

2. Justice Kennedy's Concurring Opinion

While Justice Kennedy concurred with Justice O'Connor's holding, he disagreed with the Court's reasoning.[151] Justice Kennedy argued that the criminal's expressive activity is entitled to full protection by the First Amendment and no test need be applied.[152] He stated:

> Here a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld.[153]

Justice Kennedy continued by stating that the Court should not apply the strict scrutiny test in determining the constitutionality of content-

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Malcolm X before he became a public figure); HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1849) (Thoreau wrote of his refusal to pay taxes); SAINT AUGUSTINE, THE CONFESSIONS OF SAINT AUGUSTINE (Franklin Library ed. 1980) (St. Augustine describing his illicit past crimes). *Id.* Furthermore, the Court lamented that works by such authors as Emma Goldman and Martin Luther King, Jr., would have been subject to the statute. *Id.* Finally, the Court wrote that many authors would have surrendered their profits to an escrow account if their autobiographies had been written. These people include Sir Walter Raleigh, Jesse Jackson, and Bertrand Russell. *Id.* The Court does contend that many of the works would have been written without compensation, "but the *Son of Sam* law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated." *Id.*

147. *Id.* (citation omitted).
148. *Id.* at 511.
149. *Id.* at 512.
150. *Id.*
151. *Id.* at 512-14 (Kennedy, J., concurring).
152. *Id.* at 512 (Kennedy, J., concurring).
153. *Id.* at 512-13 (Kennedy, J., concurring).

based restrictions.[154] He warned that when the Court resorts to the strict scrutiny test, the states may attempt to prohibit speech if they can find a sufficiently compelling reason to do so.[155] Justice Kennedy argued that, instead of applying a test to content-based restrictions, any legislation restricting expression because of its message, ideas, subject matter, or content should automatically be struck down.[156] Justice Kennedy concluded that New York's *Son of Sam* law was "raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press."[157]

IV. ANALYSIS

The Supreme Court's reasoning in overturning the New York *Son of Sam* statute is faulty. First, the Court should have applied the *O'Brien* test rather than strict scrutiny. The *Son of Sam* statute does not directly burden a criminal's free speech nor does it prevent a criminal from fully expressing his thoughts or ideas to the public. Accordingly, the statute must be judged under the balancing test set forth in *United States v. O'Brien.*[158] Furthermore, even assuming that the statute was content-based and did directly restrict the criminals freedom of expression, it should have survived the strict scrutiny test. The following analysis examines the statute's validity using these theories.

A. *The O'Brien Analysis*

As determined by the United States District Court for the Southern District of New York, the *Son of Sam* statute satisfied the four part *O'Brien* test.[159] The court determined that the statute was enacted within the constitutional power of the government, it furthers a substantial governmental interest, the governmental interest is unrelated to the suppression of expression, and the incidental restriction on free expression is no greater than is essential.[160]

The first part of the test charges the court to determine whether the *Son of Sam* statute was enacted within the constitutional power of the

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154. *Id.* at 513 (Kennedy, J., concurring).

155. *Id.* (Kennedy, J., concurring).

156. *Id.* at 514 (Kennedy, J., concurring). In support of his position that the strict scrutiny test was inapplicable to this case, Justice Kennedy maintained that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* (citations omitted).

157. *Id.* at 515 (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

158. 391 U.S. 367 (1968).

159. *See supra* notes 105-11 and accompanying text.

160. *O'Brien,* 391 U.S. at 377.

New York legislature.[161] As one commentator noted, "[the *Son of Sam*] statutes clearly meet the first part of the . . . test. The state power to regulate commerce within its borders and its police powers provide adequate authority for the state to enact this legislation."[162] It is both necessary and essential for New York to develop a system to compensate victims of crime.[163] Furthermore, in its brief, Simon & Schuster agreed that "aside from its impact on speech," there would be no constitutional harm if the statute operated in the same way as do New York's general attachment and enforcement of judgment laws.[164] The district court concluded and the petitioners conceded that the legislature had sufficient authority to enact the statute.[165]

The second part of the test requires that, to pass constitutional muster, the statute further a substantial governmental interest. As the Supreme Court admitted, New York has an "undisputed compelling interest in ensuring that criminals do not profit from their crimes."[166] Furthermore, the government has a legitimate interest in depriving criminals of economic proceeds obtained from their crime.[167] The

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161. *Id.*

162. *In Cold Type*, *supra* note 15, at 269 n.123 (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)); *see also* Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963) ("It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'" (quoting Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949))).

163. *Simon & Schuster I*, 724 F. Supp. 170, 178 (S.D.N.Y. 1989).

164. Petitioner's Brief at 29, *Simon & Schuster II*, 112 S. Ct. 501 (1991) (No. 90-1059) (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984)).

165. *Simon & Schuster I*, 724 F. Supp. at 178.

166. *Simon & Schuster II*, 112 S. Ct. at 510; *see also* Simon & Schuster v. Fischetti, 916 F.2d 777, 782 (2d Cir. 1990).

> It cannot be gainsaid that the state has a very strong interest in preventing criminals from profiting from their crimes. But the state has a much stronger, indeed a compelling, interest in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization. . . . Our society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by that crime.

Id. (citations omitted). *See also* Children of Bedford, Inc. v. Petromelis, 541 N.Y.S.2d 894 (N.Y. Sup. Ct. 1989).

167. Caplin v. Drysdale, 491 U.S. 617, 630 (1988). In his case, the defendant, charged with running a drug importation and distribution ring, used funds derived from his criminal activities to pay for legal services. The District Court ordered that all of the defendant's assets be forfeited to the government. The Supreme Court held that this forfeiture did not place a constitutional burden on the defendant's Sixth Amendment right to retain counsel of his choice.

statute satisfies the governmental interest in compensating victims by granting them access to proceeds they would not otherwise enjoy.[168]

The third requirement that must be satisfied under the *O'Brien* test is that the substantial governmental interest must not be related to the suppression of free expression.[169] In other words, a statute must be content-neutral and not stem from the communicative content of the conduct.[170] The statute does not prevent a criminal or an accused from discussing any aspect of the crime:

> or his thoughts and feelings about its commission or about the resulting prosecution and trial. Nor does the law prohibit . . . the press from functioning as the instrument for the communication of such information to the public or from reaping a financial benefit from performance of that function. The statute affects only the rights of the perpetrator to receive any profit from communications concerning the crime unless and until all proceeds have been held in escrow for five years and made available to satisfy any civil judgment obtained against the wrongdoer.[171]

The *Son of Sam* statute is only related to the regulation of the criminals' profiteering and the victims' compensation, but is unrelated to the suppression of expression. A criminal may choose not to write a story because of the delay in receiving compensation.[172] However, the statute does not *prohibit* the writing or telling of a crime story; its sole purpose is to attach the profits made from these stories to compensate crime victims.[173]

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168. *See generally* N.Y. EXEC. LAW § 632-a, *infra* app. 1.

New York Crime Victims Board's brief discusses the necessity for the legislature to escrow criminals' storytelling profits:

> Most crime victims do not sue criminals for their injuries and suffering because the criminal usually does not have any significant assets from which a civil judgment may be satisfied. Even "[i]f the defendant does have money or property at the time of the offense, it is quickly exhausted on bail and/or legal expenses." If an entity desires to pay a particular criminal to sell the rights to his crime story, the criminal may profit considerably from the contract which is usually the criminal's only significant asset. Unfortunately, the victims of that crime may not be able to recover for their injury and suffering from this asset because these profits may be acquired many years after the crime or conviction took place and, therefore, after the tort and wrongful death action statute of limitations have run.

Respondents' Brief, *supra* note 16, at 10 (citations omitted).

169. Texas v. Johnson, 491 U.S. 397, 406 (1989).

170. TRIBE, *supra* note 108, at 992.

171. Children of Bedford, Inc. v. Petromelis, 541 N.Y.S.2d 894, 898 (N.Y. Sup. Ct. 1989).

172. *Id.*

173. *Simon & Schuster I*, 724 F. Supp. 170, 179 (S.D.N.Y. 1989).

It is well established that the First Amendment fully protects the right of a criminal to write and speak about his or her crime.[174] Furthermore, the Supreme Court has often stated that "[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."[175] Moreover, the Court has reiterated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[176] However, the Court's "bedrock principle" does not apply in this instance because the statute does not prohibit the criminal's expression and the purpose of the statute is not to protect society's sensibilities.

The statute on its face and as applied does not prevent a willing speaker from communicating his or her crime story.[177] The Supreme

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174. *In Cold Type*, *supra* note 15, at 257. The commentator writes: "The First Amendment fully protects an offender's right to tell the circumstances surrounding the commission of his crime or to tell his thoughts and feelings about the crime. The fact that the subject matter of the speech may include offensive details of an infamous crime is inconsequential." *Id.* *See generally* Widmar v. Vincent, 454 U.S. 263 (1981) (infringement of First Amendment rights to deny a student religious group to assemble on a university campus); Linmark Assoc., Inc., v. Willingboro, 431 U.S. 85 (1977) (racially-integrated town's prohibition on real estate 'For Sale' and 'Sold' signs violated First Amendment); Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) (sexually-explicit material could be regulated but not suppressed); Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976) (state statute banning a pharmacist from advertising prescription drug prices violated the First Amendment); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (an ordinance prohibiting the showing of films containing nudity in drive-in movie theaters with screens that can be seen from the street was struck down); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) (an ordinance that prohibited all picketing near school buildings during school hours, except for peaceful picketing of a school involved in a labor dispute, found unconstitutional); Cohen v. California, 403 U.S. 15 (1971) (foul words are protected by the First Amendment if an audience is not "captive"); Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech can only be proscribed if it is directed at inciting imminent lawless action and imminent lawless action is likely to result); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (state defamation rules are limited by First Amendment principles and criticism of government policy must not be censored).

175. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (quoting FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978)).

176. United States v. Eichman, 496 U.S. 310, 319 (1990) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

177. As author Joel Rothman explains, the statute does not prevent a willing speaker from discussing his or her crime because the statute focuses solely on an economic incentive:

> The argument that the [New York] statute[] violate[s] the first amendment because [it] deter[s] the offender from publishing the story of his crime centers on the withdrawal of the proceeds as the source of the deterrent

Court maintains that the statute is content-based because it imposes a financial burden on criminals based on the content of their speech.[178] The Court cites *Leathers v. Medlock*[179] as authority and expresses its concern that if the government were free to impose content-based restrictions on speech, it could drive certain ideas or viewpoints from the marketplace.[180] However, the Court offered no evidence that any idea or viewpoint had been deterred as a result of the statute.[181]

True, it would seem that without immediate financial return, a criminal would have no reason to sell his or her crime story. Furthermore, because the escrow account is used to satisfy civil judgments against the offender and may deplete any revenue, the storyteller may be left without payment.[182] However, there are numerous reasons why a criminal would want to write and sell his or her story under the *Son of Sam* regulations. First, the statute allows for a percentage of the royalties to be used for the criminal's legal representation.[183] A criminal would rather retain private counsel to represent him or her than public counsel, and the proceeds from a story would help to pay for this.[184] Therefore, even though never receiving any profit from the story, the criminal will still receive the perceived benefits of having retained private council rather than appointed counsel.[185]

Criminals may also wish to provide restitution for their victims resulting from the profits of a story. A criminal may want to compensate

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> effect. This does not, however, allege the affirmative assertion of a barrier to his expression but rather involves the withdrawal of an incentive for him to express himself. The publishers who are willing to pay him for his story would be equally if not more willing to accept his statements free of charge. The payments to the offender induce him to tell his story but do not relate to the willingness of the publishers to print it . . . . The argument against these statutes seems to presuppose an unwilling speaker who must be induced to communicate by monetary payments.

In Cold Type, supra note 15, at 261-62.

178. *Simon & Schuster II*, 112 S. Ct. 501, 508 (1991).

179. 499 U.S. 439 (1991).

180. *Id.* at 448.

181. Respondents' Brief, *supra* note 16, at 26. "Petitioner has failed to produce any evidence that Exec. Law § 632-a prevents willing speakers from expressing thoughts and ideas or the media from communicating their message to the public or that the statute will deter speech in a significant respect." *Id.*

182. N.Y. EXEC. LAW § 632-a (McKinney Supp. 1979).

183. N.Y. EXEC. LAW § 632-a(6) (McKinney Supp. 1979).

184. *In Cold Type, supra* note 15, at 259. Rothman writes that "studies have shown that such an indigent defendant is not likely to want the public defender because he believes the defender is an agent of the state." *Id.* One study found that "nearly 80% of those represented by public defenders felt that their lawyer was not on their side. All those who had private attorneys felt that their lawyer was on their side." *In Cold Type, supra* note 15, at 259 n.27 (citing J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 107, 105-06 (1972)).

185. *In Cold Type, supra* note 15, at 259.

the victims of the crime for which he or she was responsible. Under the statute, the victims' judgments take priority over creditors,[186] which makes it easier for the criminal to repay victims. Criminals who feel remorse or compunction as a result of their actions would be encouraged to sell their story in an attempt to compensate victims of their crimes.[187]

Finally, some criminals are motivated to write stories for no compensation at all.[188] They may wish to tell their side of the story or to have their cause heard.[189] Further, some write as part of their rehabilitation process.[190]

The Court is incorrect in assuming that without an immediate financial return, criminals will be disinclined to write about their crimes.[191] As one commentator noted, "[p]erhaps the best response to the disincentive argument lies in the Supreme Court's recognition that '[f]reedom of speech presupposes a willing speaker.'"[192] In other

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186. N.Y. EXEC. LAW § 632-a(11) (McKinney Supp. 1979).

187. *Criminal Antiprofit Laws*, *supra* note 28, at 1364 n.74. Gary Gilmore requested several times before he was executed that a portion of the proceeds from any stories about his life and crime be distributed to the families of his victims. *Id.*

188. *See, e.g.*, Snider, *COMING SOON to a Theater Near You*, 7 CAL. LAW. 29, 31-32 (1987). "'Accomplished writers spending a year or two or three on a single book, like Peter Maas or Gay Talese, have proven to the world that you don't have to pay these scumbags—they'll tell you anyway, if you're a hardworking, honest journalist.'" *Id.* (quoting John Stein, Deputy Director of the National Organization for Victim Assistance in Washington, D.C.).

189. *See* Respondent's Brief, *supra* note 16, at 26 (citing N. EMMONS, MANSON: IN HIS OWN WORDS, 15, 17 (1986)). Charles Manson spent many hours writing his story "[a]nd although it is his story, Charles Manson receives no royalties or any other remuneration from [the] book. His only recompense will be the chance to have his story heard." *Id.*

190. Respondent's Brief, *supra* note 16, at 27 (citing Note, *Israel, Jack Henry Abbott, American Prison Writing, and the Experience of Punishment*, 10 CRIM. JUST. & BEHAV. 441, 450 (1983) ("[w]riting contributes to a process of internal growth and acceptance of responsibility, many professionals believe, although it may not help ex-inmates to make a living, or make a statement")).

191. *Simon & Schuster II*, 112 S. Ct. at 508-12.

192. Donna Sanders, Note, *Alabama's Anti-Profit Statute: A Recent Trend in Victim Compensation*, 33 ALA. L. REV. 109, 128 (1981) (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976)). *Virginia State Bd. of Pharmacy* dealt with an organization of prescription drug consumers challenging a Virginia Statute as violative of the first and fourteenth amendments. The statute provided that a pharmacist licensed in Virginia is guilty of unprofessional conduct if he "publishes, advertises, or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms [for] any drugs which may be dispensed only by prescription." *See* VA. CODE ANN. § 54-524.35 (1974). The Court held that the law was invalid because it effectively prevented the dissemination of any prescription drug price information since only licensed pharmacists were authorized to dispense such drugs. *Virginia Pharmacy Bd.*, 425 U.S. at 773.

words, the Supreme Court in *Simon & Schuster* assumes that people speak for financial return; without a financial incentive, the criminal will not write about his or her crime.[193] The Court's assumption is fallacious because a criminal who does not speak because he or she is not being financially rewarded may not be a willing speaker in the first place. "[T]he argument against these statutes seems to presuppose an unwilling speaker who must be induced to communicate by monetary payments. The mere removal of this inducement should not rise to the level of a constitutional violation."[194]

The Supreme Court incorrectly reasoned that "the statute plainly imposes a financial disincentive only on speech of a particular content."[195] The Court determined that *Arkansas Writers' Project, Inc. v. Ragland*[196] was analogous to the case at bar.[197] In fact, however, the cases are clearly distinguishable. In *Arkansas Writers' Project*, the Arkansas legislature imposed a sales tax which taxed general interest magazines, but exempted newspapers and religious, professional, trade, and sports journals.[198] The Supreme Court held that this was a violation of the First Amendment's freedom of the press guarantee.[199]

These cases are distinguishable because the State of Arkansas could not demonstrate an important governmental interest in imposing a sales tax on some magazines and not others, based on their content.[200] In its holding, the Court cited *Minneapolis Star*[201] and stated that "a genuinely nondiscriminatory tax on the receipts of newspapers would be

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193. The District Court determined that:

> although it may be more difficult for publishers and authors to create books with the cooperation of a criminal source, it is not impossible nor is such cooperation proscribed by section 632-a. The statute merely diverts the criminal source's proceeds for a time to ensure that victims may be compensated.

Simon & Schuster I, 724 F. Supp. 170, 176 (S.D.N.Y. 1989) (citing Children of Bedford, Inc. v. Petromelis, 541 N.Y.S.2d 894, 899 (N.Y. Sup. Ct. 1989)). *But see* Meyer v. Grant, 486 U.S. 414, 423 (1988). "It is often more difficult to get people to work without compensation than it is to get them to work for pay." *Id.* (citation omitted).

194. *In Cold Type*, *supra* note 15, at 261-62.

195. *Simon & Schuster II*, 112 S. Ct. at 508.

196. 481 U.S. 221 (1987).

197. *Simon & Schuster II*, 112 S. Ct. at 508.

198. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 223 (1987).

199. *Id.* at 227-34. The Court emphasized that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press." *Id.* at 230. *See* Regan v. Time Inc., 468 U.S. 641, 648 (1984).

200. *Arkansas Writers' Project*, 481 U.S. at 223.

201. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

constitutionally permissible."[202] The *Son of Sam* law is analogous to the "nondiscriminatory tax" described in *Minneapolis Star* because it does not single out a particular entity of the press.[203] While the tax discussed in *Arkansas Writers' Project* created discrimination by targeting a small group within the press[204] (general interest magazines), the *Son of Sam* statute applies equally to all entities working with criminals.[205]

The cases are further distinguished because the Court held that the Arkansas tax "is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content."[206] The magazines in Arkansas were penalized for publishing strictly general interest articles. The New York statute, on the other hand, is content-neutral and does not discriminate on the basis of content in so far as it relates to the press. The statute places no burden on the press, "which is free to report about the crime from the perspective of the perpetrator without restriction."[207] The statute applies evenly to all criminals paid to tell their stories; it does not indiscriminately escrow one criminal's funds while allowing another criminal to keep his or her revenue.

The third requirement of the *O'Brien* test[208] is further satisfied by analogizing *Simon & Schuster* to *City of Renton v. Playtime Theaters.*[209] In *Renton,* the Court held that an ordinance prohibiting adult movie theaters from locating within 1,000 feet of certain property was valid.[210] The Court justified its holding by stating that the purpose of the ordinance was to eliminate the undesirable secondary effects of the theaters and not to censor the movies.[211] The Court concluded that because "the Renton ordinance is aimed not at the content of the films shown, but at the secondary effects of such theaters on the surrounding community, [it is] completely consistent with our definition of 'content-

202. *Arkansas Writers' Project,* 481 U.S. at 229 (citing *Minneapolis Star,* 460 U.S. at 586 & n.9). The Court did, however, hold that this tax was discriminatory. *Arkansas Writers' Project,* 481 U.S. at 234.

203. *Simon & Schuster I,* 724 F. Supp. 170, 175-76 (S.D.N.Y. 1989).

204. *Arkansas Writers' Project,* 481 U.S. at 229.

205. N.Y. EXEC. LAW § 632-a (1) (McKinney Supp. 1979).

206. *Arkansas Writers' Project,* 481 U.S. at 229.

207. Children of Bedford, Inc. v. Petromelis, 541 N.Y.S.2d 894, 899 (N.Y. Sup. Ct. 1989).

208. United States v. O'Brien, 391 U.S. 367 (1968).

209. 475 U.S. 41 (1986).

210. *Id.* This ordinance was similar to the one approved in Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976), where the Court held that a city may use exhibition of sexually explicit adult movies as a basis for statutory classification of theaters. *Id.* In his concurring opinion, Justice Powell stated that this is a case of innovative land-use regulation with only an incidental burden on First Amendment rights, which this regulation does not offend. *Id.* at 82 (Powell, J., concurring).

211. *Renton,* 475 U.S. at 48.

neutral' speech regulations as those that are 'justified without reference to the content of the regulated speech.'"[212]

Simon & Schuster and *Renton* are similar cases and should have been viewed by the Court as analogous. Like *Renton*, the statute in *Simon & Schuster* presents a regulation that is unrelated to the suppression of free expression. Any limited burden placed on a criminal's expression is purely a secondary effect, and not the purpose, of the regulation. The Court suggested that if the legislature in *Renton* had intended to restrict "'the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.'"[213] Certainly an analogous intent underlies the *Son of Sam* statute. If the legislature's purpose was to suppress criminal's expression, it would have passed legislation prohibiting criminals from contracting with publishers at all.[214]

To satisfy part four of the *O'Brien* test, the statute's restriction on free expression must be no greater than is essential to further the government's substantial interest.[215] The district court correctly found

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212. *Id.* (quoting Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc., 425 U.S. 748, 771 (1976) (citations omitted)). In determining that the ordinance was content-neutral, the Court rejected an argument that it did not leave open "reasonable alternative avenues of communication" because it left only five percent of the area of the city available for adult theaters which was partially occupied by other businesses. *Id.* at 53. The Court held that the first amendment does not compel the "[g]overnment to ensure that adult theaters, or any other kinds of speech-related business," will be able to obtain sites at "bargain prices." *Id.* at 53-54. The Court further rejected the argument that the ordinance singled out the adult movie business for discriminatory purposes. *Id.* at 52-53. The Court stated that "[w]e simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult movie theaters." *Id.* at 53 (citations omitted).

213. *Id.* at 48 (quoting Young v. American Mini Theaters, 427 U.S. 50, 82 n.4 (1976) (Powell, J., concurring)).

214. In United States v. O'Brien, 391 U.S. 367 (1967), discussed *supra* notes 105-11 and accompanying text, the defendant argued that the "'purpose' of Congress [by making it illegal to destroy one's draft certificate] was 'to suppress freedom of speech.'" *Id.* at 376. The Court rejected this argument because Congress's purpose was not the basis for declaring the legislation unconstitutional. The Court stated that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* at 382-83.

215. *Id.* at 377. *See also* Children of Bedford, Inc. v. Petromelis, 143 Misc.2d 999 (N.Y. Sup. Ct. 1989):

> The State's interests in providing a source of funds to compensate victims of a crime who might otherwise have no source of redress and in barring a given perpetrator from reaping a potential windfall from the publicity generated by a particularly controversial or infamous crime significantly outweigh the minimal impact on the dissemination of information.

Id. at 1006-07 (*citing* United States v. O'Brien, 391 U.S. 367, 377 (1968)).

that the statute was drawn to garnish only proceeds from a criminal's contract with the publisher.[216] The statute does not attach any other assets of the criminal. Furthermore, the statute does not affect the proceeds from others involved in the contract, such as a ghost writer's or publisher's revenues.[217]

It has been further maintained that a statute creates only an incidental burden on expression if it leaves open ample alternative channels for expression.[218] As stated above, the statute neither prohibits a criminal from speaking nor prevents the media from transmitting the criminal's story to the public. The statute "leaves every medium of communication available to the criminal. Access to the media is not the focus of the statute."[219] Further, the "[alternative channels of communication] requirement does not pose a problem. . . . In fact, if a criminal is willing to speak to the press for free, the publisher will be even happier to amplify the criminal's message."[220]

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216. *Simon & Schuster I*, 724 F. Supp. 170 (S.D.N.Y. 1989).

217. Children of Bedford, Inc. v. Petromelis, 143 Misc.2d 999, 1008 (N.Y. Sup. Ct. 1989) ("The statutory purpose is clear [compensation of the victim], it is triggered by a well-defined event [commission of a crime] and it applies to a limited class of individuals [criminal-authors]."). *Id.*

218. Ward v. Rock Against Racism, 491 U.S. 781 (1989). In *Ward*, the Court upheld a New York City regulation requiring the use of city-provided sound systems and technicians for concerts in Central Park. The justification for the regulation was the city's desire to control noise levels to avoid undue intrusion into other areas of the park and adjacent residential areas. The Court stated that "a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Id.* at 797-98 (citation omitted). *See also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) ("[T]he four-factor standard of United States v. O'Brien for validating a regulation of expressive conduct . . . is little, if any, different from the standard applied to time, place, or manner restrictions.") (citation omitted).

In *Simon & Schuster II*, the Court noted that it found it unnecessary to discuss *Ward* or *Renton*. The Court maintained that because the "*Son of Sam*" statute was so over-inclusive, it would not discuss the statutes content-neutrality. *Simon & Schuster II*, 112 S. Ct. at 511 n.**. The Court determined that the "'*Son of Sam*' law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated." *Id.* at 511. Furthermore, the Court stated that even under the *Ward* and *Renton* analysis, the statute must be narrowly tailored to advance the State's interest. *Id.* Therefore, the Court held that even if the statute was content-neutral, "a substantial burden on speech does not serve to advance [the State's content-neutral] goals." *Id.* at n.** (citation omitted). *See also* Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding a ban on all amplification devices operated in public places which emit loud and raucous noises).

219. *Criminal Antiprofit Laws*, *supra* note 28, at 1368.

220. Karen M. Ecker & Margot J. O'Brien, Simon & Schuster, Inc. v. Fischetti: *Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075, 1100-01 (1991).

Therefore, the criminal does not need to find alternative methods to express him or herself.

The statute, therefore, satisfies the *O'Brien* test as well as the *Renton* requirements. It furthers a substantial governmental interest that is unrelated to a criminal's free expression, and the incidental restriction on expression, if any, is satisfied by offering ample alternative methods of communication. The Supreme Court erred in its analysis by applying a stricter form of scrutiny[221] than was necessary and, thus, erroneously overturned the statute.

B. *The Strict Scrutiny Test*

If the statute imposed a direct, rather than an incidental, burden on speech, the Second Circuit Court of Appeals was correct in holding that it survived the test of strict scrutiny.[222] Although the court of appeals determined that the statute prevented criminals from writing about their crimes and singled out the media for differential treatment based on content, the statute was found to be both narrowly tailored and served a compelling state interest.[223] The Supreme Court has held that a statute that places a direct limitation on speech or the press will be upheld if it satisfies the test of strict scrutiny.[224]

The Supreme Court agreed with the Second Circuit that New York has a compelling interest in compensating its citizens who have been injured by criminals.[225] The compelling interest is served by prohibiting "criminals from profiting at the expense of victims who are in need of compensation and press their demands for restitution."[226] The intent of the statute, although it indirectly prohibited expression, was to create a state compensation scheme to aid victims of crime.[227] The

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221. *See supra* notes 138-50 and accompanying text (discussing the strict scrutiny test).

222. *Simon & Schuster I*, 724 F. Supp. 170, 178 (S.D.N.Y. 1989).

223. *Id.* at 179 (citations omitted).

224. *See, e.g.*, Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636 (1980); First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978). If content-based regulations are imposed in a situation that does not fall within an unprotected category—obscenity, advocacy of imminent lawless behavior, defamation, fighting words—there is a strong presumption that the regulation is unconstitutional. In this situation, the Court will strictly scrutinize the regulation: the government bears the burden of showing "that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Widmar v. Vincent, 454 U.S. 263, 270 (1981).

225. *See Simon & Schuster II*, 112 S. Ct. 501, 509 (1991); Simon & Schuster v. Fischetti, 916 F.2d 777, 782-84 (2d Cir. 1990).

226. *Fischetti*, 916 F.2d at 782.

227. *In Cold Type*, *supra* note 15, at 266.

> [G]eneral regulatory statutes, *not intended to control the content of speech* but incidentally limiting its unfettered exercise, have not been regarded as the

primary purpose of the statute was not to limit speech, but to ensure that a criminal does not avoid liability to victims.[228]

The Second Circuit recognized that the statute was narrowly tailored to satisfy the state's compelling interest.[229] The court determined that, apart from the proceeds obtained by committing the crime itself, there would be virtually no means by which criminals could profit from their crimes at the expense of their victims other than by being paid for reenacting or discussing the crimes.[230] "The First Amendment right to speak is restricted only as a consequence of [the criminal's] inability to profit until the victim is compensated."[231] The Supreme Court concluded that the statute was not narrowly tailored because it did not go after any other assets of the criminal.[232] However, as mentioned above, even if there were any other assets, the state remedies of attachment would not be as effective as section 632-a.[233] The *Son of Sam* statute placed funds from a criminal's story in escrow in order to allow victims adequate time and proceeds to retain a judgment.[234] Without the statute, there would be no isolated and identifiable resource

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> type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a pre-requisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

Id. at 265-66 n.97 (quoting Konigsburg v. State Bar of California, 366 U.S. 36, 50-51 (1961) (footnotes omitted) (emphasis added)).

Simon & Schuster maintained that the statute was both over-inclusive and under-inclusive and was not narrowly tailored to serve a compelling state interest. The publisher argued that the statute applied only to a criminal's funds derived from speaking about the crime and not to the other assets of the criminal. Petitioners' Brief, *supra* note 164, at 31, 41. However, as Respondent argued, the intent of the statute was not to compensate all victims of crime or to prevent criminals from profiting from their crime. Respondents' Brief *supra* note 16, at 37 (quoting Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541, 549-50 (N.Y. Sup. Ct. 1989)).

> The statute was never intended to reach profits received solely as a result of the criminal's notoriety. . . . That financial success is the result of their newly advertised expertise or prominence, not their illegal act. . . . Moneys received by a criminal from inheritance or other sources do not relate to the crime in which a victim has been injured.

Id.

228. *In Cold Type, supra* note 15, at 266.

229. *Fischetti*, 916 F.2d at 784.

230. *Id.* at 783.

231. *Id.* Section 632-a is designed to withhold proceeds until victims have had an opportunity to make their claims for compensation. It provides a specialized form of attachment and is designed to freeze the proceeds of storytelling by criminals for the benefit of those whose misfortunes gave rise to the story. *Id.*

232. *Simon & Schuster II*, 112 S. Ct. 501, 510 (1991).

233. *See* N.Y. EXEC. LAW § 632-a (McKinney Supp. 1982), *infra* app. 1; *see also supra* note 168 and accompanying text.

234. *See supra* note 168 and accompanying text.

to benefit victims, no way to ensure that victims were compensated before creditors, and an insufficient time for a victim to lay claim to the proceeds.[235]

V. CONCLUSION

The Supreme Court erred in its reasoning and holding because the statute survives not only the test set out in *United States v. O'Brien*, but the more demanding strict scrutiny test as well. The statute does not place a content-based restriction on criminals' expression nor does it create a disincentive for a criminal to speak, write, publish, or sell the story of his or her crime. Furthermore, even if the statute does create a direct burden on a criminal's freedom of expression, the statute is necessary to serve the compelling state interest of compensating victims and is narrowly tailored to achieve that interest. The *Son of Sam* statute is consistent with the First Amendment to the United States Constitution.

Overturning the *Son of Sam* statute has left the fifty states and the federal government without a fully adequate victim compensation system. True, victims may still recover damages through a civil judgment, yet many will be left without compensation.

The fact that, by spending time in prison, "a criminal has 'paid his debt to society,' may be small comfort to a family devastated by the death or disability of its breadwinner at the hands of an attacker."[236] The bottom line is that criminals should repay their victims in any way possible, and, if that payment happens to come from selling the story of their crime, then the Supreme Court should not interfere. The statute was developed to articulate society's attitude toward criminals profiting from their illegal activity. The *Son of Sam* law "embodies the community's belief that it is not only wrong for criminals to commit crimes and profit from them but also wrong for criminals to salt their victims' wounds by profiting from the victimization without recompense to the victims."[237] By striking down the statute, the Supreme Court has sent a message to the people of the United States that crime does indeed pay.

Robert Mazow[*]

235. Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541 (N.Y. Sup. Ct. 1991), *vacated*, 112 S. Ct. 859 (1992).

236. Children of Bedford, Inc. v. Petromelis, 541 N.Y.S.2d 894, 900 (1989).

237. *Children of Bedford*, 573 N.E.2d at 548 (N.Y. Sup. Ct. 1991).

* Dedicated to Pam Karlyn.

APPENDIX I

N.Y. EXEC. LAW section 632-a (McKinney Supp. 1982), entitled Distribution of Money Received as a Result of the Commission of Crime, provides in relevant part:

1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such a crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such a contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.
2. The board, at least once every six months for five years from the date it receives such moneys, shall cause to have published a legal notice in newspapers of general circulation in the county wherein the crime was committed and in counties contiguous to such county advising such victims that such escrow moneys are available to satisfy money judgments pursuant to this section. For crimes committed in a county located within a city having a population of one million or more, the notice provided for in this section shall be in newspapers having general circulation in such city. The board may, in its discretion, provide for such additional notice as it deems necessary.
3. Upon dismissal of charges or acquittal of any accused person the board shall immediately pay over to such accused person the moneys in the escrow account established on behalf of such accused person.
4. Upon a showing by any convicted person that five years have elapsed from the establishment of such escrow account and further that no actions are pending against such convicted person pursuant to this section, the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives.
5. For purposes of this section, a person found not guilty as a result of the defense of mental disease or defect pursuant to section 30.05 of the penal law shall be deemed to be a convicted person.
6. Whenever it is found, pursuant to article seven hundred thirty of the criminal procedure law, that a person accused of a crime is unfit to proceed as a result of mental disease or defect because such person lacks

capacity to understand the proceedings against him or to assist in his own defense, the board shall bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules to determine disposition of the escrow account.

7. Notwithstanding any inconsistent provision of the estates, powers and trusts law or the civil practice law and rules with respect to the timely bringing of an action, the five year period provided for in subdivision one of this section shall not begin to run until an escrow account has been established.

8. Notwithstanding the foregoing provisions of this section the board shall make payments from an escrow account to any person accused or convicted of crime upon a showing by such person that such moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process. The board may in its discretion and after notice to the victims of the crime make payments from the escrow account to a representative of any person accused or convicted of a crime for the necessary expenses of the production of the moneys paid into the escrow account, provided the board finds that such payments would be in the best interests of the victims of the crime and would not be contrary to public policy. The total of all payments made from the escrow account under this subdivision shall not exceed one-fifth of the total moneys paid into the escrow account and available to satisfy civil judgments obtained by the victims of the crime.

9. Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this section shall be null and void as against the public policy of this state.

APPENDIX II

The following is a list of *Son of Sam* statutes enacted throughout the United States:

ALA. CODE §§ 41-9-80 to 84 (1982); ALASKA STAT. § 12.61.010 (1990); ARIZ. REV. STAT. ANN. § 13-4202 (1989); ARK. CODE ANN. § 16-90-308 (Michie 1989); CAL. CIV. CODE § 2225 (West Supp. 1991); COLO. REV. STAT. §§ 24-4.1-201 to 207 (1988 & Supp. 1990); CONN. GEN. STAT. ANN. § 54-218 (West 1985); DEL. CODE ANN. tit. 11, §§ 9101-06 (1987 & Supp. 1990); FLA. STAT. ANN. § 944.512 (West 1985 & Supp. 1990); GA. CODE ANN. §§ 17-14-30 to 32 (1990); HAW. REV. STAT. §§ 351-81 to 88 (Supp. 1989); IDAHO CODE § 19-5301 (1987); ILL. ANN. STAT. ch. 70, para. 411 (Smith-Hurd 1989 & Supp. 1990); IND. CODE ANN. §§ 16-7-3.7-1 to 6 (Burns 1990); IOWA CODE ANN. § 910.15 (West Supp. 1991); KAN. STAT. ANN. §§ 74-7319 to 7321 (Supp. 1989); KY. REV. STAT. ANN. § 346.165 (Michie/Bobbs-Merrill 1983); LA. REV. STAT. ANN. §§ 46:1831 to 1839 (West 1982); MD. CODE ANN. art. 27, § 764 (1988); MASS. GEN. LAWS ANN. ch. 258A, § 8 (West 1989); MICH. COMP. LAWS ANN. § 780.768 (West Supp. 1990); MINN. STAT. ANN. § 611A.68 (West 1987 & Supp. 1991); MISS. CODE ANN. §§ 99-38-1 to 11 (Supp. 1990); MO. ANN. STAT. § 595.045(14) (Vernon Supp. 1991); MONT. CODE ANN. § 53-9-104 (1)(d) (1989); NEB. REV. STAT. §§ 81-1836 to 1842 (1987); NEV. REV. STAT. § 217.265 (1986); N.J. STAT. ANN. §§ 52:4B-26-33 (West 1986); N.M. STAT. ANN. § 31-22-22 (Michie Supp. 1990); OHIO REV. CODE ANN. §§ 2969.01 to 2969.06 (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 17 (West 1991); OR. REV. STAT. § 147.275 (1989); PA. STAT. ANN. tit. 71, § 180-7.18 (1990); R.I. GEN. LAWS §§ 12-25.1-1 to 12 (Supp. 1990); S.C. CODE ANN. §§ 15-59-40 to 80 (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS ANN. §§ 23A-28A-1 (1988); TENN. CODE ANN. §§ 29-13-201 to 208 (1990); TEX. REV. CIV. STAT. ANN. art. 8309-1 §§ 16 to 18 (West 1991); VA. CODE ANN. §§ 19.2-368.19 to .22 (Michie 1990); WASH. REV. CODE ANN. §§ 7.68.200 to .280 (West Supp. 1991); WIS. STAT. ANN. § 969.165 (West 1990); WYO. STAT. § 1-40-112(d)-(g) (1988).

Jacobson v. United States—Entrapment Redefined?

I. INTRODUCTION

Entrapment is "[t]he act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him."[1] The entrapment defense is most often claimed by defendants who were targets of undercover sting operations intended to eliminate crimes such as child pornography, drug trafficking, and political corruption. Courts agree that police may employ certain devices to catch those engaged in criminal enterprises;[2] however, they also agree that police are prohibited from conceiving a crime and using trickery, persuasion, or fraud to induce intent which causes a crime that would not otherwise be committed.[3] The entrapment defense "attempts to strike a balance between criminal predisposition on the one hand and law enforcement practices on the other."[4]

The United States Supreme Court recently addressed the entrapment doctrine in *Jacobson v. United States*.[5] The United States Postal Service and the United States Customs Service targeted Jacobson in an undercover sting operation for twenty-six months, and Jacobson was subsequently convicted of receiving child pornography through the mail in violation of the Child Pornography Act.[6] The Supreme Court held Jacobson had been entrapped as a matter of law.[7] The Court attempted to refine the entrapment doctrine, which is made up of two elements, government inducement and defendant's predisposition. Focusing

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1. BLACK'S LAW DICTIONARY 532 (6th ed. 1990).
2. Sorrells v. United States, 287 U.S. 435, 441 (1932).
3. EDWARD M. DANGEL, CRIMINAL LAW § 89, at 175 (1951).
4. Paul Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 5, 5 (1986). Chief Justice Warren stated that the underlying theory behind entrapment was the judiciary trying to draw a line "between the trap for the unwary innocent and the trap for the unwary criminal." Sherman v. United States, 356 U.S. 369, 372 (1958).
5. 112 S. Ct. 1535 (1992).
6. *Id.* at 1537. Jacobson was charged with violating 18 U.S.C. § 2252(a)(2)(A) (1988 & Supp. II 1990).
7. *Jacobson*, 112 S. Ct. at 1543.

primarily on the defendant's predisposition, the Court attempted to clarify when predisposition needs to be shown.[8]

This Comment examines *Jacobson v. United States* and the Supreme Court's treatment of the entrapment doctrine. Part II reviews the history of entrapment in both the Supreme Court and the Circuit Courts of Appeals.[9] In light of this historical background, Part III analyzes *Jacobson v. United States* by addressing the procedural posture in the Eighth Circuit Court of Appeals and the Supreme Court's majority and dissenting opinions.[10] Part IV presents an analysis of the Supreme Court's treatment of the entrapment issue.[11] Part V concludes with the proposition that the new definition of predisposition created by *Jacobson* continues to be somewhat ambiguous and therefore will be difficult to apply in future cases.[12]

II. HISTORY OF ENTRAPMENT

A. *Supreme Court's Treatment*

The Supreme Court first recognized the entrapment doctrine in *Sorrells v. United States*.[13] Sorrells was convicted of possessing and selling alcohol in violation of the Prohibition Act.[14] Sorrells claimed he had been entrapped.[15] The Court struggled with employing the defense because until then entrapment was an "unrecognized excuse to criminal responsibility."[16] The Court first reiterated that government agents may provide opportunities to an individual who is already willing to commit an illegal act in order to expose that individual to the law.[17] Chief Justice Hughes recognized that "[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to

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8. *Id.* at 1541 n.2.

9. *See infra* notes 13-140 and accompanying text.

10. *See infra* notes 141-258 and accompanying text.

11. *See infra* notes 259-341 and accompanying text.

12. *See infra* notes 342-44 and accompanying text.

13. 287 U.S. 435 (1932). The *Sorrells* opinion reflected two different strains of entrapment analysis, known as the subjective theory and the objective theory. *See also* Cynthia Perez, *United States v. Jacobson: Are Child Pornography Stings Creative Law Enforcement or Entrapment?*, 46 U. MIAMI L. REV. 235, 240 (1991).

14. *Sorrells*, 287 U.S. at 438.

15. *Id.* In *Sorrells*, a government agent visited the defendant at his home and repeatedly requested and coaxed the defendant to obtain liquor for him, using friendship to persuade him and stating that "one former war buddy would get liquor for another" and that they were "two old buddies." *Id. See also* Marcus, *supra* note 4, at 15-16.

16. Michael A. DeFeo, *Entrapment As A Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. REV. 243, 252-55 (1967).

17. *Sorrells*, 287 U.S. at 441 (citations omitted).

commit the alleged offense and induce its commission in order that they may prosecute."[18] The Court examined the public policy supporting the entrapment defense, which argued that "'[w]hen the criminal design originates not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution thereof.'"[19] The Court rejected this policy argument, conceding that the legislature is the proper authority to make public policy, and that the Court could not disregard the will of the legislature when the legislature has expressly forbidden and penalized certain acts.[20] Chief Justice Hughes declared that a traditional function of the Court is to interpret statutes in such a way as to avoid unjust results which would be foreign to the legislature's intention.[21]

Chief Justice Hughes then proclaimed the basis for recognizing entrapment:

> it was [not] the intention of Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter [of the statute] to do violence to the spirit and purpose of the statute.[22]

B. *Subjective Theory*

After recognizing the defense, the majority in *Sorrells* held that entrapment was not based entirely on evidence that the government induced the defendant into committing the crime.[23] The defendant's predisposition and criminal design were equally, if not more, important.[24] In fact, the majority pointed out that the "controlling question [is] whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials."[25] The majority held that if a defendant claims entrapment and produces evidence of inducement, the government must then prove that the defendant was predisposed to commit the crime.[26] The majority did not specifically

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18. *Id.* at 442.
19. *Id.* at 445 (quoting Newman v. United States, 299 F. 128, 131 (4th Cir. 1924)).
20. *Id.* at 445-46.
21. *Id.* at 450.
22. *Id.* at 448. *See* Marcus, *supra* note 4, at 16.
23. *Sorrells,* 287 U.S. at 451.
24. *Id. See also* Marcus, *supra* note 4, at 17-18.
25. *Sorrells,* 287 U.S. at 451. *See also* Paul Marcus, *Proving Entrapment Under the Predisposition Test,* 14 AM. J. CRIM. L. 53, 55 (1987).
26. *Sorrells,* 287 U.S. at 451. Since the defendant raises the defense, the

set out when predisposition must be shown, but stated that the "inquiry naturally focuses on the state of mind of the defendant at the time of the inducement."[27] The *Sorrells* majority opinion came to be known as the subjective theory of entrapment because the Court focused primarily on the defendant's mental state.[28]

The Supreme Court's next opportunity to address the entrapment doctrine came in *Sherman v. United States*.[29] The subjective theory formed the basis of the majority opinion.[30] The majority reaffirmed the reasoning from *Sorrells*, stating that Congress did not intend its statutes to be enforced by tempting innocent persons to break the law.[31]

Applying the doctrine, the Court first found that Sherman was clearly induced by the government informant.[32] Since Sherman raised the defense and produced evidence of inducement, the government now had the burden of showing that Sherman was "ready and willing" to comply with the informant's request to sell him narcotics.[33] The government presented evidence of Sherman's two prior narcotics-related convictions and argued that these convictions demonstrated Sherman's predisposition to sell narcotics to the informant.[34] This was the extent of the government's evidence of Sherman's predisposition.[35] The Court rejected the convictions as insufficient to prove predisposition at the time the government approached Sherman with the opportunity to break the law.[36] The Court concluded there was a lack of predisposition on

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defendant cannot object to an investigation of his character and background or to the introduction of evidence that would generally be inadmissible as prejudicial. *See Marcus, supra* note 4, at 18. *See also Marcus, supra* note 25, at 70.

27. Marcus, *supra* note 25, at 68.

28. *Sorrells*, 287 U.S. at 451. *See* Marcus, *supra* note 25, at 68; Perez, *supra* note 13, at 10.

29. 356 U.S. 369 (1958). In *Sherman*, the government informant played on Sherman's sympathies; both men were recovering drug addicts. *Id.* at 373. The government informant repeatedly requested the defendant to supply him with narcotics, presumably because the informant was not responding to treatment and was suffering. *Id.* The defendant finally submitted to the informant's requests and obtained narcotics for him several times. *Id.* As a result of his efforts, the informant obtained the narcotics and induced Sherman to return to his drug habit as well. *Id.* Sherman was convicted of selling narcotics to a government informant and claimed he had been entrapped. *Id.* at 370.

30. *Id.* at 372. *See* Marcus, *supra* note 4, at 20-21.

31. *Sherman*, 356 U.S. at 372. *See supra* note 22 and accompanying text (discussing *Sorrell's* basis for accepting entrapment as a defense).

32. *Id.* at 373.

33. *Id.* at 375.

34. *Id.*

35. *Id.*

36. *Id.* Chief Justice Warren stated that "a nine year old sales conviction and a five year old possession conviction are insufficient to prove [Sherman] had a

Sherman's part,[37] and held Sherman had been entrapped as a matter of law,[38] despite the principle that entrapment is usually an issue for the jury.[39]

Although the Court only examined evidence existing prior to the government's contact with Sherman, the Court inferred that it was not limiting the determination of predisposition to solely that type of evidence. The Court cited to Judge Learned Hand's opinion in Sherman's first appeal,[40] in which he stated that proof of defendant's predisposition can be shown through evidence of past offenses, through his preparation to commit the offense, and through his willingness to comply with the informant's overtures.[41]

The Court examined the entrapment doctrine again in 1973 when it decided *United States v. Russell*.[42] Russell was convicted on several narcotics violations.[43] In an opinion written by Justice Rehnquist, the Court reaffirmed the subjective theory of entrapment, concluding that "the key inquiry is properly focused on the individual's state of mind, not the government's involvement."[44] Because Russell had conceded his predisposition, the majority upheld his conviction based on the subjective theory.[45] The Court, however, did consider Russell's defense under a due process analysis.[46] The majority did not reject the defense outright, it simply rejected it as applied to Russell.[47]

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readiness to sell narcotics at the time [the government informant] approached him particularly when we must assume from the record he was trying to overcome the narcotics habit at the time." *Id.* at 375-76.

37. *Id.* at 375.

38. *Id.* at 373.

39. *Id.* at 377. "When entrapment is based on the defendant's lack of predisposition, the issue is typically . . . one for the jury . . . ." 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 209(c)(2) (1984). *See* 1B FRANK JACKSON, CRIMINAL DEFENSE TECHNIQUES § 30.05 (Irene H. Rosen et al. eds., 1992). However, *Sherman* demonstrates the clearest example in federal courts where "all evidence points to the sole conclusion that the defendant was illegally entrapped." DeFeo, *supra* note 16, at 269.

40. United States v. Sherman, 200 F.2d 880 (2d Cir. 1952).

41. *Id.* at 882-83; *see* Marcus, *supra* note 4, at 20-21.

42. 411 U.S. 423 (1973).

43. *Id.* at 424.

44. Sherman v. United States, 356 U.S. 369, 372 (1958).

45. *Russell*, 411 U.S. at 436.

46. *Id.* at 430. This due process analysis is similar to the objective theory of examining entrapment. *See infra* notes 54-89 and accompanying text (discussing the objective theory of entrapment).

47. *Russell*, 411 U.S. at 433. *See infra* notes 79-84 and accompanying text (discussing Russell's due process defense).

In *Hampton v. United States*,[48] the defendant was convicted of distributing heroin to government agents.[49] Hampton claimed he had been entrapped and testified that a government informant supplied him with the drug and encouraged him to sell it to government agents.[50] Although Hampton's defense was based on due process principles,[51] the majority in dicta reaffirmed the subjective theory espoused in *Sorrells* and *Sherman*.[52] The majority stated that since the entrapment defense centers around the defendant's predisposition to commit the crime, the defense was not available to Hampton, who had already admitted his predisposition.[53]

D. *The Objective Theory*

When the Supreme Court first recognized the entrapment defense in *Sorrells v. United States*,[54] an alternative theory of establishing entrapment emerged in Justice Roberts's concurring opinion.[55] Justice Roberts's opinion focused on police conduct rather than on the defendant's predisposition and character.[56] His concurring opinion[57] in *Sorrells* is significant because it outlined what became known as the objective theory of entrapment.[58]

Justice Roberts used the public policy grounds that the majority had rejected to recognize the entrapment defense.[59] He stated the doctrine's foundation rested in the public policy which upheld the integrity of the government and its processes.[60] Therefore, whenever "a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the

48. 425 U.S. 484 (1976).
49. *Id.* at 485.
50. *Id.* at 486-87.
51. *See infra* note 83 (discussing Hampton's due process defense).
52. *Hampton*, 425 U.S. at 488.
53. *Id.* at 489-90.
54. 287 U.S. 435 (1932); *see supra* notes 13-22 (discussing *Sorrells* acceptance of an entrapment defense).
55. *Sorrels*, 287 U.S. at 455.
56. Marcus, *supra* note 4, at 15; *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 371 (1972).
57. Justice Roberts concurred in the judgment only. *Sorrells*, 287 U.S. at 453 (Roberts, J., concurring).
58. *See* Perez, *supra* note 13, at 240.
59. *Sorrells*, 287 U.S. at 455 (Roberts, J., concurring). *See supra* notes 19-20 and accompanying text (discussing the majority's rejection of the public policy argument).
60. *Id.* at 455 (Roberts, J., concurring). *See also* DeFeo, *supra* note 16, at 255. DeFeo refers to this public policy as upholding "judicial integrity." *Id.*

consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal."[61]

Justice Roberts's reasoning regarding entrapment drew the analysis away from the defendant's mental state and more towards the government's conduct.[62] He rejected the majority's legislative intent reasoning, criticizing it as an "unwarranted judicial construction."[63] Justice Roberts declared that the majority was formulating an implied exception to the underlying criminal offense by excluding persons induced by government officials.[64] Although the defendant was induced by government agents, he acted with the intent to commit the crime, and that brought him within the applicable statute. Justice Roberts further opined that the entrapment defense cannot be read to excuse a defendant and contradict the obvious fact that he committed the crime.[65]

Although Justice Roberts's concurrence is significant as a criticism of the majority's position and for advocating a different approach, he did not clearly formulate a method to focus entrapment around the government's conduct.[66] Justice Roberts's position was refined by Justice Frankfurter's concurrence in *Sherman v. United States*.[67]

In *Sherman*, Justice Frankfurter sharply criticized the subjective theory espoused by the majority.[68] Justice Frankfurter labeled the majority's legislative intent reasoning for recognizing entrapment as "sheer fiction."[69] He explained that "the only legislative intention that . . . can be extracted from the statute is the intention to make criminal precisely the conduct in which the defendant has engaged."[70] If the defendant is going to be excused, it has to be on grounds other than his innocence.[71]

Justice Frankfurter also stated that basing the defense primarily on the defendant's predisposition is prejudicial because it allows proof of defendant's reputation and past bad acts to be admitted into evidence.[72] By raising the defense, the defendant runs the risk of having his past conduct determine his fate rather than his conduct during the

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61. *Sorrells*, 287 U.S. at 454-55 (Roberts, J., concurring).
62. Marcus, *supra* note 4, at 19.
63. *Id.* at 18; *see supra* notes 13-22 (discussing the majority's basis for recognizing entrapment).
64. *Sorrells*, 287 U.S. at 456 (Roberts, J., concurring). *See* LAFAVE & SCOTT, *supra* note 56, at 372.
65. *Sorrells*, 287 U.S. at 456 (Roberts, J., concurring).
66. Marcus, *supra* note 4, at 19.
67. 356 U.S. 369 (1958).
68. *Id.* at 378 (Frankfurter, J., concurring).
69. *Id.* at 379 (Frankfurter, J., concurring). *See also* Marcus, *supra* note 4, at 21.
70. *Sherman*, 356 U.S. at 379 (Frankfurter, J., concurring).
71. *Id.* at 380 (Frankfurter, J., concurring).
72. *Id.* at 382 (Frankfurter, J., concurring).

present case.[73] Justice Frankfurter further claimed that emphasizing the defendant's predisposition rather than the police conduct contradicted the rationale for entrapment, which centered around deterring police from planning a crime and ensnaring an individual into committing it.[74]

Conversely, Justice Frankfurter declared that "the crucial question . . . is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power."[75] Under this analysis, certain police conduct will not be tolerated regardless of the defendant's past conduct or present disposition.[76] Justice Frankfurter declared that the majority's underlying reason for holding that Sherman had been entrapped was the informant's outrageous behavior, not Sherman's lack of predisposition.[77] Justice Frankfurter believed an objective test would provide guidance and uniform standards that would define the limits to which government officers can induce persons to commit illegal acts.[78]

In *United States v. Russell*,[79] Russell claimed law enforcement officers entrapped him when a government agent supplied him with an essential

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73. *Id.* (Frankfurter, J., concurring). Justice Frankfurter stated that this prejudice constituted discrimination against the criminal class. "[I]f two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition." *Id.* at 383 (Frankfurter, J., concurring).

74. *Id.* at 382 (Frankfurter, J., concurring).

75. *Id.* at 382-83 (Frankfurter, J., concurring). Essentially, the objective theory set out by Justices Roberts and Frankfurter was the predecessor to the due process argument claimed in United States v. Russell, 411 U.S. 423 (1973). Perez, *supra* note 13, at 241 n.47.

The Model Penal Code adopted Justice Frankfurter's approach of focusing on police misconduct rather than on the defendant's predisposition. The Model Penal Code states:

> (1) A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:
>
> (a) making knowingly false representation designed to induce the belief that such conduct is not prohibited; or
>
> (b) employing methods of persuasion or inducement that create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

MODEL PENAL CODE § 2.13(1) (Proposed Official Draft 1962). *See* MODEL PENAL CODE § 2.13 cmt. 3 (Official Draft and Revised Comments 1985) (discussing the rationale for the Model Penal Code's adoption of the objective theory).

76. *Sherman*, 356 U.S. at 383 (Frankfurter, J., concurring).

77. *Id.* (Frankfurter, J., concurring).

78. *Id.* at 384 (Frankfurter, J., concurring). *See also* Marcus, *supra* note 4, at 21; Maura F.J. Whelan, *Lead Us Not Into (Unwarranted) Temptation: A Proposal to Replace The Entrapment Defense With A Reasonable-Suspicion Requirement*, 133 U. PA. L. REV. 1193, 1212 (1985).

79. 411 U.S. 423 (1973).

chemical for manufacturing speed, therefore contributing in an intolerable degree to the criminal enterprise.[80] Russell claimed the entrapment defense should be based on constitutional grounds because the government's involvement was so significant it violated his due process rights under the Fourth Amendment.[81] The Court rejected Russell's due process argument as it applied to him.[82] The Court did recognize that a defense under the Due Process Clause was possible if the government conduct was "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."[83] After rejecting Russell's due process argument as applied to him, the Court went on to apply the principles set forth in *Sorrells* and *Sherman* and agreed with the jury's finding of no entrapment.[84]

The dissenting opinions in *Russell*, written by Justices Douglas and Stewart, once again proclaimed that the objective theory was the better approach.[85] Justice Stewart reasoned that the entrapment defense should be used to "prohibit unlawful government activity in instigating crime" rather than to protect individuals who are not predisposed to commit a crime.[86]

The Supreme Court has firmly adopted the subjective theory of entrapment as its governing standard. Entrapment has two related elements: inducement by government agents and lack of predisposition by the defendant.[87] The Court has chosen to concentrate the doctrine

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80. *Id.* at 427.

81. *Russell*, 411 U.S. at 430. Russell's due process argument is essentially the equivalent to an objective theory argument. *See supra* notes 54-78 and accompanying text.

82. *Id.* at 430.

83. *Id.* at 430-32. *See also* Marcus, *supra* note 4, at 23 n.87 and accompanying text; Hampton v. United States, 425 U.S. 484 (1976). The facts in *Hampton* were similar to those in *Russell*. Hampton was convicted of selling heroin to government agents. *Id.* at 485. He claimed entrapment because the government informant supplied him with the heroin. *Id.* at 487-88. Hampton relied on the dicta in *Russell* concerning the due process defense. *Id.* at 489. The Court conceded that the government's involvement was heavier in *Hampton* than in *Russell*, but held the government's conduct did not violate any of Hampton's constitutional rights. *Id.* at 489-91. The Court recognized that law enforcement officials must be granted flexibility, since uncovering contraband offenses was a difficult task. *Id.* at 495 n.7. The Court indicated that police conduct "would have to reach a demonstrable level of outrageousness before it could bar [a] conviction." *Id. See also* Marcus, *supra* note 4, at 25-29.

84. *Russell*, 411 U.S. at 433. *See supra* notes 42-47 and accompanying text (discussing the majority's application of the subjective theory in *Russell*).

85. *Russell*, 411 U.S. at 436 (Douglas, J., dissenting); *Id.* at 441 (Stewart, J., dissenting).

86. *Id.* at 442 (Stewart, J., dissenting).

87. Mathews v. United States, 485 U.S. 58, 63 (1988).

mostly on the defendant's predisposition. Prior to *Jacobson v. United States*,[88] the Court had never expressly limited the scope of the government's proof of predisposition other than to require the government to prove predisposition as of the time of the government's inducement. Historically, the Supreme Court has been unclear on the concept of predisposition and what type of evidence the government may present to demonstrate it.[89]

E. *Confusion among the Circuits: The Circuit Courts' Application of the Entrapment Defense.*[90]

"The federal circuit courts have had great difficulty in applying the Supreme Court's opinion[s] . . . in connection with the entrapment cases."[91] The circuits that have followed the subjective theory have dictated a number of factors the government could use to prove predisposition.[92] These factors were not limited to demonstrating predisposition prior to government contact.[93]

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88. 112 S. Ct. 1535 (1992).

89. Marcus, *supra* note 25, at 74.

90. The circuit courts accepted the entrapment defense several years before the Supreme Court did. *See* Woo Wai v. United States, 223 U.S. 412 (1915). The *Woo Wai* Court held that the entrapment defense is available when there is no evidence the defendant had ever committed or thought of committing the crime. *Id.* at 414. *See also* DeFeo, *supra* note 16, at 248-50.

91. PAUL MARCUS, THE ENTRAPMENT DEFENSE 452 (1989). This confusion can be demonstrated by the Seventh Circuit's treatment of entrapment. In United States v. Fields, 689 F.2d 122 (7th Cir.), *cert. denied*, 459 U.S. 1089 (1982), the court held that predisposition may be proven by evidence of defendant's personal background and by defendant's conduct before or after he committed the crime. *Id.* at 124. Two years later, in United States v. Thoma, 726 F.2d 1191 (7th Cir.), *cert. denied*, 467 U.S. 1228 (1984), the court looked at a number of factors to determine predisposition, including: the character and/or reputation of defendant, whether defendant suggested the criminal activity, whether defendant engaged in the particular criminal act for a profit, whether the defendant expressed reluctance to commit the offense, and the nature of the government's inducement. *Id.* at 1197. Noting that the most important factor was whether the defendant was reluctant, the court carefully examined Thoma's evidence that he expressed reluctance when first approached, and concluded this evidence was not dispositive of Thoma's lack of predisposition. *Id.* at 1197-98. In 1988, the Seventh Circuit decided United States v. Marren, 890 F.2d 924 (7th Cir. 1989), wherein the court defined predisposition as the "defendant's state of mind and inclinations before his initial exposure to government agents." *Id.* at 930 (citing United States v. Navarro, 737 F.2d 625, 635 (7th Cir.), *cert. denied sub nom.* Mugercia v. United States, 469 U.S. 1020 (1984)). Despite limiting predisposition to the time period before the defendants' initial contact with the government, the court went on to apply the factors outlined in *Thoma* and held the defendants were not entrapped. *Id.* at 930.

92. *See infra* notes 94-135 and accompanying text (further discussing circuit court treatment of entrapment).

93. *See infra* notes 94-135 and accompanying text.

During the late seventies and early eighties, the Federal Bureau of Investigation (FBI) undertook an operation known as ABSCAM[94] which brought renewed attention to the doctrine of entrapment.[95] The purpose of ABSCAM was "to create opportunities for illicit conduct by public officials predisposed to political corruption."[96] In the ABSCAM operation, FBI agents posed as representatives of an international corporation, known as Abdul Enterprises, which two wealthy sheiks purportedly controlled.[97] Along with an informant, the agents made it known to political officials that they were interested in investing in the United States and offered bribes to political officials to secure favors.[98] The ABSCAM defendants demonstrated their willingness to compromise their offices in order to deal with the sheiks.[99] Through ABSCAM, six United States Congressmen, one United States Senator, a United States immigration official, three members of the Philadelphia City Council, the Mayor of Camden, New Jersey, and assorted middlemen were indicted.[100] The cases which resulted from the ABSCAM operation are enlightening because the various circuit courts treated the entrapment issue differently in each case.

In *United States v. Jannotti*,[101] the two defendants, Philadelphia City Councilmen, were convicted of accepting bribes in the ABSCAM operation.[102] In determining the defendants' predisposition, the court noted that in bribery cases, the public official's predisposition can be shown by the very acceptance of the bribe, since it otherwise would be difficult to show predisposition.[103] Although the court made this statement, it is

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94. The undercover operation involved a fictitious organization named Abdul Enterprises. Whelan, *supra* note 78, at 1200. The code name "ABSCAM" came from the first two letters of Abdul placed in front of the word scam. United States v. Myers, 692 F.2d 823, 829 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983).

95. Whelan, *supra* note 78, at 1193. *See also* Jonathan C. Carlson, *The Act Requirement And The Foundations Of The Entrapment Defense*, 73 VA. L. REV. 1011 (1987); JOHN C. KLOTTER, CRIMINAL LAW § 12.4 (1983) ("When members of Congress claimed the government had created rather than uncovered criminal conduct, the term 'entrapment' became a household word.").

96. United States v. Jannotti, 673 F.2d 578, 581 (3d Cir.) (quoting Brief for the Appellant at 6), *cert. denied*, 457 U.S. 1106 (1982), *appeal after remand*, 729 F.2d 213 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984).

97. Whelan, *supra* note 78, at 1200.

98. *Id.*

99. *Id.*

100. *Id.*

101. 673 F.2d 578 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982), *appeal after remand*, 729 F.2d 213 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984).

102. *Id.* at 580-81.

103. *Id.* at 604. *But see* A TREATISE ON THE LAW OF CRIMES § 5.13 (Marian Q. Barnes ed., 7th ed. 1967). If a public official had no previous history of soliciting bribes, and a government agent induced him to accept a bribe for the purpose of prosecuting the official, this would constitute entrapment because of the lack of

unclear whether they would have permitted predisposition to be shown after the agents made contact but before they solicited the bribe. The court did not need to reach that issue, since the defendants demonstrated their willingness to break the law as soon as they were contacted by the FBI.[104]

United States v. Myers[105] involved a consolidation of several ABSCAM cases.[106] Only one defendant, however, raised the defense of entrapment.[107] Essentially, the FBI agents offered bribes to the defendants in return for assistance with their alleged immigration problems.[108] The defendant argued that predisposition should be defined as demonstrating the individual's previous intent to commit the crime.[109] Rejecting the defendant's definition, the court interpreted predisposition as whether the defendant was "ready and willing" to break the law whenever he was given an opportunity, which could include considering post-contact evidence.[110] The court further stated that the defendant need not have consciously thought of committing the crime before being given the opportunity.[111] Examining evidence gathered after the investigation had begun (post-contact), the court concluded that the defendant was predisposed to accept the bribe.[112]

In *United States v. Williams*,[113] the defendants, a former state senator from New Jersey and a New Jersey attorney, were indicted under the ABSCAM operation and convicted on several charges including bribery.[114] The Second Circuit Court of Appeals examined the entrapment doctrine and declared that "predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime."[115] The court found that the defense's argument that predisposition had to be shown from "day one" was an "overstatement."[116] The court held that the jury need not focus on the defendant's state of mind at the beginning of the investigation,

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predisposition on the part of the official. *Id.* at 348.

104. *Jannotti*, 673 F.2d at 581-89.

105. 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983).

106. *Id.* at 826.

107. *Id.* at 835-36.

108. *Id.* at 826-34 (discussing in detail the bribes which were offered to the defendants).

109. *Id.* at 849.

110. *Id.*

111. *Id.*

112. *Id.* at 831-32.

113. 705 F.2d 603 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983).

114. *Id.* at 606.

115. *Id.* at 618.

116. *Id.*

because it was five months later before any criminal opportunity was solicited by undercover agents.[117]

United States v. Jenrette[118] was also the product of ABSCAM. Former Congressman Jenrette was convicted of accepting a bribe in exchange for introducing a private immigration bill in the United States House of Representatives.[119] Jenrette claimed he had been entrapped and that the government failed to prove his predisposition.[120] Taking the position that predisposition may be proven by showing the defendant's response to the government's inducement, the court concluded that Jenrette was predisposed to commit the crime.[121] The court's conclusion was based on evidence gathered during the investigation, consisting of videotapes and taped telephone conversations between Jenrette and the FBI agents, which demonstrated his willingness to accept the bribe.[122] The only evidence of Jenrette's predisposition before being contacted by the ABSCAM agents was a statement made by Jenrette's friend calling him a crook.[123]

United States v. Kelly[124] involved another ABSCAM case. Kelly was a United States Congressman from Florida who was convicted of, among other charges, accepting a bribe and conspiring to defraud the United States.[125] Kelly asserted that he lacked the criminal predisposition to accept a bribe because the agents first approached him when he had declined the original offer of money.[126] The court rejected his argument stating, "it is simply not the law that predisposition is to be determined based solely on defendant's reaction to his first encounter with the corrupt offer. . . . Rather, predisposition is to be determined, like any state of mind issue, from the entirety of the events surrounding the ultimate commission of the crime."[127]

The circuit courts have addressed the entrapment issue in contexts other than ABSCAM and other political corruption sting operations. In *United States v. Dion*,[128] the court declared "the key question is . . . whether the government agent caused or induced the defendant to commit a crime he was not otherwise predisposed, i.e., willing and ready

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117. *Id.*
118. 744 F.2d 817 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985).
119. *Id.* at 819.
120. *Id.* at 822.
121. *Id.*
122. *Id.*
123. *Id.* at 819 n.2.
124. 748 F.2d 691 (D.C. Cir. 1984).
125. *Id.*
126. *Id.* at 699.
127. *Id.*
128. 762 F.2d 674 (8th Cir.), *cert. granted*, 474 U.S. 900 (1985), *rev'd on other grounds*, 476 U.S. 734 (1986).

to commit whenever a propitious opportunity arose."[129] The court said it was necessary to inquire into a defendant's background, character, and state of mind to determine predisposition.[130] The court then listed ten factors to be taken into consideration in determining predisposition, citing their use by other courts.[131] These factors include: (1) defendant's ready response to the offer; (2) circumstances surrounding the incident; (3) defendant's state of mind before the government's suggestion of a crime (which could be post-contact but before the offer of committing the crime); (4) whether defendant has previously engaged in this criminal activity; (5) whether the defendant had already formed the intent to commit the crime with which he is charged; (6) defendant's reputation; (7) defendant's behavior during negotiations with the government; (8) whether defendant had previously refused to engage in criminal conduct; (9) "the nature of the crime"; and (10) the degree of inducement by the government.[132]

Conversely, in *United States v. Lasuita*,[133] the majority held that precedent indicated, although not expressly, that the government must prove predisposition of the defendant as of initial exposure to government contact rather than after contact.[134] The government had to prove beyond a reasonable doubt that the defendant's predisposition existed "at the time when government agents initially contacted the defendant to propose the wrongful conduct."[135]

Indeed, "predisposition is necessarily a nebulous concept,"[136] and the circuits clearly have had difficulty applying the doctrine.[137] Until the Supreme Court decided *Jacobson v. United States*,[138] the predisposition issue was resolved by looking either at prior acts of the defendant or at the manner in which the defendant responded to the government's contact with him.[139] Among the circuit courts, there was no bright line to determine when predisposition must be established. Some courts allowed evidence of predisposition up to the time the government agents solicited the crime, while other courts stated that predisposition must be shown as of the time of the government's initial contact with the target. *Jacobson* attempted to specify exactly when predisposition needs to be

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129. *Id.* at 685 (quoting United States v. Lard, 734 F.2d. 1290 (8th Cir. 1984)).
130. *Id.* at 686.
131. *Id.* at 687-88. *See* Marcus, *supra* note 25, at 75.
132. *Dion*, 762 F.2d at 687 (citations omitted).
133. 752 F.2d 249 (6th Cir. 1985).
134. *Id.* at 253-54. *See* Marcus, *supra* note 25, at 76-77.
135. *Lasuita*, 752 F.2d at 253.
136. United States v. Hunt, 749 F.2d 1078, 1085 (4th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985).
137. Marcus, *supra* note 25, at 69.
138. 112 S. Ct. 1535 (1992).
139. Marcus, *supra* note 25, at 84-85.

shown and adopted the view that the government must present evidence of the defendant's predisposition to break the law as occurring before government agents contact the defendant.[140]

III. *JACOBSON V. UNITED STATES*

A. *Facts*

Keith Jacobson was arrested and indicted for violating the Child Protection Act[141] when he received child pornography through the mail.[142] Jacobson claimed he had been entrapped into violating the law because the government had targeted him in an investigation spanning twenty-six months.[143]

In February 1984, Jacobson legally ordered two magazines from a California adult bookstore.[144] In May 1984, Congress enacted the Child Pornography Act, which prohibited receiving child pornography through the mail.[145] Within the same month as the enactment of the Child Pornography Act, the Postal Inspection Service obtained Jacobson's name from the California adult bookstore's mailing list.[146] In January 1985 postal inspectors sent Jacobson a letter from a fictitious organization called the American Hedonist Society, which included a

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140. This is in contrast to proving the defendant's predisposition as of the time of the inducement, which was required in *Sorrells*. *See supra* note 27 and accompanying text. What must be noted is that there is a difference between the time of government contact and time of government inducement. In many undercover operations, government agents will contact the target well *before* holding out any inducements.

141. 18 U.S.C. § 2252(a)(2)(A) (1988 & Supp. II 1990). Section 2252(a)(2)(A) states:

> (a) Any person who—
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> . . .
>
> (2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if—
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . . .

142. Jacobson v. United States, 112 S. Ct 1535, 1537 (1992).

143. *Id.*

144. *Id.* These magazines were entitled *Bare Boys I* and *Bare Boys II*. Jacobson claimed these magazines were nudist magazines; however, only young pre-teen males were pictured. Brief for Respondent at 3 n.1, Jacobson v. United States, 112 S. Ct. 1535 (1992) (No. 90-1124) [hereinafter Respondent's Brief].

145. *Id.* at 1538. *See supra* note 141 for text of statute.

146. *Jacobson*, 112 S. Ct. at 1538.

membership application and a survey.[147] Within one month, Jacobson mailed in his membership fee of $4.00 and indicated he was interested in material on pre-teen sex.[148]

Over one year later, in May 1986, Postal Inspectors sent Jacobson another letter from another fictitious organization called Midlands Data Research.[149] This letter explained the purpose of their organization and stated that those who were not interested should throw the letter away, while those who were interested should reply.[150] Within the same month, Jacobson replied, stating "[p]lease feel free to send me more information. I am interested in teenage sexuality. Please keep my name confidential."[151] During July 1986, Postal Inspectors sent Jacobson a letter and a survey from the Heartland Institute for New Tomorrow (HINT), and described the fictitious organization as a lobbying group organized to promote and protect sexual freedom and freedom of choice against censorship.[152] The letter indicated that Midlands Data Research had forwarded a survey to him which he had failed to answer.[153] In August 1986, Jacobson returned the survey and included the following note:

> I have not been asked by you before to participate in an attitude survey. I did receive a mailing from you in regards to sexual interest which I replied to. I am returning your current survey filled out. Thanks. Please let me hear from you if other surveys will be conducted. Sincerely, Keith.[154]

Jacobson voluntarily provided his name and address on the survey so that he could receive additional materials.[155]

The Postal Inspector responded to Jacobson's request for more information by sending Jacobson five fictitious names and addresses of individuals with presumably the same interests and backgrounds as Jacobson to be pen pals with him.[156] In September 1986, the Postal Inspector wrote to Jacobson under the guise of "Carl Long" in which "Carl" expressed support for HINT and invited Jacobson to write back.[157] Jacobson twice corresponded with "Carl," expressing his sexual interests, but he did not respond to "Carl's" third letter.[158]

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147. *Id.*
148. *Id.*
149. *Id.*
150. Respondent's Brief, *supra* note 144, at 5.
151. *Jacobson*, 112 S. Ct. at 1538.
152. *Id.*
153. Respondent's Brief, *supra* note 144, at 5.
154. *Id.*
155. *Id.* at 6.
156. *Jacobson*, 112 S. Ct. at 1538-39.
157. *Id.* at 1539.
158. *Id.*

In March 1987, the Customs Service became involved in the Postal Inspector's investigation and sent Jacobson a brochure from a fictitious Canadian company called Produit Outaouais.[159] On March 17, 1987, Jacobson ordered a photograph set from Produit Outaouais and enclosed a note stating that he was placing an order and, if he liked the product, he would order more items later.[160] For reasons not indicated in the record, Jacobson never received his order.[161]

Also in March 1987, Jacobson answered a letter from Far Eastern Trading Co. Ltd., another Postal Inspection organization claiming to be fighting against censorship, by returning a coupon with his name and address on it in order to obtain more information.[162] In May 1987, Far Eastern sent Jacobson a catalog from which Jacobson placed an order for a magazine entitled *Boys Who Love Boys*.[163] The catalog clearly described the magazine in terms of child pornography.[164] Jacobson enclosed a note with his order stating that he would place more orders later, but that he wanted to be discreet to protect himself and the organization.[165] "All told, the postal inspectors mailed Jacobson two sexual attitude surveys, seven letters measuring his appetite for child pornography and two sexual catalogues. Jacobson responded with interest on eight occasions."[166] On June 16, 1987, Postal Inspectors arrested Jacobson after a controlled delivery of *Boys Who Love Boys* to Jacobson's home.[167] When government agents searched Jacobson's house, they found only the two magazines Jacobson purchased in 1984 along with all the information and materials the government had sent to Jacobson throughout their investigation.[168]

B. *Procedure*

1. First Appeal (Eighth Circuit Panel)

Jacobson was convicted by a jury in the Federal District Court for the District of Nebraska for violating section 2252(a)(2)(A) of the Child Pornography Act.[169] On appeal, Jacobson argued that the government

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159. *Id.*
160. Respondent's Brief, *supra* note 144, at 8.
161. *Jacobson*, 112 S. Ct. at 1539.
162. *Id.*
163. *Id.* at 1539-40.
164. *Id.* at 1544.
165. Respondent's Brief, *supra* note 144, at 9.
166. United States v. Jacobson, 916 F.2d 467, 468 (8th Cir. 1990) (en banc), *rev'd*, 112 S. Ct. 1535 (1992).
167. *Jacobson*, 112 S. Ct. at 1540.
168. *Id.*
169. United States v. Jacobson, 893 F.2d 999 (8th Cir.), *rev'd*, 916 F.2d 467 (8th Cir. 1990) (en banc). See *supra* note 141 for text of Child Pornography Act.

did not have any reasonable suspicion to target him, and that therefore he was entrapped as a matter of law.[170] The Eighth Circuit Panel reversed Jacobson's conviction, holding that Jacobson was entrapped as a matter of law.[171] The court focused on whether the government had a "reasonable suspicion of predisposition" before targeting Jacobson in an investigation.[172] The court rejected the government's argument that Jacobson's legal purchase of two magazines from an adult bookstore was sufficient evidence of a predisposition to purchase illegal child pornography in the future.[173] The court held that when the government started investigating Jacobson, it had no "reasonable suspicion" that Jacobson was involved in illegal activity, and therefore his conviction must be set aside.[174] "When an individual engages in legal conduct and no additional or extrinsic evidence exists to give rise to a reasonable suspicion of predisposition, the government may not target that individual, no matter how distasteful the lawful conduct may be."[175] Had the government learned prior to contacting Jacobson that he had a desire to order child pornography through the mail, then the government's decision to target Jacobson would have been justified.[176] The prosecution argued that although the government did not have a reasonable suspicion for targeting Jacobson, his responses during the investigation indicated a predisposition to commit a crime.[177] The court rejected this argument, reasoning that if the government's position were permitted, law enforcement officers would be able to target groups of people without justification in an attempt to uncover some predisposed individual, in order to induce him to commit a crime so they could prosecute.[178] The panel held that the government may proceed with an undercover operation once the government hurdled the threshold limitation of finding reasonable suspicion.[179] Even with this requirement, the court acknowledged the value of undercover investiga-

170. *Jacobson*, 916 F.2d at 467. There was no discussion about whether the law enforcement agents had a right to target Jacobson at all. The appeals court only focused on whether Jacobson was predisposed to commit the crime. *Id.*

171. *Jacobson*, 893 F.2d at 1002.

172. *Id.* at 1000.

173. *Id.*

174. *Id.* Judge Fagg dissented, stating that the panel had departed from the court's usual standard of reviewing the government's undercover operations pursuant to due process principles, which do not require reasonable suspicion. *Id.* at 1002 (Fagg, J., dissenting).

175. *Id.* at 1000.

176. *Id.*

177. *Id.* at 1001.

178. *Id.* The court stated that any evidence of predisposition was "taint[ed] by the illegal targeting." *Id.* at 1002.

179. *Id.* at 1001.

tions as an effective tool in law enforcement.[180] However, the court also recognized the potential harms which are inherent in these operations if they are allowed to proceed without limitation.[181]

C. *Second Appeal (Eighth Circuit sitting en banc)*

Upon the government's petition for rehearing, the Eighth Circuit, sitting *en banc*, reversed the panel's decision and reinstated the conviction.[182] Jacobson repeated his argument that the government must have reasonable suspicion before targeting him.[183] Judge Fagg, writing for the majority, stated that the Eighth Circuit "review[s] the government's involvement in undercover investigations under due process principles"[184] rather than under the doctrine of entrapment.[185] Accordingly, due process is triggered only when the government has violated a protected right.[186] The court held that Jacobson did not have a constitutional right to be free from investigation; therefore, the government did not need a reasonable suspicion before beginning an investigation.[187] Judge Fagg cited Justice Powell's concurrence in *Hampton v. United States*,[188] in which Justice Powell emphasized that law enforcement agencies require significant discretion during their investigations.[189]

After rejecting Jacobson's reasonable suspicion claim, the court examined Jacobson's argument that the government's conduct was "so outrageous" it violated his due process rights.[190] Judge Fagg did not consider the government conduct to be outrageous, therefore Jacobson's due process claim failed.[191] The court held that a defendant must

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180. *Id.* at 1002.

181. *Id.* Without the requirement of reasonable suspicion, the law enforcement officials, in their zeal to enforce the law, may produce such potential harms as entrapment and destruction of an innocent person's reputation, while heaping tremendous temptation upon themselves to overstep their bounds. *Id.* at 1002 n.2.

182. United States v. Jacobson, 916 F.2d 467 (8th Cir. 1990) (en banc), *rev'd*, 112 S. Ct. 1535 (1992). *See also* Perez, *supra* note 13, at 239.

183. *Jacobson*, 916 F.2d at 468.

184. *Id.*

185. *Id.* Judge Fagg reiterated the position he set forth in his dissent from the original appeal, basing his opinion on due process principles and dedicated only a short space to the doctrine of entrapment. *Jacobson*, 893 F.2d at 1002.

186. *Jacobson*, 916 F.2d at 469. *See also Hampton*, 425 U.S. at 490.

187. *Jacobson*, 916 F.2d at 469. *See* Perez, *supra* note 13, at 251. *See also Jannotti*, 673 F.2d at 609 ("[T]he mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait.").

188. 425 U.S. 484, 491 (1976) (Powell, J., concurring).

189. *Jacobson*, 916 F.2d at 469; *Hampton*, 425 U.S. at 495 n.7.

190. *Jacobson*, 916 F.2d at 469.

191. *Id. See also Hampton*, 425 U.S. at 492-95; *Russell*, 411 U.S. at 423, 431-32 (recognizing the possibility of a due process claim, but denying its availability in those individual cases). Judge Fagg did not consider the Postal Inspector's conduct

demonstrate a significantly high level of outrageousness in order to prove a due process violation.[192]

After focusing most of the opinion on the due process arguments, the court turned fleetingly to the entrapment doctrine and held Jacobson was not entrapped as a matter of law.[193] In order to be entrapped as a matter of law, so that the issue is taken from the jury, there must be no genuine issue of material fact as to Jacobson's lack of predisposition.[194] Jacobson repeatedly argued that he was not predisposed to receive child pornography. However, the government argued that Jacobson was predisposed and that their evidence merely showed "that the postal inspectors only provided Jacobson with opportunities to purchase child pornography . . . as [he] responded to their solicitations."[195] The parties' evidence and arguments contradicted each other on the issue of predisposition. Therefore, the court held Jacobson was not entrapped as a matter of law, and the issue was properly submitted to the jury.[196]

On April 22, 1991, the United States Supreme Court granted certiorari on the issue of entrapment.[197]

D. *The Supreme Court's Majority Opinion*

With Justice White[198] writing for the majority, the Court reversed the Eighth Circuit's judgment that the government had failed, as a matter of law, to prove Jacobson was predisposed to illegally purchase child pornography.[199] At the outset, the majority acknowledged that the government may engage in undercover operations to eliminate such

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to be outrageous. *Jacobson*, 916 F.2d at 470. Jacobson responded favorably to the Postal Inspector's contacts, and at no time did the postal inspector apply "extraordinary pressure on Jacobson." *Id.* at 470. Furthermore, the court reasoned that since there were no face to face contacts, Jacobson easily could have disregarded the material sent by the government if he had not been interested. *Id. See also* Perez, *supra* note 13, at 253.

192. *Jacobson*, 916 F.2d at 469.

193. *Id.* at 470.

194. *Id.*

195. *Id.*

196. *Id.* Judge Heaney, in his dissent, repeated his position that the government must have reasonable suspicion of the defendant's predisposition to commit the crime. *Id.* at 470 (Heaney, J., dissenting). In Judge Heaney's view, the lawful purchase of two "nudist magazines" did not constitute a reasonable suspicion that Jacobson was predisposed to violate the Child Pornography Act. *Id.* (Heaney, J., dissenting).

197. 499 U.S. 974 (1991).

198. Justices Blackmun, Stevens, Souter, and Thomas joined Justice White's opinion. Jacobson v. United States, 112 S. Ct. 1535 (1992).

199. *Id.*

evils as child pornography and drug trafficking.[200] The Court reaffirmed the proposition first stated in *Sorrells* that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises"[201] and that government agents could afford opportunities for the commission of an offense without defeating the prosecution.[202] Despite affirming this proposition, the Court went on to state that the government was prohibited from creating the crime, implanting the idea in an individual's mind and then luring that person into committing the act in order to prosecute.[203] Of the two essential elements of entrapment,[204] the Court focused its opinion entirely on the issue of Jacobson's predisposition.[205]

In order to avoid the defense of entrapment, the majority proclaimed that the government had to prove beyond a reasonable doubt that Jacobson was predisposed to purchase child pornography through the mail *prior* to first being contacted by the government.[206] The majority discussed how the prosecution could prove predisposition in an entrapment case. Justice White stated that a time factor may be of significance.[207] If the government agents had simply offered Jacobson the opportunity to purchase child pornography and he had promptly agreed, then his readiness would have sufficiently demonstrated his predisposition.[208] Since Jacobson did not place an order until after two years of mailings, the Court held that his predisposition to break the

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200. *Id.* at 1540.

201. *Id.* (citing *Sorrells*, 287 U.S. at 441).

202. *Id.*

203. *Id.* This was essentially the same proposition set forth by the *Sorrells* majority for recognizing the defense. *See supra* note 22 and accompanying text.

204. Entrapment has "two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." Mathews v. United States, 485 U.S. 58, 63 (1987). Inducement exists "whenever the [g]overnment's conduct [has] created a substantial risk that the offense would be committed by a person other than one ready to commit it." United States v. Johnson, 872 F.2d 612, 620 (5th Cir. 1989). To prove inducement, the defendant must show more than mere solicitation. *Id.* at 621. Inducement was not at issue in this case. The government did not deny that it induced Jacobson to illegally purchase child pornography through its two and one half years of targeting him. *Jacobson*, 112 S. Ct. at 1541 n.2.

205. *Jacobson*, 112 S. Ct. at 1540.

206. *Id. See* Whelan, *supra* note 78, at 1216-21 (advocating that government agents be required to have reasonable suspicion prior to initiating the sting against the defendant).

207. *Jacobson*, 112 S. Ct. at 1541.

208. *Id.* A defendant's ready commission of the crime after the opportunity is presented demonstrates a predisposition. *Id.* The Court used the example of a government agent offering the opportunity for an illegal drug sale and the target accepting immediately or shortly thereafter. *Id.*

law was not independent of the government's attention, nor did it demonstrate a ready response on Jacobson's part.[209]

The Court viewed the sole piece of pre-investigation evidence,[210] the legal purchase of two nudist magazines through the mail,[211] as being too weak to demonstrate predisposition to commit a crime.[212] The Court admitted that the magazines purchased in 1984 may have indicated a predisposition to view sexually explicit materials, but found that was not indicative of a predisposition to illegally purchase child pornography.[213] Furthermore, Jacobson had not violated the law when he received these magazines.[214] The Court concluded the government had failed to meet its burden[215] with its pre-contact evidence that Jacobson was predisposed to break the law.[216]

Although Justice White stated the test for predisposition is evidence of the defendant's mental state before being contacted by the government, he examined evidence of Jacobson's predisposition obtained after the agents had contacted him but before they had provided him with an opportunity to break the law. The Court considered the government's evidence gathered during the investigation (post-contact with Jacobson) as insufficient to meet its burden.[217] Again, the Court acknowledged that Jacobson's responses to the surveys, letters, and brochures indicated a disposition to view sexually explicit materials pertaining to pre-teen sex, but they did not indicate predisposition to illegally receive child pornography through the mail.[218] The Court also held that the government had "exerted substantial pressure"[219] on Jacobson by exciting his interest to join the "fight against censorship."[220]

The *Jacobson* Court went further than simply reaffirming the predisposition principles set forth in *Sorrells* and *Sherman*.[221] The

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209. *Id.*

210. The fact that evidence of Jacobson's predisposition existed prior to the government agents' having contacted him indicates that it is indeed pre-contact evidence.

211. *Jacobson*, 112 S. Ct. at 1537. These magazines contained pictures of nude pre-teen and teenage boys. *Id.*

212. *Id.* at 1541-42.

213. *Id.* at 1541.

214. *Id.*

215. *See supra* note 206 and accompanying text.

216. *Jacobson*, 112 S. Ct. at 1541-42.

217. *Id.* at 1542.

218. *Id.* at 1542. The Court went on to state that Jacobson's "inclinations and 'fantasies . . . are his own and beyond the reach of government.'" *Id.* (quoting Paris Adult Theater I v. Slaton, 413 U.S. 49, 67 (1973)).

219. *Id.*

220. *Id.*

221. *See supra* notes 13-41 and accompanying text (discussing the analysis in *Sorrells* and *Sherman*).

majority has proclaimed exactly when predisposition must be proven, an issue not previously addressed by the Court.[222] Justice White stated that a jury could not have found beyond a reasonable doubt that Jacobson had been predisposed to commit the crime *prior* to being contacted by the Postal Service.[223] Consequently, Jacobson's conviction was reversed.[224]

E. *The Supreme Court's Dissenting Opinion*

Justice O'Connor,[225] writing for the dissent, sharply disagreed with the majority's interpretation of the facts and its holding of entrapment as a matter of law.[226] The dissent first set forth its own interpretation of the facts, did not find entrapment as applied to *Jacobson*, and then turned to the issue of predisposition.

1. Dissent's Interpretation of the Facts

Justice O'Connor declared that not only was there no inducement, there was also sufficient evidence to infer Jacobson's predisposition.[227] Distinguishing *Jacobson* from *Sorrells*[228] and *Sherman*,[229] Justice O'Connor stated that Jacobson "needed no government agent to coax, threaten or persuade him [and] no one played on his sympathies [or] friendship . . . . In fact, no Government agent . . . contacted him face-to-face."[230] The dissent primarily focused on the fact that Jacobson was given only two opportunities to purchase child pornography, and both times he placed orders and included notes which indicated his interest in purchasing more in the future.[231] The dissent rejected the majority's statement that the government exerted "substantial pressure" upon Jacobson to help fight censorship.[232] At most, Justice O'Connor opined, the letters sent by the government advocated legislative actions, and Jacobson could have easily ignored these communications.[233]

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222. *Jacobson*, 112 S. Ct. at 1543. *See* Bennett L. Gershman, *Entrapment Revisited*, N.Y. L.J., April 17, 1992, at 3. The previous entrapment cases had only asserted that predisposition had to be proven, but the Court had never outlined when it had to be established.

223. *Jacobson*, 112 S. Ct. at 1543.

224. *Id.*

225. Chief Justice Rehnquist and Justice Kennedy joined in Justice O'Connor's dissent, and Justice Scalia joined in part. *Id.*

226. *Jacobson*, 112 S. Ct. at 1543-44 (O'Connor, J., dissenting).

227. *Id.*

228. *See supra* note 15 (discussing the facts of *Sorrells*).

229. *See supra* note 29 (discussing the facts of *Sherman*).

230. *Jacobson*, 112 S. Ct. at 1543 (O'Connor, J., dissenting).

231. *Id. See supra* notes 159-65 and accompanying text.

232. *Jacobson*, 112 S. Ct. at 1545 (O'Connor, J., dissenting).

233. *Id.*

Jacobson's predisposition could have been readily inferred from his enthusiastic response to the government's solicitations.[234] The dissent stated that the crucial factor is whether the defendant expressed reluctance to break the law which was subsequently overcome by government inducement.[235] From Justice O'Connor's view, the record demonstrated that Jacobson readily and promptly responded to the majority of the government's communications.[236] Justice O'Connor concluded that a jury could find reasonable inferences of Jacobson's predisposition sufficient to reject his claim of entrapment.[237]

2. Dissent's Interpretation of Predisposition Within the Doctrine of Entrapment

Justice O'Connor then turned to the issue of predisposition as an element of entrapment and announced that the majority had "redefine[d] 'predisposition', and introduce[d] a new requirement that Government sting operations have a reasonable suspicion of illegal activity before contacting a suspect."[238] Justice O'Connor stated that the standard previously used was a demonstration of the defendant's predisposition "as of the time the Government agents first suggested the crime, not when the Government agent first became involved."[239] To buttress her argument, Justice O'Connor cited to *United States v. Williams*,[240] a case stemming from the ABSCAM undercover sting operations.[241] Regarding the entrapment issue, the *Williams* Court stated "predisposition refers to the state of mind of a defendant before government agents make any suggestion that he should commit a crime."[242] This test does not suggest the defendant's predisposition had to be shown prior to government contact. In fact, the *Williams* court further stated that government agents discussing non-criminal matters with the defendant before presenting an opportunity to engage in crime is not inducement and does not dispose the defendant to commit the crime.[243] Therefore, the dissent's interpretation suggested

234. *Id.* at 1546.
235. *Id.* at 1543 (citing United States v. Reynoso-Ulloa, 548 F.2d 1329, 1336 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978)).
236. *See supra* note 166 and accompanying text.
237. *Jacobson*, 112 S. Ct. at 1544 (O'Connor, J., dissenting).
238. *Id.*
239. *Id.*
240. 705 F.2d 603 (2d Cir.) *cert. denied*, 464 U.S. 1007 (1983). For a discussion of *Williams*, see *supra* notes 113-17 and accompanying text.
241. *Williams*, 705 F.2d at 606.
242. *Id.* at 618.
243. *Id.* at 618 n.9; *see also Sorrells*, 287 U.S. at 442.

that post-contact evidence of Jacobson's predisposition was sufficient to hold off a defense of entrapment.[244]

Justice O'Connor declared that the majority's requirement of predisposition prior to government contact and the majority's acknowledgment of the possibility that preliminary government contact with a target would create a disposition would be "misread by lower courts as well as criminal investigators."[245] The majority's holding, Justice O'Connor proclaimed, indicated that the government must have sufficient knowledge of the defendant's predisposition before ever contacting him or beginning an investigation, a condition never before imposed.[246] Justice O'Connor declared that this new element of reasonable suspicion would impede government sting operations and make it easier for defendants to claim entrapment.[247] The dissent also pointed out that this effect was probably not the majority's intention but would be interpreted this way by the lower courts.[248]

The dissent proclaimed that the majority's analysis of predisposition "seem[ed] to add something new to the burden of proving predisposition."[249] In Justice O'Connor's view, the government now must demonstrate stronger evidence to prove predisposition than to convict.[250] The majority stated that Jacobson's responses to the survey were evidence of his personal inclinations, but not evidence of his predisposition to commit a crime.[251] The dissent interpreted this to mean that the government had to prove that Jacobson was predisposed to receiving child pornography through the mail *and* that he knew he was breaking the law.[252] However, the Child Pornography Act *only* requires that Jacobson knowingly received child pornography through the mail; it does not require the government to show that Jacobson knew

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244. *Jacobson*, 112 S. Ct. at 1545 (O'Connor, J., dissenting). *See supra* notes 206-24 and accompanying text (discussing Justice White's examination of predisposition).

245. *Jacobson*, 112 S. Ct. at 1545 (O'Connor, J., dissenting).

246. *Id.* This new element of reasonable suspicion had been applied in Jacobson's first appeal to the Eighth Circuit Court of Appeals and was soundly rejected by the Eighth Circuit sitting en banc. *See supra* note 187 and accompanying text.

247. *Jacobson*, 112 S. Ct. at 1545 (O'Connor, J., dissenting). Justice O'Connor used examples of a "bribe taker [claiming] that the description of the amount of money available was so enticing that it implanted a disposition to accept the bribe later offered [or a] drug buyer [claiming] that the description of the drug's purity and effects was so tempting that it created the urge to try it for the first time." *Id. See also* Gershman, *supra* note 222, at 4.

248. *Jacobson*, 112 S. Ct. at 1545 (O'Connor, J., dissenting). The majority rebutted Justice O'Connor's proposition, stating that demonstrating predisposition prior to contact with government agents was established by precedent. *Id.* at 1540-41 n.2.

249. *Id.* at 1546.

250. *Id.*

251. *See supra* note 213 and accompanying text.

252. *Jacobson*, 112 S. Ct. at 1546 (O'Connor, J., dissenting). *See supra* note 141 for text of the statute.

he was breaking the law.[253] Justice O'Connor stated that the elements of predisposition should conform to the elements of the crime so that requiring the government to demonstrate that Jacobson knowingly violated the law would be unwarranted.[254] Furthermore, Justice O'Connor declared that the predisposition element was used by the government to block entrapment claims by those defendants who would have committed the crime without any inducement.[255]

Ultimately, after its harsh criticism of the majority opinion, the dissent concluded that predisposition was an issue for the jury since "the jury is the traditional 'defense against arbitrary law enforcement.'"[256] Precedent has indicated that entrapment issues are almost always left to the jury.[257] Justice O'Connor believed that the jury was properly instructed on entrapment and that their finding Jacobson guilty should stand.[258]

IV. ANALYSIS

A. *The Supreme Court Redefines the Entrapment Doctrine by Setting Forth a New Test for Predisposition*

The Supreme Court has attempted to redefine the entrapment doctrine.[259] Between the two elements of entrapment, the defendant's predisposition to commit the crime has been the most controversial and "the chief source of litigation in the area."[260] Predisposition is controversial because it is difficult to define, and the Supreme Court has not been clear on how to apply it.[261] In *Jacobson,* the Supreme Court finally attempted to define predisposition precisely,[262] by stating that the government must prove beyond a reasonable doubt that the defendant was mentally disposed to commit the crime *prior* to being contacted by government agents.[263] The majority claimed that this

253. *Jacobson,* 112 S. Ct. at 1546 (O'Connor, J., dissenting).
254. *Id.*
255. *Id.*
256. *Id.* at 1547 (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)).
257. *Id. See* Sorrells v. United States, 287 U.S. 435, 452 (1932). *But see* Sherman v. United States, 356 U.S. 369, 373 (1958) (finding entrapment as a matter of law; however, the facts under *Sherman* were extraordinary). See *supra* note 39 and accompanying text for a discussion of the jury issue; *see also* Marcus, *supra* note 25, at 60.
258. *Jacobson,* 112 S. Ct. at 1547 (O'Connor, J., dissenting).
259. *Id.* at 1544.
260. Marcus, *supra* note 25, at 68.
261. United States v. Hunt, 749 F.2d 1078, 1085 n.9 (1984).
262. Gershman, *supra* note 222, at 4.
263. *Jacobson,* 112 S. Ct. at 1540. This test is very similar to the test used by the Eighth Circuit in Jacobson's first appeal. The Eighth Circuit stated that the

principle was rooted in precedent,[264] although its definition is inconsistent with the Court's past standard.[265] Furthermore, the majority in *Sorrells* focused on the defendant's predisposition at the time of the government inducement, which is not necessarily prior to government contact.[266] The *Sorrells* test contained no language that the defendant's predisposition must be established before the government contacts him. Moreover, even the lower federal courts have not consistently limited predisposition to pre-government contact when applying the doctrine.[267]

To support its position that its test was rooted in precedent, the majority cited to the Attorney General Guidelines on Undercover Operations,[268] which state that "an inducement to commit a crime should not be offered unless . . . there is reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type . . . ."[269] The guideline does not contain language which supports the majority's position, because it limits predisposition to pre-inducement, not pre-contact. This guideline would be consistent with the standard enunciated in the federal jury instruction.[270]

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government must have reasonable suspicion of the defendant's predisposition before targeting him in an investigation. United States v. Jacobson, 893 F.2d 999, 1000, *rev'd*, 916 F.2d 467 (8th Cir. 1990) (en banc). *See supra* notes 169-81 and accompanying text (discussing Jacobson's first appeal).

264. *Jacobson*, 112 S. Ct. at 1540-41 n.2.

265. *Id.* at 1544 (O'Connor, J., dissenting).

266. *See* Sorrells v. United States, 287 U.S. 435, 452 (1952). *See also* Marcus, *supra* note 25, at 68.

267. *See supra* notes 92-132 and accompanying text. *But see supra* notes 133-35 and accompanying text.

268. *Jacobson*, 112 S. Ct. at 1540-41 n.2. *See* Office of the Attorney General, Attorney General's Guidelines of FBI Undercover Operations 16 (Dec. 31, 1980), *reprinted in* S. REP. NO. 682, 97th Cong., 2d Sess. 86, 101 (1982).

269. *Id. See also Jacobson*, 112 S. Ct. at 1540-41 n.2.

270. The standard federal jury instruction for entrapment which "promote[s] clarity and reflect[s] current case" does not reflect this precedent. JACKSON, *supra* note 39, § 30.07. The instruction defines predisposition as "the defendant [being] ready and willing to commit the crimes . . . before anything at all occurred respecting the alleged offense." 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 13.09 (3d ed. 1977 & Supp. 1990). "The instruction has been generally accepted by the lower federal courts." Louis M. Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 118 n.26. However, this jury instruction in no way indicates that this evidence is solely limited to defendant's predisposition before government agents make contact with him. Nonetheless, one circuit court concedes that even this jury instruction is no more enlightening than the general notion of predisposition itself. *See* United States v. Hunt, 749 F.2d 1078, 1085 n.9 (1984). But the Supreme Court's decisions on entrapment have made it impossible to articulate a clearer definition for predisposition than the above jury instruction. *Id.*

Furthermore, the guideline states that information developed from government informants would be sufficient to show a reasonable indication of defendant's predisposition.[271] However, if the informant is qualified as a government agent,[272] any information gathered by the informant demonstrating the target's predisposition would be considered to have been obtained after the government had made contact.[273] This would lend credence to the position that the majority's test is not rooted in precedent, since the guidelines are not limited to pre-contact evidence.[274]

B. *The Majority Violated the New Rule for Predisposition When They Applied It to the Facts in Jacobson.*

The majority divided the government's evidence into two categories, evidence of predisposition before the government contacted Jacobson (pre-contact evidence) and evidence of predisposition obtained after the government contacted Jacobson (post-contact evidence).[275] Justice White examined both categories to determine if Jacobson was predisposed to violate the Child Pornography Act.[276] He first examined the pre-contact evidence, which consisted solely of Jacobson's 1984 legal purchase of two adult "nudist" magazines.[277] He deemed this evidence to be insufficient to demonstrate Jacobson's predisposition to receive child pornography through the mail in violation of the law.[278] Once he concluded his analysis of the pre-contact evidence, his examination should have ended according to his predisposition test.[279] However, Justice White proceeded to contemplate the post-contact evidence, which consisted of Jacobson's responses to the government's letters and surveys regarding child pornography.[280] His analysis of the post-contact evidence is plainly inconsistent with the test he set forth.[281] In fact, Justice White's analysis goes beyond what he declared was necessary to

271. *See supra* note 268 and accompanying text for the guideline's language.
272. Jackson, *supra* note 39, § 30.04[3].
273. In Sherman v. United States, 356 U.S. 369, 373 (1958), the Court held that the government was responsible for the actions of the informant. *Id.*
274. See *supra* notes 268-70 and accompanying text setting forth the guideline.
275. United States v. Jacobson, 112 S. Ct. 1535, 1541 (1992).
276. *Id.* at 1541-43.
277. *Id.* at 1542.
278. *Id.*
279. Recall that Justice White's test for predisposition is evidence of defendant's predisposition *prior* to being contacted by the government. *Id.* at 1540.
280. *Id.* at 1541.
281. *See supra* note 206 and accompanying text for Justice White's pronouncement of the predisposition test. *See infra* notes 290-341 and accompanying text (examining how this inconsistency is further demonstrated by the lower federal courts which have attempted to apply *Jacobson*).

prove predisposition. Technically, the second category of evidence, post-contact evidence, should be irrelevant under his test.

C. *The Supreme Court has Essentially Adopted a Reasonable Suspicion Requirement for Predisposition.*

The majority in *Jacobson* is basically adopting the Eighth Circuit panel's decision that the government must have reasonable suspicion of predisposition before targeting an individual.[282] This can be inferred from the Court's definition, which asserts that predisposition must be established prior to governmental instituted contact.[283] This new definition is likely to hamper government undercover sting operations, since the government "must [now] have a reasonable suspicion of criminal activity before it begins an investigation."[284]

Predisposition, however, cannot effectively be determined unless the inquiry examines in some detail the level of inducement offered by the government.[285] To ascertain "whether a person is 'ready and willing' to break the law depends on what the person expects to get in return—that is, on the level of inducement."[286] This would mean analyzing evidence obtained after the government contacted the target. However, the *Jacobson* majority has taken the position that predisposition can be determined by only looking at evidence prior to government contact. Concededly, in some cases, determining predisposition solely by pre-contact evidence will not be difficult. Examples would be when the child pornographer has an extensive library of child pornography[287] or when the narcotics dealer has several recent narcotics

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282. United States v. Jacobson, 893 F.2d 999, 1000 (8th Cir.), *rev'd*, 916 F.2d 467 (8th Cir. 1990) (en banc); *Jacobson*, 112 S. Ct. at 1545 (O'Connor, J., dissenting).

283. *Jacobson*, 112 S. Ct. at 1540. *See also* Gershman, *supra* note 223, at 4.

284. *Jacobson*, 112 S. Ct. at 1545 (O'Connor, J., dissenting); *but see* Gershman, *supra* note 223, at 4. Gershman states that this new requirement will not hamper government operations as much as the dissent stated. *Id.* Gershman predicts that the government will still be able to offer criminal inducements randomly without reasonable suspicion, but the government may not relentlessly pursue an individual who is suspected of no crime and does not have a criminal intent at the time of first contact. *Id.* Gershman believes *Jacobson's* most significant contribution is that the ruling will "restrain[] law enforcement [officers] from pursuing individuals after the initial contact produces no clear evidence of criminal intent." *Id.*

285. Seidman, *supra* note 270, at 118.

286. *Id.* This position is also held by the Seventh Circuit. A jury instruction from that circuit states: "[i]n determining whether the defendant had a prior intent or predisposition to commit the offense charged, you may consider the personal background of the defendant as well as the nature and degree of any inducement or persuasion of the defendant by law enforcement officers or their agents." DEVITT & BLACKMAR, *supra* note 270, at 154.

287. *See* United States v. Sykora, 967 F.2d 595 (9th Cir. 1992).

convictions, assuming the past convictions could be admitted.[288] However, in cases such as *Jacobson* and *Sherman*, the test becomes much more difficult when examining pre-contact evidence. The failure to take into account the level of inducement which occurs after the government makes contact may explain the reason why the lower federal courts have had difficulty applying the predisposition test.[289]

D. *The Lower Federal Courts' Difficulty in Applying Jacobson's New Predisposition Test.*

The lower federal courts are still experiencing difficulty applying the predisposition test, despite the fact that the *Jacobson* Court attempted to articulate a precise definition. In *United States v. Orton*,[290] the defendant was convicted of mailing child pornography.[291] Orton claimed he had been entrapped as a matter of law.[292] Distinguishing *Jacobson*, the court stated Orton's predisposition clearly existed prior to government contact.[293] The government's pre-contact predisposition evidence was that Orton possessed child pornography.[294] The court applied the *Jacobson* test, but then inquired into evidence gathered after government agents contacted Orton.[295] The court noted Orton's responses to the undercover agents' queries and his willingness to forward child pornography to them.[296] This evidence is strikingly similar to the facts in *Jacobson*. Jacobson also had responded favorably to the government agents' inquiries,[297] but the majority in *Jacobson* stated that such evidence was insufficient to show predisposition.[298] Technically, under the *Jacobson* test, the *Orton* Court should have analyzed only the pre-contact evidence to determine Orton's predisposition. However, the *Orton* court also examined post-contact evidence when they were deciding the issue of predisposition.[299] This contradicts the language of the *Jacobson* test but is consistent with the Supreme Court's confused application of their new test.

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288. *See* United States v. Olson, 978 F.2d 1472 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993).

289. Seidman, *supra* note 270, at 118 n.27.

290. No. 91-30045, 1992 U.S. App. LEXIS 17544 (9th Cir. Jul. 16, 1992).

291. *Id.* at *2.

292. *Id.*

293. *Id.* at *3.

294. *Id.*

295. *Id.*

296. *Id.*

297. *See supra* notes 141-68 and accompanying text (discussing the facts of *Jacobson*).

298. *See supra* notes 217-220 and accompanying text.

299. United States v. Orton, No. 91-30045, 1992 U.S. App. LEXIS 17544 at *2 (9th Cir. Jul. 16, 1992).

In *United States v. Sykora*,[300] the defendant was the target of an undercover sting operation and was convicted of receiving child pornography through the mail.[301] The government obtained Sykora's name from two child pornography organizations' mailing lists.[302] Custom agents sent Sykora a questionnaire regarding child pornography which Sykora returned, indicating his interest.[303] The government then sent a catalog to Sykora, but he did not place an order.[304] Upon receiving a second catalog from the government, Sykora placed an order for four child pornographic films.[305] Government agents arrested Sykora after a controlled delivery of the films to Sykora's house.[306] The facts were very similar to *Jacobson*, except that less questionnaires and letters had been sent to Sykora.[307] The court rejected Sykora's reading of *Jacobson* and differentiated the two cases.[308] The court used substantially the same analysis as the majority did in *Jacobson*.[309] The court examined the pre-contact evidence in addition to evidence adduced after the custom agents made contact.[310] The court concluded that Sykora's predisposition was clearly more evident than Jacobson's predisposition, noting the extensive library of child pornography found by the government agents after searching Sykora's house.[311] Under the plain reading of the *Jacobson* test, the analysis did not need to go further, but the court went on to examine Sykora's responses to the government agents' inquiries, which were post-contact, to determine Sykora's predisposition.[312]

In *United States v. Tejeda*,[313] the defendants were convicted on drug charges after DEA agents arrested them when they witnessed a paid informant purchase cocaine from them.[314] One of the defendants, Christian, claimed he had been entrapped by the agents.[315] The court held that Christian did not satisfy either requirement of the entrapment

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300. No. 90-30425, 1992 U.S. App. LEXIS 17544 at *2 (9th Cir. Jun. 9, 1992).
301. *Id.* at *1.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at *1-2.
306. *Id.* at *2.
307. *See supra* notes 141-68 and accompanying text (discussing the facts of *Jacobson*).
308. *Sykora*, No. 90-30425, 1992 U.S. App. LEXIS 13542 at *2.
309. *Id. See supra* notes 198-224 and accompanying text (discussing the majority's analysis in *Jacobson*).
310. *Sykora*, No. 90-30425, 1992 U.S. App. LEXIS 13542 at *2-3.
311. *Id.* at *3.
312. *Id.*
313. 974 F.2d 210 (1st Cir. 1992).
314. *Id.* at 211-12.
315. *Id.* at 217.

defense.[316] They stated that the "record . . . would not support a reasonable inference that Christian was an 'unwary innocent' rather than an 'unwary criminal.'"[317] Focusing on the predisposition element, the court looked at evidence obtained both before the government made contact with him and after they contacted him.[318] However, under the plain reading of *Jacobson*, the court should have examined only the evidence of Christian's predisposition before the agents contacted him. This consisted of a notation by the court that "there was some evidence that he was familiar with the cocaine trade."[319] The court noted that "predisposition can be inferred from history of criminal activity . . . ."[320] Christian's prior drug dealing should have been enough to conclude that he was predisposed to commit the crime, but, nonetheless, the court went further and analyzed the defendant's meetings and conversations with the informant.[321] That evidence was acquired after the government contacted Christian through its informant. Under *Jacobson*, this evidence should not have been used, and the First Circuit misapplied the test as did the Supreme Court with its own test.

In *United States v. Olson*,[322] the defendants were convicted of various drug charges resulting from a sale of cocaine to a DEA agent.[323] One defendant claimed he had been entrapped and relied on *Jacobson* to support his argument.[324] The court rejected his claim and distinguished the defendant's situation from *Jacobson*'s.[325] The court correctly applied the predisposition test outlined in *Jacobson* by examining *only* the evidence of the defendant's predisposition *prior* to the government agents contacting him.[326]

The court concluded that the defendant was predisposed to commit the crime because the government had evidence of his "two prior felony convictions, drug arrests during probationary period, frequent association with drug traders and a quick reply to [the informant's] invitation to 'talk business.'"[327] Unlike Justice White's analysis in *Jacobson*, this

316. *Id.*
317. *Id.*
318. United States v. Tejeda, 974 F.2d 210, 218 (1st Cir. 1992).
319. *Id.*
320. *Id.* at 218 (citing United States v. Sullivan, 919 F.2d 1403, 1418 (10th Cir. 1990), *cert. denied*, 113 S. Ct. 285 (1992)).
321. *Id.*
322. 978 F.2d 1472 (7th Cir. 1992).
323. *Id.* at 1474.
324. *Id.* at 1483.
325. *Id.*
326. *Id.*
327. United States v. Olson, 978 F.2d 1472, 1483 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1614 (1993).

court did not look at any evidence obtained after the DEA agents contacted the defendant.[328]

The First Circuit Court of Appeals recently decided a case involving a defendant who had been convicted of receiving child pornography in violation of the child pornography act.[329] In *United States v. Gifford*,[330] the defendant, William Gifford, appealed his conviction claiming the government entrapped him under the principles enunciated in *Jacobson*.[331] The court distinguished *Jacobson* on two grounds. First, it held that the government did not induce Gifford even though the government had targeted him for fifty-two months.[332] The court deemed the government mailings to be no more than open-minded solicitations.[333]

Second, although Gifford failed to establish inducement by the government, the court for the sake of completeness still addressed the issue of predisposition.[334] The court acknowledged that "Jacobson [gave] . . . guidance as to what evidence suffices to show a predilection to violate the law at the critical time . . . [which is] in advance of the government's initial intervention."[335] However, *Jacobson* also stated that a ready commission of the criminal act can also evidence a defendant's predisposition.[336] The court concluded that Gifford was predisposed to commit the crime from the inception.[337] However, this conclusion was based on Gifford's reaction to the government's second solicitation.[338] This solicitation consisted of a catalogue sent to Gifford one year after the government's initial contact.[339] Gifford promptly placed an order for two items and this "manifested the required predisposition to commit the crime."[340] As in *Jacobson*, the *Gifford* Court based its conclusion on evidence received after the government initiated its contact with Gifford. This finding is inconsistent with the majority's

328. *Id.*
329. United States v. Gifford, No. 93-1645, 1994 WL 46738 (1st Cir. Feb. 24, 1994). *See also* United States v. Gendron, No. 92-2003, 1994 WL 50975 (1st Cir. Feb. 28, 1994).
330. No. 93-1645, 1994 WL 46738 (1st Cir. Feb. 24, 1994).
331. *Id.* at *1.
332. *Id.* at *5. This is unlike *Jacobson* where the government conceded that Jacobson was induced after only twenty-six months of targeting. *See supra* note 204.
333. *Gifford*, No. 93-1645 at *5.
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*

statement of the predisposition test but is consistent with their application.

The court also examined evidence uncovered in a search of Gifford's home which was "wholly independent of the federal government."[341] It appears that under the majority's test this evidence should have been the evidence primarily relied upon to determine predisposition.

V. CONCLUSION

Even with the new definition of predisposition from *Jacobson*,[342] the lower federal courts will continue to struggle to apply the predisposition test. This may be due to the fact that Justice White was inconsistent in applying the facts to his test. He ended up analyzing the case in the same way the courts have always examined entrapment, namely by examining the defendant's predisposition all the way up to the time the defendant is ready and willing to commit the crime. This type of inquiry almost always looks at evidence of predisposition gathered after government agents have made contact.

Nonetheless, future defendants will rely on *Jacobson* to claim entrapment more easily. These defendants will claim that the government created a disposition in them to break the law with their initial contact and that this disposition was not present in them before the government contacted them.[343] This new definition of predisposition will be heralded as requiring greater limits on the government's undercover operations and protecting individual freedoms from abuse.[344] However, the new standard will also be renounced as placing greater restraints on law enforcement agents who are trying to prevent and eliminate such atrocities as child pornography, drug trafficking, and corruption by public officials.

Amy Perkins[*]

341. *Id.*

342. The *Olson* Court agreed that the *Jacobson* Court had announced a new standard for determining predisposition. *Id.* at 1483.

343. United States v. Jacobson, 112 S. Ct. 1535, 1545 (1992) (O'Connor, J., dissenting). *See supra* note 247 and accompanying text.

344. Gershman, *supra* note 223, at 4.

* To my family, especially Matt, whose continuing love and encouragement made law school and this publication a reality.

NOTE

Criminal Defendant Perjury: A Lawyer's Choice Between Ethics, the Constitution, and the Truth

"The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant."[1]

I. INTRODUCTION

The United States criminal justice system affords a criminal defendant a plethora of legal rights.[2] In the representation of their clients, criminal defense attorneys are regulated by statutes, case law, and ethical codes promulgated by the American Bar Association (ABA). The purpose of the criminal justice system is two-fold: first, to ensure that a criminal defendant enjoys the right to a fair trial;[3] second, to determine the truth.[4] In order for the state to succeed in the prosecution of a case, the guilt of the defendant must be established beyond a reasonable doubt.[5] At trial, testimony and facts are elicited from witnesses.[6] From this testimony, the trier of fact hopefully determines

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1. Lopez v. United States, 373 U.S. 427, 440 (1963).

2. These rights are set forth in federal and state constitutions, federal and state statutes, and judicial opinions. *See e.g.*, U.S. CONST. amend. V (privilege against self-incrimination); U.S. CONST. amend. VI ("right to a speedy and public trial" and right to a trial "by an impartial jury"); Rock v. Arkansas, 483 U.S. 44 (1987) (criminal defendant has a constitutional right to testify at trial); Powell v. Alabama, 287 U.S. 45 (1932) (constitutional right to the effective assistance of counsel).

3. U.S. CONST. amends. V, VI; *see also* Stone v. Powell, 428 U.S. 465 (1976) (Constitution does not guarantee the defendant a perfect trial, only a fair trial).

4. *Lopez*, 373 U.S. at 440.

5. *In re* Winship, 397 U.S. 358 (1970). The Court stated that:

> "[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules . . . developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."

Id. at 362 (quoting Brinegar v. United States, 338 U.S. 160, 174 (1949)).

6. U.S. CONST. amends. VI, XIV.

the truth. In the majority of cases, the system functions properly.[7] Occasionally, however, the rights of a client, the obligations of his or her lawyer, and the truth-seeking function of the system become diametrically opposed to one another.[8] Client perjury is one of the areas in which these opposite forces place a criminal defense attorney in an uncomfortable position.

This Note analyzes criminal defense attorneys' obligations, if any, when confronted with client perjury.[9] These obligations are examined in light of the American Bar Association's Model Rules of Professional Conduct[10] (Model Rules) and various judicial opinions.

Part II discusses the lawyer's obligations when he or she "reasonably believes" the client intends to testify falsely, but the client has neither done so nor clearly stated an intention to do so.[11] Part III analyzes the lawyer's obligations when he or she "knows" that the client intends to commit perjury.[12]

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7. *See* Duncan v. Louisiana, 391 U.S. 145, 157 n.24 (1968) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 4 n.2 (1966)) ("[j]uries do understand the evidence and come to sound conclusions in most of the cases presented to them . . . .").

8. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 111 (1990).

9. This Note focuses upon client perjury in the context of criminal cases. For a thorough analysis on civil perjury, see Steven H. Goldberg, *Heaven Help the Lawyer for a Civil Liar*, 2 GEO. J. LEGAL ETHICS 885 (1989); Charles W. Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977). For a discussion of surprise perjury and the lawyer's obligations after perjury has already occurred, see generally Wolfram, *supra*; Wayne D. Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601 (1979).

10. As of July 1992, the Model Rules had been adopted in whole or in part by forty states, including: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois (structure of Model Rules), Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York (Amended Model Code incorporating substance of some Model Rules), North Carolina (takes substance from both Model Rules and Model Code), North Dakota, Oklahoma, Oregon (Amended Model Code incorporating substance of some Model Rules), Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia (Amended Model Code incorporating substance of some Model Rules), Washington, West Virginia, Wisconsin, and Wyoming. Laws. Man. on Prof. Conduct (ABA/BNA) § 01:3 (1992). *See* MODEL RULES OF PROFESSIONAL CONDUCT (1992).

11. *See infra* notes 13-129 and accompanying text.

12. *See infra* notes 130-281 and accompanying text.

II. THE LAWYER "REASONABLY BELIEVES" THAT THE CLIENT INTENDS TO TESTIFY FALSELY BUT THE CLIENT HAS NEITHER DONE SO NOR CLEARLY STATED AN INTENTION TO DO SO

What obligations does a criminal defense lawyer have following a reasonable belief that the client's proposed testimony may be perjurious?[13] Model Rule 3.3(c) provides that "a lawyer *may* refuse to offer evidence that the lawyer reasonably believes is false."[14] The Model Rules define a "reasonable belief" as one in which "a lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."[15] Thus, according to Rule 3.3(c), an attorney who has a reasonable belief that a client's proposed testimony will be perjurious has discretionary authority to refuse to offer such testimony.[16] Unfortunately, references to other Model Rules provisions,[17] as well as other bodies of law,[18] indicate that this problem is not so easily resolved.

A. *Hypothetical*

A lawyer represents a client who is charged with attempted robbery. The client tells the lawyer that he or she is innocent and in no way participated in the robbery, although the client admits to being in the vicinity when the crime occurred. The client is arrested the following day, and the victim makes a positive identification. The lawyer believes that the victim's testimony can be discredited. The client has told the lawyer that, at the time of the robbery, he was walking down a nearby street. Although no witnesses can corroborate the client's testimony, the lawyer plans to have the client testify at trial. Now, two days before trial, the client states that he will testify to being home asleep when the

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13. Under federal law, perjury is defined as:

> Whoever . . . having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . [or] willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury . . . .

18 U.S.C. § 1621 (1988). Perjury by a witness or the subornation of perjury by counsel is also a felony in most states. *See* 2 Laws. Man. on Prof. Conduct (ABA/BNA) 50 (1986).

14. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (1992) (emphasis added).

15. *Id.* at Terminology.

16. *Id.* at Rule 3.3(c).

17. *Id.* at Rules 1.2, 1.16, 1.6; *see also infra* notes 36-47, 61-79 and accompanying text.

18. *See infra* notes 49-59, 80-129 and accompanying text.

robbery took place. The client's home is twenty miles from the scene of the crime. What should the lawyer do?

B. *The Lawyer's Options*

When a criminal defense attorney has only a reasonable belief that the client's proposed testimony may constitute perjury, but does not "know"[19] that it is in fact false, there are several options. First, the lawyer can do nothing.[20] The lawyer may present and argue the client's testimony to the jury without violating Model Rule 3.3(c), since its provisions are not mandatory.[21] This may be a criminal defense attorney's most favorable option. Brent Appel, the Iowa Deputy Attorney General who argued the seminal client perjury case, *Nix v. Whiteside*,[22] has stated that "'in the vast amount of cases, there may be some doubt in the attorney's mind as to the veracity of a witness.' If the lawyer does not know for sure that the evidence is false . . . he should 'put the evidence on.'"[23] Thus, under Model Rule 3.3(c), a lawyer may present questionable evidence without fear of disciplinary action. Under the facts set forth in the hypothetical, the lawyer appears to have a reasonable belief that the client will commit perjury. However, the lawyer may call the client to testify and argue this testimony to the jury.

A second option is to try to dissuade the client from offering testimony which the lawyer suspects is perjurious.[24] Almost all commentators,[25] case law,[26] and ethical codes[27] agree that an attorney "should seek to persuade the client to refrain from perjurious testimony . . . ."[28] According to Model Rule 1.2(d), "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist the client to make a good faith effort to determine the validity, scope, meaning, or application of the law."[29] Thus, even

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19. The Model Rules define "knowingly," "known," or "knows" as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." MODEL RULES OF PROFESSIONAL CONDUCT at Terminology.

20. Model Rule 3.3(c) uses the discretionary language "may," thereby allowing the attorney to present evidence he reasonably believes is false. *Id.* at Rule 3.3(c); *see supra* notes 14-15 and accompanying text.

21. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c).

22. 475 U.S. 157 (1986).

23. David O. Stewart, *Drawing the Line at Lying*, 72 A.B.A. J. 84, 88 (May 1, 1986); *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987) (it is the unusual case where the lawyer does know that the client will testify falsely at trial).

24. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt.

25. *E.g.*, Wolfram, *supra* note 9, at 846; FREEDMAN, *supra* note 8, at 120.

26. *E.g.*, Nix v. Whiteside, 475 U.S. 157, 169 (1986).

27. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1992).

28. *Id.*

29. *Id.* at Rule 1.2(d).

if the attorney has decided to present the suspect testimony, he or she should still seek to dissuade the client from giving perjurious testimony. The lawyer should inform the client of the criminal nature of perjury,[30] the problems perjury can present during cross-examination,[31] and other pitfalls of such testimony.[32]

The American Bar Association Committee on Ethics and Professional Responsibility has stated that "if the lawyer learns that the client intends to testify falsely before a tribunal, the lawyer must advise the client of the consequences of giving false testimony, *including* the lawyer's duty of disclosure to the tribunal."[33] In addition, Model Rule 1.2(e) states that "when a lawyer *knows* that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct."[34] Where the lawyer has only a *reasonable belief* of the client's perjury, however, the attorney may not inform the client of his or her duty to disclose suspected perjury to the tribunal.[35]

Model Rule 1.2(e) only applies where the lawyer "knows"[36] of the client perjury.[37] If a lawyer has only a belief of perjury, he or she lacks actual knowledge.[38] Thus, Model Rule 1.2(e) does not apply to situations in which the lawyer has only a "reasonable belief" that the client's proposed testimony will be perjurious. Similarly, the mandatory disclosure provisions of ABA Formal Opinion 353[39] would be inapplicable absent knowledge by the attorney that the client's proposed testimony is perjurious.

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30. *See supra* note 13.

31. The defendant should be warned that perjury on the stand can often lead to inconsistent statements when that perjury is attacked by a strong cross-examination. "[Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 JOHN H. WIGMORE, EVIDENCE § 1367 (Chadbourn rev. 1974).

32. The defendant should be informed that the judge may consider any perjurious testimony in sentencing the defendant. United States v. Grayson, 438 U.S. 41, 52 (1978).

33. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987) (emphasis added).

34. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(e) (1992) (emphasis added).

35. The attorney has no affirmative "duty" to disclose suspected perjury to the tribunal. *Id.* at Rule 3.3 cmt. In fact, the lawyer may not disclose to the court his or her reasonable belief of client perjury. *Id.* at Rule 1.6; *see also infra* notes 75-79 and accompanying text.

36. *See supra* note 19.

37. *See supra* note 34 and accompanying text.

38. *See supra* note 15 and accompanying text.

39. *See supra* note 33 and accompanying text.

Although Model Rule 3.3(c) provides a lawyer with discretion to refuse to offer evidence which he or she reasonably believes to be false,[40] closer analysis reveals that refusal is not a viable option. Other provisions in the Model Rules make it an ethical violation for a lawyer to refuse to offer this evidence.[41]

2. The Client's Statutory and Constitutional Right to Testify

"In a criminal case, the lawyer *shall* abide by the client's decision, after consultation with the lawyer . . . whether the client will testify."[42] Although the obligation imposed by Model Rule 1.2(a) is qualified by Model Rules 1.2(d)[43] and (e),[44] those rules only concern situations in which the lawyer has "actual knowledge" of the client's proposed conduct. Therefore, where the lawyer entertains a reasonable belief of intended client perjury, Model Rule 1.2(a) requires that the lawyer abide by the client's decision to testify.[45]

Rule 1.2(a)'s command that a lawyer comply with a client's decision to testify must logically supersede Model Rule 3.3(c). Model Rule 1.2(a) uses mandatory language ("shall")[46] in stating the lawyer's obligation to honor the client's decision to testify. On the other hand, Model Rule 3.3(c) uses discretionary language ("may")[47] in providing that a lawyer may decline to offer suspected perjury. Thus, when the suspected proposed perjurious testimony is that of the client, the lawyer has no discretion to refuse to offer it.

The problem of client perjury also involves constitutional questions. The comment to Model Rule 3.3 states that "a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. . . . In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel."[48] A close analysis of the federal Constitution, along with United States Supreme Court decisions, reveals that a lawyer may never act under Model Rule 3.3(c).

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40. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (1992).

41. *See id.* at Rules 1.2, 1.6, 1.16.

42. *Id.* at Rule 1.2(a) (emphasis added).

43. *Id.* at Rule 1.2(d). Rule 1.2(d) states that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is criminal or fraudulent." *Id.* (emphasis added).

44. *Id.* at Rule 1.2(e); *see supra* note 34 and accompanying text.

45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a).

46. *Id.*; *see supra* note 42 and accompanying text.

47. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c); *see supra* note 14 and accompanying text.

48. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt.

In *Rock v. Arkansas*,[49] the Supreme Court held that "it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense."[50] The Court based this holding on the Fifth, Sixth, and Fourteenth Amendments.[51] On the other hand, a criminal defendant's right to testify has been interpreted not to include the right to commit perjury.[52]

A lawyer's mere reasonable belief should not be allowed to abridge a client's constitutional right to testify. Where the lawyer does not know the client will lie, it follows that the client's proposed testimony may be truthful.[53] Furthermore, even if the client tells the lawyer that he or she intends to testify untruthfully, the possibility exists that once on the witness stand, under oath, the client may change his or her mind and testify truthfully. If the lawyer does not call the client to testify, the client has been deprived of the fundamental constitutional right to testify in his or her own defense.[54] Moreover, this right has been taken away by the lawyer's mere belief.[55] "We permit no other constitutional right of a defendant . . . to be stripped away in this fashion."[56] For example, consider the situation in which a police officer enters a house, without a search warrant, on the mere belief that illegal activities are taking place inside. Absent lawful consent to the entry,[57] the officer's action violates the resident's Fourth Amendment right to privacy.[58] If the police officer's suspicion of criminality does not suffice to overcome the defendant's Fourth Amendment rights, then surely the lawyer's mere belief cannot defeat the equally immutable constitutional right to testify in one's own defense.[59]

D. *Additional Options*

Thus, the question remains: how can a lawyer ethically comply with Model Rule 3.3(c)'s statement that the lawyer may refuse to offer testimony which is reasonably believed to be false?[60] A lawyer has three possible options. Arguably, each fails to solve the perjury problem.

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49. 483 U.S. 44 (1987).
50. *Id.* at 49.
51. *Id.* at 51-53.
52. Harris v. New York, 401 U.S. 222, 225 (1971). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Id.*
53. Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 538-39 (1988).
54. *Id.*
55. *Id.* at 538.
56. *Id.* at 539.
57. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
58. U.S. CONST. amend. IV.
59. Rock v. Arkansas, 483 U.S. 44 (1987).
60. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (1992).

First, a lawyer with a reasonable belief of intended client perjury may seek to withdraw from the representation pursuant to the permissive withdrawal provision of Model Rule 1.16(b)(1).[61] In considering whether to allow the lawyer to withdraw, the court may weigh various factors, including the proximity to trial,[62] the reasons given for withdrawal,[63] and any adverse effects resulting to the client.[64] Nevertheless, even if the judge permits the attorney to withdraw, the perjury problem is not solved.[65] The defendant will retain or be assigned new counsel.[66] Assuming the defendant still intends to offer the same testimony, he or she will probably be less candid with his new lawyer.[67] Thus, if the testimony is in fact false, all that is achieved is that the second attorney will unknowingly assist in presenting perjury.[68]

A second scenario is that the new attorney will also come to reasonably believe the client intends perjury and will also move to withdraw.[69] The court will likely reject this request. No court is inclined to grant an attorney's repeated motion to withdraw from representation.[70] This process only slows an already overburdened judicial system. Accordingly, the second attorney ends up where the first lawyer started.[71] Furthermore, withdrawal is fraught with difficulty because the judge will often ask for a reason when a lawyer moves to withdraw.[72] Under the Model Rules, the lawyer may not disclose client confidences.[73] Thus, the lawyer may only inform the court that there is an ethical problem.[74] The lawyer may in no way reveal his or her belief of intended perjury. Under these circumstances, the uninformed judge is even less likely to grant the attorney's withdrawal motion.

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61. *Id.* at Rule 1.16(b)(1). This rule provides, that with the permission of the court, "a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interest of the client, or if . . . the client persists in a course of action involving the lawyer's services that the lawyer *reasonably believes* is criminal or fraudulent." *Id.* (emphasis added).

62. *In re* Palmer, 252 S.E.2d 784 (N.C. 1979).

63. *See* FREEDMAN, *supra* note 8, at 115 (noting that a defense lawyer should not reveal the specific reasons for the motion to withdraw if doing so would infringe upon confidential client information); People v. Schultheis, 638 P.2d 8, 13 (Colo. 1981) ("Counsel should not reveal to the trial judge the specific reasons for his motion to withdraw.").

64. FREEDMAN, *supra* note 8, at 115.

65. Lefstein, *supra* note 53, at 525.

66. FREEDMAN, *supra* note 8, at 115.

67. *Id.*

68. *Id.*

69. *Id.* at 115.

70. *Id.* at 116.

71. *Id.*; *see also* Lefstein, *supra* note 53, at 539.

72. FREEDMAN, *supra* note 8, at 115.

73. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.6 (1992).

74. *Id.*

Another option is for the lawyer to disclose the proposed perjury to the tribunal.[75] Unfortunately, if the lawyer chooses this remedy, he or she will probably violate Model Rule 1.6.[76] Rule 1.6 provides that all information the lawyer receives during the course of his representation of the client must be kept confidential and may not be disclosed absent client consent.[77] Although such information may lead the lawyer to believe the client intends perjury, the information is nevertheless protected.[78] According to Model Rule 3.3(b), Model Rule 1.6's obligation of confidentiality may be violated only if the lawyer has actual knowledge that "disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."[79] Therefore, an attorney's disclosure of confidential information, based only on a reasonable belief that the client intends perjury, improperly reveals confidential information that is protected by Model Rule 1.6.

A lawyer's final option is to use the so-called "narrative approach."[80] This remedy was adopted by the ABA in 1971.[81] Although this section was deleted from the Standards in 1979, it is useful to examine because courts still employ the "narrative" today.[82] Under Section 4-7.7, the lawyer instructs the client to testify in narrative form concerning any matters which the lawyer believes will be perjurious.[83] There is no question and answer exchange between the lawyer and client.[84] Although the alleged perjury is presented, the lawyer is not assisting in its presentation.[85] However, the "narrative" was intended to be used only where the lawyer has actual knowledge that the client intends perjury.[86] The Standard applies only where the "defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation establish[es] that the admissions are true."[87]

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75. *Id.* at Rule 3.3 cmt.
76. *Id.* at Rule 1.6.
77. *Id.*
78. *Id.*
79. *Id.* at Rule 3.3(b).
80. The lawyer may choose to use the narrative approach if "dissuading the client" and "withdrawal" have both failed.
81. ABA STANDARDS FOR CRIMINAL JUSTICE 4-7.7 (1971) (deleted by the ABA in 1979) [hereinafter STANDARDS].
82. *See infra* notes 96, 274.
83. STANDARDS, *supra* note 81, at 477.
84. *Id.*
85. In addition, the lawyer may not argue any facts related by the defendant, and known by the lawyer to be false, to the jury in closing argument. *Id.*
86. *Id.*
87. *Id.*

Since the adoption of the Model Rules in 1983, the narrative approach has been rejected as a viable option for counsel.[88] The ABA did not adopt the narrative approach when it drafted the Model Rules.[89] To the contrary, the commentary to Model Rule 3.3 rejects the narrative approach.[90] The comment explains that the narrative "subjects the client to an implicit disclosure of information imparted to counsel."[91] In essence, the ABA believes that the narrative approach violates the confidentiality requirements established by Model Rule 1.6.[92] Furthermore, ABA Formal Opinion 353[93] and the United States Supreme Court in *Nix v. Whiteside*[94] explicitly reject use of the narrative. Consequently, the narrative is not an option in those jurisdictions which have adopted the Model Rules.[95]

Despite the ABA's rejection of the narrative, some courts[96] (including those which have adopted the Model Rules) and commentators[97] continue to use and defend the narrative approach.

E. *State and Federal Case Law*

In *Sanborn v. State*,[98] the court stated "that a lawyer's task is not to determine guilt or innocence, but only to present evidence so that others—either court or jury—can do so. A lawyer, therefore, should not decide what is true and what is not unless there is compelling support for his conclusion."[99] When a lawyer refuses to present the client's testimony under Model Rule 3.3(c), he or she is, in effect, making a finding of guilt against the client for a crime (i.e., perjury) which has not yet been committed. Based solely on the lawyer's belief that the client

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88. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt.9 (1992). *But see infra* 96-97 and accompanying text.

89. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt.9.

90. *Id.*

91. *Id.*

92. *Id.* at Rule 1.6.

93. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

94. 475 U.S. 157, 171 (1986).

95. *See supra* note 10.

96. *See* Shockley v. State, 565 A.2d 1373, 1379-80 (Del. Super. Ct. 1989) ("Recently the ABA has eschewed the use of the narrative . . . . Nevertheless, the narrative continues to be a commonly accepted method of dealing with client perjury."); *see also* Butler v. United States, 414 A.2d 844 (D.C. 1980); Sanborn v. State, 474 So. 2d 309 (Fla. Dist. Ct. App. 1985); In Matter of Goodwin, 305 S.E.2d 578 (S.C. 1983); Conn. Comm. on Professional Ethics, Formal Op. 42 (1992) ("A lawyer may not assist a client to commit perjury, but must allow a criminal defendant to take the stand and testify in narrative form.") This approach will be reexamined below. *See infra* notes 271-81 and accompanying text.

97. *See* Lefstein, *supra* note 53, at 542.

98. 474 So. 2d 309 (Fla. Dist. Ct. App. 1985).

99. *Id.* at 313 n.2.

will commit the crime of perjury, the client is deprived of basic constitutional rights.[100] The *Sanborn* Court also asserted that "[m]ere suspicion or inconsistent statements by the defendant alone are insufficient to establish that the defendant's testimony would have been false."[101] Thus, an attorney with a mere belief or suspicion of client perjury may not refuse to offer this testimony. A Model Rule 3.3(c) belief is insufficient to overcome a client's constitutional rights to effective assistance of counsel,[102] the right to testify,[103] and due process of law.[104]

Several federal courts have addressed this constitutional issue.[105] Two circuit court cases are particularly noteworthy. The first, *United States ex rel. Wilcox v. Johnson*,[106] involved a criminal rape trial. In his first trial, the defendant was convicted of rape.[107] Subsequently, he was granted a retrial.[108] After the state rested its case in the second trial, the defendant and his attorney argued as to whether the defendant would testify.[109] The attorney advised the court that if her client testified over her objection, she would move to withdraw.[110] The attorney based her motion on the belief[111] that the defendant would

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100. *See supra* notes 42-59 and accompanying text.

101. *Sanborn*, 474 So. 2d at 313 n.2 (citing Whiteside v. Scurr, 744 F.2d 1323, 1328 (8th Cir. 1984), *rev'd on other grounds*, Nix v. Whiteside, 475 U.S. 157 (1986)); *see also* People v. Schultheis, 638 P.2d 8, 11 (Colo. 1981) ("mere inconsistency in the client's story is insufficient in and of itself to support the conclusion that a witness will offer false testimony"); Butler v. United States, 414 A.2d 844, 850-51 (D.C. 1980) (finding that a lawyer violated the confidences of his client by informing the court that he had warned his client of perjury due to the client's inconsistent statements); Johnson v. United States, 404 A.2d 162, 164 (D.C. 1979) (holding that inconsistency between two defenses is insufficient to establish that the second defense, the testimony to be presented, is false).

102. Powell v. Alabama, 287 U.S. 45 (1932)

103. Rock v. Arkansas, 483 U.S. 44 (1987).

104. U.S. CONST. amend XIV.

105. United States v. Long, 857 F.2d 436 (8th Cir. 1988), *cert. denied*, Jackson v. United States, 112 S. Ct. 98 (1991); Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), *rev'd*, Nix v. Whiteside, 475 U.S. 157 (1986); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977).

106. 555 F.2d 115 (3d Cir. 1977).

107. Commonwealth v. Wilcox, 223 A.2d 914, 915 (Pa. Super. Ct. 1966).

108. *Wilcox*, 555 F.2d at 116.

109. *Id.* at 116-17.

110. *Id.* at 117.

111. The attorney wanted to abandon an alibi defense which was presented at the defendant's first trial. *Id.* at 116. Instead, the attorney decided to proceed on the theory that the alleged victim consented to sexual relations with the defendant. *Id.* However, the defendant objected and insisted on testifying to his non-involvement and calling alibi witnesses in his defense. *Id.* at 116-17. The lawyer believed that this testimony would be perjury. *Id.* at 117.

perjure himself.[112] At this point, the trial judge informed the defendant that if he insisted on testifying, his attorney would be permitted to withdraw.[113] Further, the judge advised the defendant that he would have to represent himself for the rest of the trial.[114] The defendant decided not to testify,[115] and the jury convicted him of rape.[116] The Third Circuit held that "[t]he threatened loss of counsel here not only violated appellee's Sixth Amendment rights but worked as a lever to pry from appellee his statutory right to testify."[117] The court found no evidence indicating that the defendant intended perjury and concluded that "an attorney may not volunteer a mere unsubstantiated opinion that the client's protestations of innocence are perjured. To do so would undermine a cornerstone of our system of criminal justice."[118] As will be discussed,[119] the Supreme Court, in *Nix v. Whiteside*,[120] held that it is not a constitutional violation for an attorney to threaten a client who intends to commit perjury with withdrawal or disclosure of the perjury.[121] However, *Nix* can be distinguished from *Wilcox*. In *Wilcox*, the lawyer had, at most, a reasonable belief that her client would commit perjury.[122] On the other hand, in *Nix*, the attorney was found to have actual knowledge of intended client perjury.[123] Thus, the *Nix* holding does not control in a *Wilcox*-type case.

The second federal case is *Whiteside v. Scurr*.[124] In *Whiteside*,[125] as in *Nix*,[126] the Eighth Circuit relied on the Iowa Supreme Court's factual finding that the defendant did intend to commit perjury,[127] and that the attorney had actual knowledge that the client intended to commit perjury. In dicta, however, the Eighth Circuit stated its agreement with the *Wilcox* standard.[128] The court emphasized that

112. *Id.* at 117.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 120-21.
118. *Id.* at 122.
119. *See infra* notes 140-80 and accompanying text.
120. 475 U.S. 157 (1986).
121. *Id.* at 175-76.
122. *Wilcox*, 555 F.2d at 121-22.
123. *Nix*, 475 U.S. at 172.
124. 744 F.2d 1323 (8th Cir. 1984), *rev'd on other grounds*, Nix v. Whiteside, 475 U.S. 157 (1986).
125. *Whiteside*, 744 F.2d at 1328.
126. *Nix*, 475 U.S. at 171.
127. State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978).
128. *Whiteside*, 744 F.2d at 1328.

mere suspicions are insufficient to establish that the defendant would have testified falsely.[129]

F. *Conclusion*

Perhaps the ABA only intended Model Rule 3.3(c) as an opt-out provision for lawyers (i.e., a means by which lawyers could avoid both the perjury problem and disciplinary action). If a lawyer refuses to offer a client's testimony under Model Rule 3.3(c), the client's fundamental constitutional right to testify, to effective assistance of counsel, and to due process of law have been infringed upon. Thus, the client will be granted a new trial. Yet, the perjury problem remains. The perjury will simply be presented at the subsequent trial by the client's next unknowing attorney. Yet, no disciplinary action may be taken against the client's initial attorney. Since that attorney complied with Model Rule 3.3(c), there has been no ethical violation.

Model Rule 3.3(c) appears to be in direct contradiction to the constitutional rights of the criminal defendant. If the ABA enacted Rule 3.3(c) solely for the protection of lawyers, while sacrificing the fundamental rights of criminal defendants, the ABA has done a tremendous disservice to the legal profession. The constitutional rights of a client should be at the forefront of legal representation. Ethical obligations which impede a client's fundamental rights have no place in the Model Rules.

Based on the preceding analysis, an attorney has no right, under Model Rule 3.3(c), to refuse to offer evidence which he or she reasonably believes is false. Model Rule 3.3(c) gives lawyers a false sense of security when confronted with the client perjury dilemma. When a lawyer merely has a reasonable belief that the client will commit perjury, his or her only remedy is to attempt to dissuade the client. If the client insists upon testifying, the attorney must go forward with full and zealous representation and present the client's testimony.

III. THE LAWYER "KNOWS" THE CLIENT INTENDS TO COMMIT PERJURY

> The problem of representing a defendant who insists on testifying falsely has been called, correctly, one of the hardest questions a criminal defense lawyer faces. The attorney is faced simultaneously with a duty to represent [the] client effectively, a duty to protect [the] client's right to testify, a duty not to disclose the confidential communications of [the] client, a duty to reveal fraud on the court, and a duty not to knowingly use perjured testimony. . . . Experienced and conscientious people can come to different conclusions about the best way to deal with the conflict.[130]

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129. *Id.*

130. Maddox v. State, 613 S.W.2d 275, 280 (Tex. Crim. App. 1980).

A. *When Does A Lawyer "Know"?*

When does a lawyer know the client will give perjurious testimony? This is the threshold question when analyzing the client perjury dilemma. As the preceding analysis indicates, if the lawyer lacks knowledge of client perjury, he or she must present the evidence.[131] The problem lies in attempting to draw the line between "belief"[132] and "knowledge."[133] The Model Rules define knowledge as "actual knowledge" which can be "inferred from circumstances."[134] Since this definition is somewhat vague, ethical committees and courts have taken the responsibility to define "actual knowledge." As a result, courts have adopted several definitions of what constitutes attorney knowledge of client perjury.

When a client clearly states an intention to commit perjury, some courts will infer attorney knowledge of that intent. In *Nix v. Whiteside*,[135] the United States Supreme Court stated that "[a]n attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct."[136] Although the preceding was stated by the Court in dictum, other courts have adopted this standard.[137] In addition, ABA Formal Opinion 353[138] requires that knowledge be established by a "clearly stated intention to commit perjury."[139] The facts of *Nix* illustrate the extent to which the Court will strain to find a clearly stated intention.

Nix involved an Iowa murder trial.[140] Whiteside and two companions, looking for marijuana, went to Calvin Love's apartment late one night.[141] Whiteside and Love became involved in an argument.[142] Love told his girlfriend to get his "piece."[143] At one point, Love got out of bed and then returned.[144] According to Whiteside, Love

131. *See supra* notes 13-129 and accompanying text.
132. *See supra* note 15 and accompanying text.
133. *See supra* note 19.
134. MODEL RULES OF PROFESSIONAL CONDUCT at Terminology (1992).
135. 475 U.S. 157 (1986).
136. *Id.* at 174.
137. *See, e.g.*, United States v. Long, 857 F.2d 436, 445 (8th Cir. 1988), *cert. denied*, Jackson v. United States, 112 S. Ct. 98 (1991) ("clear expression of intent to commit perjury is required before an attorney can reveal client confidences").
138. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).
139. *Id.*
140. 475 U.S. at 160.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

reached under his pillow and then started toward him.[145] In response, Whiteside stabbed Love in the chest.[146] Love died of the stab wound.[147] Whiteside was charged with murder.[148]

Attorney Gary Robinson was appointed to represent Whiteside.[149] Whiteside told Robinson that the stabbing occurred as Love "'was pulling a pistol from underneath the pillow on the bed.'"[150] Although convinced Love had a gun, Whiteside admitted "that he had not actually seen a gun."[151] No gun was ever found at the house.[152] Whiteside reiterated these facts numerous times to Robinson. A week before trial, Whiteside, for the first time, indicated that he had seen "something metallic" in Love's hand.[153] Upon questioning by Robinson, Whiteside stated, "'[I]n Howard Cook's case there was a gun. If I don't say I saw a gun I'm dead.'"[154] Robinson believed this statement, if presented as testimony, would be perjury. He indicated to Whiteside that only a reasonable belief "that he was in danger" was needed for a self-defense claim.[155] However, Whiteside insisted on testifying that he saw "something metallic."[156] At this point, Robinson told Whiteside that if this testimony was presented, he would withdraw from representation and advise the court of the perjury.[157]

At trial, Whiteside testified that he "knew" Love had a gun and he thought that Love was reaching for that gun.[158] No mention was made of "something metallic." Whiteside was convicted of second degree murder.[159]

On appeal, Whiteside claimed he was denied a fair trial.[160] The Iowa Supreme Court refused to overturn the conviction on these grounds.[161] Next, Whiteside claimed that he had been denied effective assistance of counsel.[162] He sought a writ of habeas corpus in the

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145. *Id.* at 157.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 160.
151. *Id.*
152. *Id.*
153. *Id.* at 161.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 162.
160. *Id.*
161. State v. Whiteside, 272 N.W.2d 468 (Iowa 1978).
162. *Nix*, 475 U.S. at 162.

federal district court,[163] which was denied.[164] The Eighth Circuit reversed and ordered the writ granted.[165]

In *Nix v. Whiteside*,[166] the Supreme Court reversed and held that Robinson's conduct did not constitute ineffective assistance of counsel[167] under *Strickland v. Washington*.[168] In dictum, the Court asserted that "Robinson's representation of Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*."[169]

According to the Court, *Nix* is a case where there was a clearly stated intention of client perjury.[170] In reaching this conclusion, the Court relied on factual findings made by the Iowa Supreme Court.[171] The state supreme court's opinion reveals that an "actual knowledge" standard was not used to determine if Robinson knew that Whiteside would commit perjury.[172]

> In the present case, counsel was convinced with *good cause* to believe defendant's proposed testimony would be deliberately untruthful. . . . [D]efendant's own statement (in the face of his contrary earlier version) that he had to testify that Love had a gun if he hoped to be acquitted, lends strong support to counsel's *belief* defendant did not see a gun and that he nevertheless intended to say he did.[173]

In *Nix*, the Supreme Court conducted its analysis assuming that Robinson had actual knowledge of the client's intended perjury.[174] However, the factual underpinnings for this assumption, as found by the Iowa Supreme Court,[175] fall far short of meeting an actual knowledge standard.[176] The Iowa Supreme Court concluded only that Robinson

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163. *Id.*

164. *Id.*

165. Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), *rev'd*, 475 U.S. 157 (1986). The Eighth Circuit held that the defendant had been denied effective assistance of counsel due to Robinson's threats of action. *Id.*

166. 475 U.S. 157 (1986).

167. *Id.* at 175.

168. 466 U.S. 668 (1984). In order for a convicted defendant's ineffective assistance of counsel claim to merit a reversal of conviction, the defendant must prove "first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *Id.* at 669.

169. *Nix*, 475 U.S. at 171.

170. *Id.* at 176.

171. *Id.* at 163.

172. State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978).

173. *Id.* (emphasis added).

174. *Nix*, 475 U.S. at 172. "We see this as a case in which the attorney successfully dissuaded the client from committing the crime of perjury." *Id.*

175. *See supra* note 171 and accompanying text.

176. *See supra* note 19.

had a good faith belief that the client intended to perjure himself.[177] The United States Supreme Court in *Nix* should have assessed Robinson's conduct pursuant to Model Rule 3.3(c).[178] Had it done so, Robinson's actions might well have violated Whiteside's right to effective assistance of counsel.[179] Since the Court inappropriately applied an actual knowledge standard, it never reached the real issue presented by the case.[180]

Nix left many unanswered questions. The portion of the opinion pertaining to ethical considerations is read as dicta.[181] "[L]et there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law . . . . Lawyers, judges, bar associations, students, and others should understand that the problem has not now been 'decided.'"[182]

Other courts have used different standards in determining whether an attorney has actual knowledge. Some courts use a "firm factual basis" standard,[183] i.e., a lawyer must possess a firm factual basis to conclude that the client will commit perjury.[184] In *Whiteside v. Scurr*,[185] the court stated that "[i]t will be a rare case in which this factual requirement is met. Counsel must remember they are not triers of fact, but advocates. In most cases a client's credibility will be a question for the jury."[186]

Re-examine the hypothetical robbery client. As the date for trial drew near, the client changed his story from having been in the vicinity of the crime to having been twenty miles away at home. Based on this alone, does the lawyer have a firm factual basis of perjury? The client may have initially thought that the truth would not have been believed by the lawyer. Perhaps the lawyer has a reasonable belief that the client intends perjury. However, the client's change of story probably does not give the lawyer a firm factual basis for this conclusion. "A lawyer's certainty that a change in the client's recollection is a harbinger of intended perjury . . . should be tempered by the realization that, after

177. *See supra* note 173 and accompanying text.
178. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(c) (1992).
179. *See supra* notes 13-129 and accompanying text.
180. The Court never reached the issue of whether Robinson's actions were proper under a mere "reasonable belief" standard.
181. Nix v. Whiteside, 475 U.S. 157, 166-71 (1986).
182. *Id.* at 177 (Brennan, J., concurring).
183. Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977); Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), *rev'd*, Nix v. Whiteside, 475 U.S. 157 (1986).
184. *Wilcox*, 555 F.2d at 122.
185. *Scurr*, 744 F.2d at 1328.
186. *Id.*

reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked."[187]

Two courts, in determining the test for actual knowledge, have employed a "beyond a reasonable doubt" standard.[188] In *Commonwealth v. Alderman*,[189] the defendant was charged with entering a private home, ordering a holdup, and shooting one of the occupants.[190] The shooting victim managed to shoot and seriously wound the robber.[191] Although wounded, the robber was able to flee the house.[192] The defendant, suffering from a gunshot wound, later checked into a local hospital.[193] In preparation for trial, the defendant admitted to his lawyer that he had gone to the house in question.[194] He asserted that he had gone there to collect a debt and shot a person there in self-defense.[195] Upon testifying at trial, the defendant denied being at the house where the robbery was committed.[196] The defendant explained that the gunshot wound was self-inflicted in his father's house while he was "messing" with some shotguns.[197] The defense lawyer learned of this new version of the defendant's story during the course of the trial.[198] The lawyer concluded that the defendant's testimony was false.[199] The court stated that "there could have been no reasonable doubt but that appellant's newly discovered alibi was a fabrication."[200]

A reasonable doubt standard is a sensible solution to the perjury dilemma.[201] Perjury is a criminal offense. In order to be charged with a criminal offense, a crime must have been committed or at least

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187. *Nix*, 475 U.S. at 190-91 (Stevens, J., concurring).

188. Shockley v. State, 565 A.2d 1373, 1379 (Del. Super. Ct. 1989) ("[A]n attorney should have knowledge 'beyond a reasonable doubt' before he can determine under Rule 3.3 that his client has committed or is going to commit perjury."); Commonwealth v. Alderman, 437 A.2d 36 (Pa. Super. Ct. 1981).

189. 437 A.2d 36 (Pa. Super. Ct. 1981).

190. *Id.* at 37.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 38.

195. *Id.*

196. *Id.* at 37.

197. *Id.*

198. *Id.* at 38.

199. *Id.*

200. *Id.* at 39.

201. *See* Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 149 (1985) (lawyer should be convinced "beyond a reasonable doubt" that client's testimony will be perjurious); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 314 (1965) (lawyer should disclose client confidences if the lawyer is convinced beyond a reasonable doubt that a crime will be committed).

attempted. When an attorney seeks to determine whether the client's proposed testimony will be perjurious, in essence the attorney is forced to make a determination of guilt as to a crime which has not yet been committed. The lawyer determines the client's guilt based only on the thought of perjury. By contrast, it is not possible to accuse someone of murder when, in fact, there has been no murder. A person may be accused of attempted murder; however, there is no such crime as attempted perjury.[202] Since perjury is a crime of spoken words rather than physical action, no crime takes place until those words are actually spoken. The crime of perjury is analogous to the crime of threatening. One may not be charged with attempted threatening. This is because it is impossible to "know" if a person will threaten another until words are actually spoken. In short, a lawyer should not be permitted to find the client guilty of a crime which has not been committed. On the other hand, if the Model Rules are willing to allow such actions, there must be proof beyond a reasonable doubt.[203]

It is extremely difficult for a lawyer to "know" that a client will commit perjury. Neither the Model Rules nor case law establishes any bright line tests. An attorney should resolve all doubts in favor of the client. The client's right to testify and present a defense are fundamental to our criminal justice and adversary systems.[204] The denial of these rights should not be taken lightly.

B. *The Lawyer's Options When He or She Knows of Intended Client Perjury*

Even though the foregoing analysis shows the difficulty of determining actual knowledge, let us assume that the lawyer has actual knowledge that the client intends to commit perjury. Under the Model Rules, a lawyer's obligations are unclear.[205] The operative Model Rule provisions are Rule 3.3(a)(2), (a)(4) and (b).[206] Model Rule 3.3 forbids a lawyer from "knowingly fail[ing] to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."[207] Also, the "lawyer shall not knowingly offer evidence the lawyer knows to be false."[208] Model Rule 3.3(b) expressly makes the duties under Rules 3.3(a)(2) and (4) paramount to the Rule protecting client confidences.[209] Thus, under the Model Rules, it is

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202. *See* Adams v. Murphy, 394 So. 2d 411, 415 (Fla. 1981), *cert. denied*, 455 U.S. 920 (1982) (there can be no crime of attempted perjury).

203. *See supra* notes 183-200 and accompanying text.

204. *See supra* note 2 and accompanying text.

205. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1992).

206. *Id.* at Rule 3.3(a)(2), (a)(4) & (b).

207. *Id.* at Rule 3.3(a)(2).

208. *Id.* at Rule 3.3(a)(4).

209. *Id.* at Rule 3.3(b). Rule 3.3(b) states: "The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires

clear that the attorney-client confidence will not protect a perjurious client.[210]

As previously mentioned, the Model Rules define "knowingly," "known," or "knows," as "actual knowledge."[211] Although it appears from Model Rule 3.3 that an attorney must disclose intended client perjury, the comment to the rule blurs that duty.[212] Under the section "Perjury by a Criminal Defendant," the comment lists several possible solutions to the client perjury problem.[213]

1. Dissuading the Client

The comment to Model Rule 3.3 asserts that the attorney should first seek to dissuade the client from giving perjurious testimony.[214] ABA Formal Opinion 353 has interpreted this to mean that "[o]rdinarily, after warning the client of the consequences of the client's perjury, including the lawyer's duty to disclose it to the court, the lawyer can reasonably believe that the client will be persuaded not to testify falsely at trial."[215]

Case law and commentators are in agreement with this position.[216] "It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."[217] In *Nix*, the court held that threatening a client with disclosure or withdrawal does not constitute ineffective assistance of counsel.[218] Thus, the client should be informed that as a tactical matter, perjury can only hurt the client's defense.[219] First, the prosecutor can elicit inconsistencies through cross-examination.[220] Second, the jury may decide that the client is lying. Third, perjury is a felony.[221] Fourth, the judge may consider the perjurious testimony in sentencing the defendant.[222] After consultation, the lawyer may present the defendant's testimony in the normal manner. The question remains though, what should an

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disclosure of information otherwise protected by Rule 1.6." *Id.*

210. *Id.*

211. *See supra* note 19.

212. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt.

213. *Id.*

214. *Id.*

215. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

216. *See* Nix v. Whiteside, 475 U.S. 157 (1986); *see also* Wolfram, *supra* note 9, at 846.

217. *Nix*, 475 U.S. at 169 (citing Model Rule 3.3 cmt.).

218. *Id.* at 175-76.

219. *See supra* notes 30-32 and accompanying text.

220. *See supra* note 31 and accompanying text.

221. *See supra* note 13.

222. *See supra* note 32.

attorney do when a client insists on testifying falsely? On this point, the Model Rules, case law, and commentators begin to disagree.

2. The Withdrawal Approach

The comment to Model Rule 3.3 states that when the client cannot be dissuaded from testifying falsely, the attorney must seek to withdraw from the representation.[223] The attorney should move to withdraw under Model Rule 1.16(a)(1). This rule allows for mandatory withdrawal if "the representation will result in violation of the rules of professional conduct or other law."[224] In *Nix*, the Court agreed that withdrawal should be the attorney's next step.[225] However, the comment concedes that withdrawal may not be possible.[226] A judge may deny the motion, particularly when it is close to the date of trial or when replacement counsel is not available.[227]

The withdrawal approach has been criticized by a number of courts and commentators. In *Sanborn v. State*,[228] the defendant's fifth defense attorney made a motion to withdraw.[229] The court denied the motion.[230] The court asserted that "[i]f withdrawal were allowed every time a lawyer was faced with an ethical disagreement with the accused, the ultimate result could be a perpetual cycle of eleventh-hour motions to withdraw and an unlimited number of continuances for the defendant."[231] The court also stated that if a new lawyer is appointed, the "new counsel might fail to recognize the fabricated testimony . . . ."[232] Thus, the new attorney would unknowingly present the perjury.[233]

Some commentators have criticized the withdrawal approach. Two authorities on this topic, Deans Norman Lefstein and Monroe Freedman, both agree that withdrawal should never be used to solve the perjury dilemma.[234] Withdrawal serves no purpose because the perjury will be presented by another attorney, and in the alternative, the new attorney

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223. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1992).
224. *Id.* at Rule 1.16(a)(1).
225. Nix v. Whiteside, 475 U.S. 157, 170 (1986).
226. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1992).
227. *Id.*
228. 474 So. 2d 309 (Fla. Dist. Ct. App. 1985).
229. *Id.* at 311.
230. *Id.* at 314.
231. *Id.*
232. *Id.*
233. *Id.*; *see also* Matter of Goodwin, 305 S.E.2d 578, 579 (S.C. 1983) ("Had the trial judge allowed the withdrawal, any new attorney he appointed would, if faced with the same conflict, have moved to withdraw, potentially resulting in a perpetual cycle of eleventh-hour motions to withdraw. Worse, new counsel might fail to recognize the problem and unwittingly present false evidence."). *Id.*
234. *See* Lefstein, *supra* note 53, at 524; FREEDMAN, *supra* note 8, at 115.

will file a withdrawal motion.[235] Yet, there may be one instance in which the court should grant a withdrawal motion: here counsel claims that the attorney-client relationship has broken down.[236] Essentially, a lawyer has three remaining options when withdrawal is denied or the lawyer fails to dissuade the client from committing perjury.

3. Disclosure To The Tribunal

When withdrawal is denied, the comment to Model Rule 3.3 addresses three possible alternatives for the lawyer: (1) the lawyer may present the testimony by use of the narrative approach; (2) the lawyer may present and argue the perjury; or (3) the lawyer may make disclosure of the perjury to the court.[237] The comment quickly rejects the first two approaches and opts for a mandatory disclosure requirement.[238] In addition, the comment contains a statement which may severely limit the impact of the rule. A lawyer's ethical duties "may be qualified by constitutional provisions for due process and the right to counsel in criminal cases."[239] The comment further states that the constitutional requirements are paramount to the ethical rules.[240] Therefore, although the Rules adopt a disclosure approach, the attorney's duty to inform the tribunal must yield to constitutional considerations.

Generally, courts have accepted the disclosure requirement. In *Nix*, the Court stated that "the Model Rules do not merely authorize disclosure by counsel of client perjury; they require such disclosure."[241] Courts have analyzed the impact of disclosure in various ways. One main concern arises from the holding of *United States v. Grayson*.[242] In *Grayson*, the Court held that a trial court may, in sentencing a defendant, consider its belief that the defendant perjured himself during testimony.[243] Thus, when an attorney discloses potential client perjury, the lawyer acts adversely to the interests of the client. "When an attorney unnecessarily discloses the confidences of the client, he creates a chilling effect which inhibits the mutual trust and independence necessary to

235. Lefstein, *supra* note 53, at 525; FREEDMAN, *supra* note 8, at 116.
236. Lefstein, *supra* note 53, at 539 ("if a dispute about the proposed testimony and how it will be handled has destroyed the attorney-client relationship, the court should not lightly dismiss counsel's withdrawal motion").
237. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. (1992).
238. *Id.*
239. *Id.*
240. *Id.*
241. Nix v. Whiteside, 475 U.S. 157, 168 (1986).
242. 438 U.S. 41 (1978).
243. *Id.* at 55.

effective representation."[244] In response, some courts have taken measures in an attempt to lessen any harm to the client.

For example, in *Butler v. United States*,[245] the court stated that once disclosure was made to the tribunal, the proceedings should have been transferred to another judge.[246] The failure to take these steps deprived the defendant of due process.[247] In *United States v. Long*,[248] the court cautioned attorneys to be wary of disclosure. "[D]efense counsel must use extreme caution before revealing a belief of impending perjury. It is, as Justicé Blackmun noted, 'the rarest of cases' where an attorney should take such action."[249] The court further noted that the tribunal should attempt to alleviate prejudice to the client.[250] According to the court, this can be accomplished in two ways. First, remind the lawyer of his or her duties to the client and limit subsequent disclosures of client confidences.[251] Second, familiarize the defendant with his or her rights and see if the defendant wishes to waive any of those rights.[252]

One commentator has proposed a unique remedy.[253] Once disclosure is made, an impartial judge should be called in to conduct a hearing on the issue.[254] If it is determined beyond a reasonable doubt that the testimony would constitute perjury, then and only then can the defendant be denied the right to testify.[255]

The question arises as to who will represent the defendant at this perjury determination hearing. The defendant's lawyer may not represent him or her because the attorney will be testifying against the defendant. Thus, new counsel must be retained or appointed solely for this perjury hearing. Suppose the newly appointed lawyer "believes" or "knows" that the defendant will now commit perjury at this hearing. Should a new hearing now be conducted to determine if the defendant will perjure himself at the initial perjury hearing? This solution may lead to an infinite set of perjury hearings, each of which requires new counsel.

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244. United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977).
245. 414 A.2d 844 (D.C. 1980).
246. *Id.* at 853.
247. *Id.*
248. 857 F.2d 436 (8th Cir. 1988), *cert. denied*, Jackson v. United States, 112 S. Ct. 98 (1991).
249. *Id.* at 447.
250. *Id.*
251. *Id.*
252. *Id.*
253. *See* Rieger, *supra* note 201, at 151.
254. *Id.* at 152-53.
255. *Id.*; *see also* Lefstein, *supra* note 53, at 537.

Yet, these solutions raise a valid point. The client is being accused of a crime–in fact, the serious felony of perjury. Thus, before the defendant can be deprived of his or her constitutional rights (i.e., right to counsel and right to testify), a separate trial must be held.[256] The burden of proof rests with the lawyer to prove beyond a reasonable doubt that the client intended perjury. Usually, the client will deny this allegation.[257] Therefore, it is for the judge to decide if the lawyer has met his or her burden.

A better solution would be to hold the perjury hearing only after the client testifies. Even if the client admits a perjurious intention, prior to testifying, no crime has yet been committed. It is not usually a crime to say one is going to perpetrate a crime. The crime occurs when there is an attempt or actual commission. A client may not be charged with attempted perjury.[258] Thus, the lawyer must wait until the client testifies. Only then may the lawyer accuse the client of perjury. Under this approach, the client is afforded a most basic right, that is, the right to change one's mind. A fundamental principle of criminal law states that the law does not punish a person for evil thoughts.[259] Yet, the client is being punished for the thought of committing perjury if his or her lawyer is permitted to disclose confidences prior to the client's testimony. Even the crime of conspiracy, which is an agreement to commit a crime, requires an overt act. When constitutional rights are at stake, a person's actions, not words, should determine when these rights may be denied.

4. Full Representation

In 1966, Monroe Freedman argued that if a client could not be dissuaded from committing perjury, the lawyer should elicit and argue the client's testimony in the ordinary manner.[260] Today, Freedman

256. *See* United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984), *cert. denied*, 475 U.S. 1064 (1986). The court stated that "[b]ecause it seems apparent that Curtis would have testified perjuriously, counsel's refusal to put him on the witness stand cannot be said to have violated Curtis' constitutional rights." *Id.* at 1076.

257. Lefstein, *supra* note 53, at 540 ("If the court asks defendant whether he or she plans to present perjury, the answer will almost surely be a resounding 'No!'").

258. *See supra* note 202 and accompanying text.

259. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 8 (2d ed. 1986). "[T]here exist some basic premises which underlie the whole of the Anglo-American criminal law. . . . [T]here can be no criminal liability for bad thoughts alone; there is a requirement of some sort of action (or a non-action when there is a duty to act) for criminal liability." *Id. See also* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960).

260. Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1479-80 (1966).

continues to assert that the lawyer should follow this course of action when confronted with client perjury.[261]

Freedman views the problem of client perjury as a trilemma.[262] First, the lawyer is required to know all relevant facts.[263] Second, the lawyer owes a duty of confidentiality to the client.[264] Third, the lawyer must be candid with the court.[265] It is not possible to accomplish all three simultaneously. If the lawyer "knows" the client will present perjurious testimony, the attorney cannot keep this confidential while fulfilling his duty of candor to the tribunal. Since the lawyer is the sole advocate for the client, Freedman asserts that the duty to be candid with the court must yield.[266] Under this approach, clients will freely tell their lawyers all relevant facts. The lawyer would present the client's testimony even if he or she knows it to be false. This solution leaves all issues of credibility to the fact-finder.

Freedman's solution is certainly the minority position.[267] The Model Rules clearly reject Freedman's position. A lawyer may not offer evidence that he or she knows to be false.[268] Also, the comment to Model Rule 3.3 rejects Freedman's approach because it "makes the advocate a knowing instrument of perjury."[269] In addition, case law almost universally rejects Freedman's theory.[270] Thus, in theory, Freedman's approach may seem practical. However, in practice, a lawyer's use of this approach may likely end in disciplinary action.

5. The Narrative Approach

A last option available to lawyers confronted with client perjury is the narrative approach.[271] The Model Rules explicitly reject the use of the narrative.[272] In addition, the Supreme Court also rejected this approach in *Nix*.[273] Many courts, however, even in Model Rule jurisdictions, have embraced the narrative.[274]

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261. *See* FREEDMAN, *supra* note 8, at 109.
262. FREEDMAN, *supra* note 8, at 111.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Cf.* Coleman v. State, 621 P.2d 869, 881 (Alaska 1980), *cert. denied*, 454 U.S. 1090 (1981) (judge ordered attorney to "fully assist his client in presenting suspect testimony").
268. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1992).
269. *Id.* at Rule 3.3 cmt.
270. *E.g.*, Nix v. Whiteside, 475 U.S. 157, 171 (1986).
271. *See supra* notes 80-96 and accompanying text.
272. *See supra* notes 88-92 and accompanying text.
273. *Nix*, 475 U.S. at 170 n.6.
274. *See* Sanborn v. State, 474 So. 2d 309, 313 (Fla. Dist. Ct. App. 1985) ("The procedure most often sanctioned in this situation is to allow the defendant to take

ABA Standard 4-7.7 permits a lawyer to question the client concerning matters which the lawyer believes will not be perjurious.[275] The lawyer may not ask any questions which may elicit perjurious responses.[276] Instead, the lawyer should ask the client if he or she has any further comments concerning the case.[277] This solution is the least intrusive to the defendant's constitutional rights. It permits the client to testify, under oath, while the attorney is protected from assisting in the fraud.

Yet, even pursuant to the narrative approach, the lawyer is still partially infringing upon the client's rights. By employing the narrative, the lawyer implicitly discloses to the judge and jury the fact that the witness is testifying falsely. The narrative is such a departure from the traditional questioning of a witness that any lay observer would sense that there is a problem with the witness's testimony. In *State v. Robinson*,[278] the lawyer employed the narrative approach in eliciting testimony from the client. The lawyer used the narrative because he "reasonably believed" that the client would give perjurious testimony.[279] The court held that "this procedure [the narrative] could hardly have failed to convey to the jury the impression that the defendant's counsel attached little significance or credibility to the testimony of the witness, or that the defendant and his counsel were at odds. Prejudice to the defendant's case by this trial tactic was inevitable."[280] The court concluded that the defendant was denied a fair trial under the Fourteenth Amendment and ordered a new trial.[281]

A better solution may be for the lawyer to begin questioning the client in the usual manner. If the client testifies falsely, then the lawyer should employ the narrative. This would again protect the client's right

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the stand and deliver his statement in narrative form."); In Matter of Goodwin, 305 S.E.2d 578, 580 (S.C. 1983) ("[W]ith an acute awareness that any practice we endorse will draw criticism, we approve [the "'narrative'"] . . . as it allows the lawyer to refrain from actively participating in the presentation of the false testimony while affording the assistance of counsel."); *see also* Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984), *rev'd on other grounds*, Nix v. Whiteside, 475 U.S. 157 (1986); United States v. Campbell, 616 F.2d 1151 (9th Cir.), *cert. denied*, 447 U.S. 910 (1980); Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978); Shockley v. State, 565 A.2d 1373 (Del. Super. Ct. 1989); Butler v. United States, 414 A.2d 844 (D.C. 1980); State v. Fosnight, 679 P.2d 174 (Kan. 1984); Maddox v. State, 613 S.W.2d 275 (Tex. Crim. App. 1981).

275. ABA STANDARDS FOR CRIMINAL JUSTICE 4-7.7 (1971) (deleted by the ABA in 1971). Although not adopted by the ABA, the unapproved Standard 4-7.7 was published in brackets in the second edition of the DEFENSE FUNCTION STANDARDS.

276. *Id.*

277. *Id.*

278. 224 S.E.2d 174 (N.C. 1976).

279. *Id.* at 180.

280. *Id.*

281. *Id.*

to change his or her mind. The client may not comprehend the gravity of committing perjury until he or she is under oath, in front of a judge and jury, and speaking on the record. Any combination of these factors could lead the client to finally realize that truthful testimony is the best policy.

IV. CONCLUSION

There is no solution to the dilemma of criminal defendant perjury. Rather, there are procedures which a lawyer may employ to alleviate the situation. The perjury problem, however, remains. It is impossible to eradicate perjury, just as it is impossible to rid society of crime. Perjury is and will continue to be inherent in all types of adversarial proceedings. Yet, most of the time, the system functions properly. The adversarial system was designed to take into account the existence of perjury. Thus, the role of the trier of fact is to weigh a witness's credibility and determine the truth.

The fundamental rights of a criminal defendant are too important for ethical committees and courts to bypass the essential role of the trier of fact. When rules and laws are promulgated to weed out possible perjury, the trier of fact's duty becomes only a formality. The defendant has been found guilty of perjury long before he or she enters the courtroom.

The Model Rules and case law should instead focus exclusively on perjury which has been committed, rather than potential perjury. In addition, a criminal defense lawyer should scrutinize every possible avenue before infringing on a client's fundamental constitutional rights. "A conviction under our system must be at the hands of the jury, not the defendant's lawyer."[282]

Donald Liskov[*]

282. Monroe H. Freedman, *Are the Model Rules Unconstitutional*, 35 U. MIAMI L. REV. 685, 694 (1981).

* This article is dedicated to my parents, Andrew and Marsha, for always being there with love and support.

BOOK REVIEW

The History of the Law in Massachusetts:
The Supreme Judicial Court 1692-1992
Edited by Russell K. Osgood
Boston, Massachusetts
Supreme Judicial Court Historical Society
c/o Social Law Library
Hardbound, 790 pages, $50.00

George Dargo*

Institutional history is one of the oldest forms of historical writing; it is also among the most difficult to write. There are several reasons for this. If history is not to be "as dry as dust," then it must touch upon subjects of general concern. To cabin the contents of an institution's history would be to limit its potential audience to a precious few. Yet, any attempt to enlarge the scope of institutional history risks losing contact with the special institutional identity that is the touchstone of any such history. Moreover, there is no clear definition regarding the content of institutional history. Is it simply a "march through time," just one darned thing after another? Or is it, to take the opposite extreme, a series of disconnected "snap shots" out of the past? Is institutional history best defined as a searching inquiry into the decision-making process–in other words, a functional analysis of institutional inputs and outputs arranged chronologically? Or, is institutional history really about people, notable or obscure?

Court history is a subset of institutional history with unique challenges of its own. The most common method for writing the history of a court–usually a high appellate court–is to examine the decisional law of that court. This is a legitimate methodology; it can even be a useful one. Such a history might catalogue important cases for easy reference. It might also illuminate doctrinal, political, or institutional trends for judges, lawyers, legislators, and academics for whom the workings of the court may be of real practical and professional importance. Court history also can be done by identifying broad social, economic, or political movements and then locating the court's role as one among many factors in the broad process of historical development.

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Still another method is to examine particular cases, not so much in order to trace "lines of decision," but to spotlight, and even dramatize, the judicial process itself. If the source materials are sufficient, this approach can sometimes take on the character of an expose by revealing the inner workings ("the secret history") of the court.

The History of the Law in Massachusetts: The Supreme Judicial Court 1692-1992[1] is an unusually successful contribution to judicial historiography. The product of a conference held in October 1990 as part of the Three-Hundredth Anniversary of the Supreme Judicial Court (SJC), the book is a rich compilation of papers by over a dozen presenters at the conference. Each of the papers covers a different segment of the SJC's distinguished past. The methodology employed is varied in keeping with the book's bifurcated title. It is not just a court history, but also a history of the law in Massachusetts.

The book begins with an historical overview by Russell Osgood, which usefully summarizes the broad contours of the court's development, the court's origins and growth from a trial to an appellate tribunal, notable justices who have sat on the court, and the changing position of the SJC in the Commonwealth's legal system.[2] The overview provides a helpful framework for the more narrowly defined topics which constitute the great bulk of this hefty, 790 page, volume.

Chronological coverage is well-balanced. Each of the three centuries of the Court's living history receive nearly equivalent treatment. Even the period prior to the SJC's establishment receives attention in Barbara Black's interesting treatment of the Court's antecedents, principally the Great and General Court itself.[3] Professor Black, who has written often about government and law in colonial Massachusetts, offers a fresh look at familiar historical materials. Her essay in this volume traces the decline of the General Court's adjudicatory function and the advance of more clearly defined concepts of separation of powers. The seventeenth century is also in focus in David Konig's comparative treatment of legal developments in colonial Virginia and Massachusetts.[4] In particular, Konig documents the law's response to commercial development; he explains why Massachusetts law was better positioned than Virginia law to accommodate the economic forces of the future.

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1. THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992 (Russell K. Osgood ed., Supreme Judicial Court Historical Society, 1992) [hereinafter HISTORY OF THE LAW].

2. *See* Russell K. Osgood, *The Supreme Judicial Court, 1692-1992: An Overview, in* HISTORY OF THE LAW, *supra* note 1, at 9-41.

3. *See* Barbara A. Black, *The Concept of a Supreme Court: Massachusetts Bay 1630-1686, in* HISTORY OF THE LAW, *supra* note 1, at 43-79.

4. David T. Konig, *The Virgin and the Virgin's Sister: Virginia, Massachusetts, and the Contested Legacy of Colonial Law, in* HISTORY OF THE LAW, *supra* note 1, at 81-115.

Both Black's and Konig's essays represent institutional history in the broadest sense. In discussing possible judicial antecedents to the SJC[5] and in developing "the legacy of colonial law," particularly as it relates to economic change,[6] these essays provide context for more focused topics.

Special subjects receive close attention. The "Maine Connection" is the subject of L. Kinvin Wroth's essay.[7] Wroth traces the effects of Maine's judicial ties to Massachusetts, and the special role that the bench and bar played in preparing Maine for its smooth transition to separate statehood. (Maine was part of Massachusetts until 1820). The Massachusetts Constitution of 1780, the oldest written constitution still in force today, is the subject of Aviam Soifer's essay.[8] Soifer examines two periods of state constitutional history: when the Constitution was adopted (the SJC's first centennial), and the Court's bicentennial (when the Constitution was only a century old). While no single theme emerges from Soifer's treatment of the latter period, in which the problems of industrialization, immigration, and urbanization were in the forefront, the historical juxtaposition of these two venerable legal institutions—the SJC and the Massachusetts Constitution—is in itself intriguing. It is particularly useful in our own era, when constitutional scholars are rediscovering the importance of constitutional law and experience at the state level.

Judicial personalities receive considerable attention in the book. Theophilus Parsons,[9] Isaac Parker,[10] and Oliver Wendell Holmes, Jr.,[11] are subjects of separate essays, although Lemuel Shaw is not. Perhaps this is because Shaw has already received serious scholarly attention, most notably in Leonard Levy's excellent biography.[12] Yet, somehow, this commemorative volume might have offered a fresh look at the venerable Shaw, arguably the most influential figure ever to serve as Chief Justice of the Supreme Judicial Court.

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5. *See* Black, *supra* note 3, at 43.

6. *See* Konig, *supra* note 4, at 81.

7. *See* L. Kinvin Wroth, *The Maine Connection: Massachusetts Justice Downeast, 1620-1820, in* HISTORY OF THE LAW, *supra* note 1, at 171-206.

8. *See* Aviam Soifer, *The Supreme Judicial Court of Massachusetts and the 1780 Constitution, in* HISTORY OF THE LAW, *supra* note 1, at 207-39.

9. *See* M. H. Hoeflich, *Theophilus Parsons and the Culture of Practical Virtue, in* HISTORY OF THE LAW, *supra* note 1, at 117-25.

10. *See* Russell K. Osgood, *Isaac Parker: Republican Judge, Federalist Values, in* HISTORY OF THE LAW, *supra* note 1, at 153-69.

11. *See* Patrick J. Kelley, *Holmes on the Supreme Judicial Court: The Theorist as Judge, in* HISTORY OF THE LAW, *supra* note 1, at 275-352.

12. LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (Oxford University Press, 1957).

There are other subjects of special interest. The development of corporate law in the first decade of the nineteenth century;[13] the role of SJC advisory opinions in the development of the Commonwealth's constitutional law;[14] the battle over the adoption of rules of procedure patterned upon the federal rules;[15] and the impact of the Appeals Court on legal development since that court's establishment in 1972.[16] These topics are narrow in focus, but they are treated with full scholarly apparatus and offer new insights on important but lesser known areas of Massachusetts legal history.

Multiple authorship in *Festschriften*, such as this history of the SJC, can be problematic. Duplication, overlap, and lack of theoretical coherence are to be expected. But, while present in this tricentennial history to some degree, these hazards have been kept to a minimum. The absence of a central thematic focus is a particular shortcoming. Apart from those essays that deal with developments in the law rather with the Court, the only central focus is the SJC itself. No final historical perspective emerges from the book; but that is often a difficult assignment, even when court history is written by a single author. If, as Holmes said, the life of the law has been experience and not logic, it may be misleading to impose conceptual ordering on the process of adjudication at the high appellate level which, by definition, is particular and variegated—a process which defies thematic definition. If the reader does not come away from an examination of this excellent volume of essays with a single understanding of the history of the SJC, this is more than compensated for by an exposure to new subjects and important insights into the legal history of Massachusetts.

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13. *See* Dale A. Oesterle, *Formative Contributions to American Corporate Law by the Massachusetts Supreme Judicial Court from 1806 to 1810, in* HISTORY OF THE LAW, *supra* note 1, at 127-52.

14. *See* Cynthia R. Farina, *Supreme Judicial Court Advisory Opinions: Two Centuries of Interbranch Dialogue, in* HISTORY OF THE LAW, *supra* note 1, at 353-92.

15. *See* Robert G. Bone, *Procedural Reform in a Local Context: The Massachusetts Supreme Judicial Court and the Federal Rule Model, in* HISTORY OF THE LAW, *supra* note 1, at 393-44.

16. *See* Daniel J. Johnedis, *Creation of the Appeals Court and its Impact on the Supreme Judicial Court, in* HISTORY OF THE LAW, *supra* note 1, at 445-526.

ESSAY

Spare Parts, Family Values, Old Children, Cheap

Patricia J. Williams*

Across the USA, there are about 250,000 children without homes. . . . In Alaska, the whales are being fawned over because of their intelligence, their lovability. Hourly reports measure the 'terrible stress' on these endangered mammals. . . . Our endangered homeless children are under greater stress. They are also intelligent and lovable, when given a chance. . . . If we could bottle that national will and enthusiasm poured on the whales and sprinkle it on children in dangerous waters, they would be more grateful than Jonah was when a great whale spit him out rather than devour him.[1]

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An old woman walks by and she clenches her purse
When asked my opinion, I'm expected to curse
Take a look at my life . . . .
Where a man examines his life and lets out a sigh
He knows there is one way out–that escape is to die
Take a look at my life.[2]

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Let me begin with a warning: My subject here is one about which it is very hard for me to be "fair" in the sense of that tone in which most law review articles are generally written. I hope, therefore, that the reader will allow for my having chosen to reveal my anger and distress

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1. Barbara Reynolds, *Save the whales, but don't lose the kids*, USA TODAY, Oct. 21 1988, at 11A.

2. Matthew Purdy, *Budding Scientist's Success Breaks the Mold*, N.Y. TIMES, Jan. 30, 1994, at 1, 17 (quoting Jamel Oeser-Sweat's poem "*Heroism*"). Mr. Oeser-Sweat was one of 40 high school students in the country to receive the 1994 Westinghouse science prize, and is now a student at Harvard University, thanks to an interlocking set of interventions by family, friends, social programs, and his own remarkable intelligence. His poem is about the difficulties he encountered growing up in and out of foster care, hotels for the homeless, and on welfare. *Id.*

directly, at the risk of some polemicism. If my remarks inspire debate, I do hope that the debate is a productively charged one, and one that will move us all toward resolving the tensions that inspired me to write as passionately as perhaps I have.

Last week I was reading an article by that great literary mogul of the University of Chicago's School of Law and Economics, Judge Richard Posner and his associate Elizabeth Landes. In their short opus, "The Economics of the Baby Shortage,"[3] newborn human beings are divided up into white and black and then taken for a spin around a monopoly board theme park where the white babies are put on demand curves and the black babies are dropped off the edge of supply sides. "Were baby prices quoted as prices of soybean futures are quoted," they say, "a racial ranking of these prices would be evident, with white baby prices higher than nonwhite baby prices."[4] The trail of the demand curve leads straight into the arms of the highest bidder; the chasm of oversupply has a heap of surplus at the bottom of its pit.[5] In this house of horrors, the surplus (or "second quality") black babies will continue to replicate themselves like mushrooms, unless the wise, invisible, strong arm of the market intervenes to allow the wisdom of pure purchasing power to effect some clearing away of the underbrush. In a passage that some have insisted is all about maximizing the kindness of strangers, Landes and Posner argue that "[b]y obtaining exclusive control over the supply of both 'first quality' adoptive children and 'second quality' children residing in foster care but available for adoption, agencies are able to internalize the substitution possibilities between them. Agencies can charge a higher price for the children they place for adoption, thus increasing not only their revenues from adoptions but also the demand for children who would otherwise be placed or remain in foster care at the agency's expense. Conversely, if agency revenues derive primarily from foster care, the agencies can manipulate the relative price of adopting 'first-quality' children over 'second quality' children to reduce the net flow of children out of foster care."[6] The conclusion that these authors make, in a not surprising rhetorical turn, is that the current "black market" for adoptive children must be replaced with what they call a "free baby market."

When this article first appeared almost twenty years ago, it created a storm of controversy. Since Judge Posner has reaffirmed its premises

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3. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Market*, 7 J. LEGAL STUD. 323 (1978).

4. *Id.* at 344.

5. *Id.* at 327. "The thousands of children in foster care . . . are comparable to an unsold inventory stored in a warehouse." *Id.*

6. *Id.* at 323, 347. *See also* Ronald A. Cass, *Coping with Life, Law, and Markets: A Comment on Posner and the Law-and-Economics Debate*, 67 B.U. L. REV. 73 (1987).

many times, most recently in his book, *Sex and Reason*,[7] the article has remained a major bone of contention in his constellation of publications. I will leave to economists a full-fledged critique of the models presented (as well as of the more sophisticated models and analyses of adoption markets proposed by economist Gary Becker, from whom Posner borrows heavily). But my purpose in resurrecting this piece as a reference for this essay is to examine: (1) the degree to which it is a reflection of what goes on in the world of not just adoption but reproduction in general; (2) the degree to which market valuation of bodies, even when for ostensibly noble purposes, embodies what is most wrong with community as well as family in America; and (3) the possibility that a shift in focus could help us imagine a more stable, less demeaning, and more inclusive sense of community.

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When I decided to adopt a child, I was unprepared for the reality that adoption is already a pretty straightforward market. I was unprepared for the "choices" with which I was presented, as to age, race, color, and health of prospective children. I was unprepared for the fact that I too would be shopped for, by birth mothers as well as social workers, looked over for my age, marital and economic status, and race. All that was missing was to have my tires kicked.

"Describe yourself," said the application form. *Oh lord, I remember thinking, this is worse than a dating service. What's appealing about me, and to whom? Responsible non-smoker omnivore seeks . . . what? Little person for lifetime of bicycle rides, good education, and peanut butter sandwiches? Forty and fading fast so I thought I'd better get a move on?* "You can't tell them you're forty," advised a friend of mine. "No one will ever pick you." OK, I sighed. "Very well rounded," I wrote.

"Describe where you live." At the time, I was still at the University of Wisconsin, even though I was visiting at Columbia, and traveling almost every week to places like Indiana and Georgia in a frenzied ritual of academic legitimation. I struggled, as I straddled worlds, with which side I should present my "dear birthmother" letter. *Chic New York apartment with expansive square footage, north-south exposure, and a refrigerator stocked with the left-overs of fifteen different types of ethnic take-out food? Your child will grow up riding the subways and knowing the finer shades of the chardonnay and caviar lifestyle of the middlebrow and not-so famous? Or should I just offer a well-child-proofed home in that friendly dairy production center of the universe, Wisconsin, land o' butter, cream, and lakes?* "Your child will taste the world," I wrote.

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7. RICHARD A. POSNER, SEX AND REASON 409-17 (1992).

"What age, what sex," asked the social worker. "Doesn't matter," I said, "though I'd like to miss out on as little as possible."

"If you're willing to take a boy, you'll get younger," she replied. "There's a run on girls."

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"What races would you accept?" asked the adoption agency. "And what racial combinations?" There followed a whole menu of evocative options, like Afro-Javanese, Sino-Germanic, and just plain "white." I assume that this list, so suggestive of the multiple combinations of meat offered at, say, Kentucky Fried Chicken, would make Elizabeth Landes and Richard Posner very happy indeed. They advise: "The genetic characteristics of natural children are highly correlated with their parents' genetic characteristics, and this correlation could conceivably increase harmony within the family compared to what it would be with an adopted child. Nevertheless, there is considerable suitability between natural and adopted children and it might be much greater if better genetic matching of adopted children with their adoptive parents were feasible–as might occur, as we shall see, under free market conditions."[8]

"Any," I wrote, knowing that harmony genes abound in my ancestral bloodlines–yet wondering if the agency really meant to address that question to black parents. Would they truly consider placing "any" child with me if this agency happened to have a "surplus" of white babies? Would I get a Korean baby if I asked? And for all of the advertised difficulties, what does it mean that it is so relatively easy for white American families to adopt not just black children but to choose from a range of colors, nationalities, and configurations from around the world? (And I do mean *relatively* easy–for all of the publicity about the "impossibility" of white people adopting black American children, doing so is still in most instances far easier than going to Romania or China, for instance. While there are well-publicized instances of white families who are barred by local social service office policies, in most states a waiting period of about six months is the biggest institutional hurdle they will face. In addition, there are a good number of reputable private adoption agencies that facilitate and even specialize in "interracial" adoptions.)

What does it reveal, moreover, about the social backdrop of such transactions that if I "chose" a "white" child, it might reveal something quite alarming about my own self-esteem? What does it mean that if a white parent chose a black child, I daresay most people would attribute it to an idealistic selflessness that–however some blacks might feel is misguided and threatening to cultural integrity–is not generally perceived as necessarily proceeding from a sense of diminishment? Is

8. Landes & Posner, *supra* note 3, at 336.

race-neutral adoption the answer—even to the extent of barring "mild-preferences for same-race placements," as Professor Elizabeth Bartholet has suggested? While I very much agree with the impulse behind that solution, does the social reality of unbalanced race relations and racial power not suggest some constraints on complete color blindness as even possible?

While there are apparently a number of studies that claim to show that black children fare just fine when adopted into white families—and I have not doubt that this is true on any number of levels—I am at times troubled by some of the conclusions drawn from such representations: the claims that such children have "unique" abilities to deal with white people, or that they are "more tolerant." I always want to ask, more tolerant of what, of whom? More tolerant than other blacks? Or than whites? More tolerant of whites? Or of other blacks? I am particularly troubled by the notion that black children in white families are better off simply because they may have access to a broader range of material advantages by having white parents and living in the largely white and relatively privileged world. Such an argument should not, I think, be used to justify the redistribution of children in our society, but rather to bolster a redistribution of resources such that blacks can afford to raise children too. Moreover, assertions that black children actually do better in white homes play dangerously against a social backdrop in which slavery's history of paternalistic white protectionism still demands black loyalty to white people and their lifestyle as a powerful symbolic precedent for deeming black social organization "successful." Such assertions do not take into account the imbalanced intervention of state agencies in the lives of poor women and women of color—particularly in view of the disproportionate rate at which children of color are removed from their homes and put into foster care or up for adoption, with little thought for the possibility of the kinds of facilitative family counseling that are available at the higher ends of the socioeconomic latter.

In any event, I wonder how many social science studies there are about how white children fare in black homes.

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"What color?" asked the form. You've got to be kidding. I looked quizzically at the social worker. "Some families like to match," she said. You mean, like color-coordinated? You mean like the Louisiana codes? Like ebony, sepia, quadroon, mahogany? Like matching the color of a brown paper bag? Like red, like Indian, like exotic, like straight haired, like light skinned? Like 1840, is that what this means? Like 1940, sighed my mother, when I mentioned this to her. (And is this what the next generation will be sighing about, so sadly like that, in 2040? . . . .)

"I don't care," I wrote.

And with that magical stroke of the pen, the door to a whole world of plentiful, newborn, brown-skinned little boys with little brown toes and big brown eyes and round brown noses and fat brown cheeks opened up to me from behind the curtain marked, "Doesn't Care."

("This is a cheap shot," says my friend the economist. "How can anyone criticize or take scholarly issue with the breathy mother-love of such descriptions. And what does any of this have to do with the price of tea in China?" It's a good question, I guess, and all I can do is remind the reader that I am trying, quite intentionally, to problematize the clean, scientific way in which the subject is often discussed. And if it has little to do with tea or soybeans, just maybe, for example, the positioning of mother-or-any-other-love as some kind of irrelevant exterriality has a little something to do with the price of children in America.)

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My son, because he is a stylish little character, arrived at my home in a limousine. (Credit for this must also be shared with the social worker, who was a pretty jazzy sort herself.) I had a big party and a naming ceremony and invited everyone I knew. I was so happy that I guess I missed that price tag hanging from his little blue-knit beanie. A few weeks later I got a call from the agency: "Which fee schedule are you going to choose?"

"What's this?" I asked the adoption agent, flipping madly through Landes and Posner for guidance: "Prospective adoptive parents would presumably be willing to pay more for a child whose health and genealogy were warranted in a legally enforceable instrument than they are willing to pay under the present system where the entire risk of any deviation from expected quality falls on them."[9]

"Are you going with the standard or the special?" came the reply. There followed a description of a system in which adoptive parents paid a certain percentage of their salaries to the agency, which fee went to administrative costs, hospital expenses for the birth mother, and counseling. Inasmuch as it was tied exclusively to income, in a graduated scale, it clearly met the definition of a fee for services rendered. This, it was explained to me, was the Standard Price List.

"And the special?" I asked. After an embarrassed pause, I was told that that referred to "older, black, and other handicapped children," and that those fees were exactly half of those on the standard scale. Suddenly, what had been a price system based on services rendered became clearly, sickeningly, irretrievably, a price system for "goods," a sale for chattel, linked not to services but to the imagined quality of the "things" exchanged. Although it is true that, as the agency asserted , this

9. Landes & Posner, *supra* note 3, at 341.

system was devised to provide "economic incentives" for the adoption of "less requested" children, it is perhaps more than true, in our shopping mall world, that it had all the earmarks of a two-for-one sale.

I was left with a set of texts resounding in my brain, rattling with the persistence of their contradiction. One text is when Frederick Douglas's description of his own escape from slavery as a "theft" of "this head" and "these arms" and "these legs." He employed the master's language of property to create the unforgettable paradox of the "owned" erupting into the category of a speaking subject whose "freedom" simultaneously and inextricably marked him as a "thief." That this disruption of the bounds of normative imagining is variously perceived as dangerous as well as liberatory is a tension that has distinguished racial politics in America from its inception to this day.

The contrasting stories are a medley of voices like descriptions of Americans adopting children in Latin America and of having to hide them for fear of kidnapping until they were back on the plane to the United States because "desirable" children were worth a great deal of money on the open adoption block; or like *The New York Times Magazine* cover story of a white American couple who adopted a little girl from China: when the couple finally returned from Wuhan to New York City with the child, they felt as though they "had walked off with something of incalculable value–a baby–with the approval of everyone involved. What a coup, what a blessing–what a relief!"[10]

What links these sets of narratives for me is the description of a powerful emotional state that styles itself as theft, as a coup, a walking off with something right under the disapproving noses of everyone: "Sara and I regarded each other with a deep sense of disbelief."[11] I am troubled; the theft of one's own body is a kind of trickster's inversion of one's life reduced to a chattel status. But the acquisition of another for a sum considered as either a "deal" or a "steal," if not outright slavery, resembles nothing less than bounty hunting.

(A friend of mine who has given birth to two children assures me that biological parents where no money was exchanged feel exactly the same way–exhilarated, disbelieving, unworthy of the life with which they are suddenly charged. I am sure that it is true–I too feel great amazement at my own motherhood. But my point is that the ideology of the marketplace devalues such emotions, either by identifying them as externalities in and of themselves, or by using them to infuse, even impassion, certain price structures, uncritically crystallizing into a dollars and cents equivalent what we might be better off trying to understand as "priceless" relation.)

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10. Bruce Porter, *I Met My Daughter at the Wuhan Foundling Hospital*, N.Y. TIMES, Apr. 11, 1993, (Magazine), at 46.

11. *Id.*

How will my son's price at birth relate to what value doctors put on his various parts if he ever has an accident and shows up at a hospital? Will he be valued more as a series of parts in the marketplace of bodies or more as a whole, as a precious social being with not just a will but a soul? Will his fate be decided by a fellow human being who cares for him or will his "outcome" be negotiated by some formulaic economic tracking policy based on his having health insurance or a job? Will his idiosyncratic, non-market value be visible in the subconscious, well-intentioned decisions of a nice suburban doctor who has never known, spoken, lived, or worked with a black person in a status position of anything close to equality? Will "ethics" be able to consider this complicated stuff or will we decide the whole topic is too risky, too angrifying, so that forced neutrality and pretend-we-don't-see-ness will rule the day? Who will rule the fate of this most precious bit of "living property" as Harriet Beecher Stowe called that status of blacks?

"[T]he precarious difference between person and thing appears . . . as the difference between consuming and being consumed . . . the competition for personhood in the market is the choice between eating and being eaten."[12] How will our children, figured as the tidy "consumption preferences" of unsocial actors, be able to value themselves?

I was unable to choose a fee schedule. I was unable to conspire in putting a price on my child's head.

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"When Luong Hung looks in the mirror, he says, shame ripples through his body. His sad-eyed visage, his tightly curled dark hair, are daily reminders of the relationship between his Vietnamese mother, a waitress in Saigon during the war, and his father, a cargo pilot he knows only as John.

"'I feel ashamed that my mother was with a black man, and now I have to carry that,' said the slender 26-year-old refugee, his knees almost touching his chest as he perched atop a child-sized plastic chair in his Bronx apartment. 'I wish I were a white Amerasian.'"[13]

A picture of Mr. Hung showed him wearing a t-shirt with a gigantic dollar bill on it. *Were baby prices quoted as soybean prices* . . . I ruminate.

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One feature of the market as politics is that where consumer demand is supposedly high, market actors are rationalized by succumbing to the pressure to produce more; where, on the other hand, the soy surplus is great, growers stop growing. It is no wonder that as long as one's head

12. MARK SELTZER, BODIES AND MACHINES 140 (1992).

13. David Gonzalez, *For Afro-Amerasians, Tangled Emotions*, N.Y. TIMES, Nov. 16, 1992, at B1.

is locked within the box of this paradigm, a deference like Judge Richard Posner's to the fundamentally absurd notion of a purely private preference for white babies might not reveal itself immediately as insidiously eugenic. The language of the market is so clean and impersonal after all—it hardly hurts a bit when Landes and Posner slip into thinking up incentives to actually *produce* more white babies, not merely to provide incentives to white women to "give up" more of their babies for adoption. Giving things up and other artifacts of a gift economy, after all, have little place in the logical order of a productive market economy. Most alarming of all, the troublesomely excessive supply of black and other socially discarded categories of babies—i.e., the babies for whom there is this relatively low "demand"—this inspires Landes and Posner not only to try to create a set of incentives to "consume" or "take" them. Rather, they actively pursue ways of creating *dis*incentives from producing at all.

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How does one create oneself apart from such power? How does one know oneself in a world of such double-edged symbolism? What is the escape route to the future for "cheap" black bodies, for those whose existence is continually devalued or written out of the social compact altogether? One "option" I suppose, is the sad odyssey of singer Michael Jackson—his trajectory from the sweet brown-faced nine-year-old on the cover of his first album, to the strangely-effaced shell who exists apparently only in the mirror of society's harshest illusion. Another version of that path is perhaps that pursued by female rap singer Lichell "Boss" Laws. Her career is a most interesting one: from her beginnings as a middle class former cheerleader and college student—who attended private schools all her life, and who began her career doing profanity- and violence-free rap at campus functions while dressed in "little cute matching [outfits]"[14]—to her present calculatedly hard core image of swilling malt liquor on stage, toting automatic weapons and singing about shooting her boyfriend dead. Being herself ("sweet as pie," proclaims one publicist)[15] didn't sell so she toughened her act up. ("The sad truth is the harder the rapper's image, the more music they sell,' says . . . a rap music producer.")[16] *The Wall Street Journal* says that "[i]n promoting her career as a gangster rapper, Ms. Laws has made much of her experiences of living on the streets. She says she sold drugs and hung with the notorious street gang the Bloods. She also says she spent some time in jail. She didn't; and the stories about her life on the

14. Brett Pulley, *How a "Nice Girl" Evolved Into Boss, The Gangster Rapper*, WALL ST. J., Feb. 3, 1994, at A1, A16.

15. *Id.*

16. *Id.* at A1.

streets can't be verified."[17] But as Ms. Laws opines, "I'm both a gangster and a smart business person. I know what I'm doing, and I know how to make it in this business."[18]

This tactic is familiar to too many blacks: success by dissembling, dissembling styled upon the "Boo, I scared you"–potential of our fearsome demographic selves. *The New York Times* essayist Brent Staples writes about his dawning realization, while a student at the University of Chicago, that white people were afraid of him: "I'd been a fool. I'd been grinning good evening at people who were frightened to death of me. I did violence to them just by being. How had I missed this? I kept walking at night, but from then on I paid attention . . . . I tried to be innocuous but I didn't know how. The more I thought about how I moved, the less my body belonged to me; I became a false character riding along inside it."[19] Staples describes how he went through a period of whistling Vivaldi so people could hear him coming and "they wouldn't feel trapped"–in effect he hung a bell around his neck, playing domesticated cat to a frightened cast of mice. "Then I changed . . . . The man and the woman walking toward me were laughing and talking but clammed up when they saw me . . . . I veered toward them and aimed myself so that they'd have to part to avoid walking into me. The man stiffened, threw back his head and assumed the stare: eyes ahead, mouth open. I suppressed the urge to scream into his face. Instead, I glided between them, my shoulder nearly brushing his. A few steps beyond them I stopped and howled with laughter. I came to call this game 'Scatter the Pigeons.'"[20]

The gangster rapper who carves her sweet-as-pie-self up into high-priced images of a low-down market. The gentle journalist who stands on the street corner and howls. What upsidedown craziness, this paradoxical logic of having to debase oneself in order to retrieve one's sanity from the remaindered edges of market space. Are we to imagine that the dynamics of a free market are really just the same as those of a Free World?

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"Mr. Hung said all he knew about black Americans came from a movie about the antebellum South he saw in his youth.

'I heard in Vietnam that black people were slaves,' he said. 'I didn't want to be a slave.'

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17. *Id.*

18. *Id.*

19. Brent Staples, *Into the White Ivory Tower*, N.Y. TIMES, Feb. 6, 1994, (Magazine), at 24, 36.

20. *Id.* at 44.

He may still be hostage to his decidedly derogatory view of black Americans, fearfully associating them with crime and homelessness. When asked if his time here has helped persuade him otherwise, he nodded affirmatively.

'Of course it has changed,' he said. 'In the United States there is freedom. I don't have to live in the black community.'"[21]

Not long ago, some law students at New York Law School told me of an experience they had while teaching a so-called "street law" class in a New York City public high school. They asked a class of twelfth graders to break up into small groups and envision that they had to send an expedition of people to populate a new planet. They were to describe the six new architects of the brand new world, giving their race or ethnicity and their professions. In every group, Hispanics, if they were included, were car mechanics ("They're good at stripping cars" was the explanation some students gave); Asians were included in every group and were always scientists ("They're smart"); whites (including ethnics such as "French," "Italian," "Russian," as well as just "white") had the greatest numerical presence and variety of profession. No blacks were included in the new world (the one student who listed a Nigerian doctor thought that Nigeria was in Asia). The kicker is that this school was 53% black and 45% Hispanic–a milieu, and I'm guessing here, in which most whites might find be surprised to find themselves the object of such double-edged veneration. Moreover, when the law students attempted to discuss the significance of such an impressive skewing, the students–sounding for all the world like the *National Review*–uniformly protested that race had nothing to do with it, and why did the law students (who, by the way, were white) have to "racialize" everything?

This image of a planet with a hand-picked population is what *Brown v. the Board of Education*[22] and the entire civil rights movement was supposed to make better. But the tragic insistence of de facto segregation in the United States has resulted in this recurring reconstruction of an ideal world, this dream of elimination, this assemblage of parts into an imaginary whole, this habit of shopping among the surplus of the living for the luxury of self-effacement. It has resulted in a massively expensive web of idealized sensation and deep resentment.

What are the limits of this attribution to "choice" to eliminate oneself just before the emptiness swallows one up? At least some public urgency about such matters came to the fore in the recent media brouhaha in Great Britain about a black woman, married to an Italian white man, who gave birth to a "healthy boy with fair hair and blue eyes."[23] The mother had been implanted with a white woman's egg to ensure that

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21. Gonzalez, *supra* note 13, at B2.

22. 347 U.S. 483 (1954).

23. Ronald Singleton, *A child to order; Black mother chooses white test-tube baby so he won't suffer from racism*, DAILY MAIL, Dec. 31, 1993, at 3.

their offspring would be "spared the misery of racism."[24] I remember when I first heard about the so-called "Baby M" case (the first case of surrogate motherhood to receive widespread national and international attention), I had a dream that I was in one of those gigantic silos in which chickens are mass-produced. As I looked up into the dizzying height of the vast industrial space, all I could see were black women, like brood hens, sitting on thousands of little nests, a little white egg nestled beneath each one of them.

What I did not anticipate at that time was that black women would emerge as not only the vehicles through which more efficient white baby production would be fostered, but that black women would be out there busying *themselves* with the acquisition of more profitable racial properties. "Uh-oh, I'll bet that's really got them scared," chuckled a friend of mine at the British case. "Us really *having* 'their' children." She was laughing, I think at the strange juxtaposition of both mammy imagery and a kind of devilishly clever efficient breach of the supposed bounds of "white race." But she paused, grew serious, and then said, "Uh-oh. This is really *scary*." This scenario, after all, is enabled by nothing less than the transformation of the social difficulty of being black into an actual birth defect, an undesirable trait that technology can help eliminate.

Such complicated imagery of desire for survival, of wanting continuity even in disguise, of wanting to pass into new life even where a part of one has already died.

"In a regime of free baby production and sale" write Landes and Posner, "there might be efforts to breed children having desirable characteristics and, more broadly, to breed children with a known set of characteristics that could be matched up with those desired by prospective adoptive parents. Indeed, one can imagine, though with some difficulty, a growing separation between the production and rearing of children. No longer would a woman who wanted a child but who had a genetic trait that might jeopardize the child's health have to take her chances on a natural birth. She could find a very close genetic match-up to her and her husband's (healthy) genetic endowment in the baby market. However, so long as the market for eugenically bred babies did not extend beyond infertile couples and those with serious genetic disorders, the impact of a free baby market on the genetic composition and distribution of the human race at large would be small."[25]

Sometimes I feel as though we are living in a time of invisible body snatchers—as though some evil force had entered the hearts and minds of an entire nation and convinced them that they should shed their skin, cut off their noses, fly out of their bodies, and leave behind their genetic

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24. *Id.*
25. Landes & Posner, *supra* note 4, at 345.

structure as they climb the DNA ladder to an imagined freedom. It is as though some invisible hand were nudging us toward a nice obliging mass suicide, disguised as a fear of looking into one another's faces without masks, disguised as fear not of difference but of being not enough "the same as . . . ." The body has become a receptacle for the tracks of a cruel iconography. We risk a high tech internalized fascism, where it is difficult to live in a world without a conformed exterior and a submissive will.

There is a Benetton's advertisement circulating in European publications in which a photograph of Queen Elizabeth II of England is subjected to computer imagery to darken her skin and depict her as a black woman. According to British newspaper *The Sun*, "a Royal aide said the Queen was 'deeply upset.' The aide added: 'It obviously cheapens the monarchy."[26]

The article goes on to say that Benetton has given new faces to other well-known figures: the Pope becomes Chinese, Arnold Schwartzenegger becomes "a negro," and, not surprisingly, Michael Jackson becomes a white man.[27] (Sounds of protest from Mr. Jackson were apparently not forthcoming.)

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Let me end with a strange story that unfolded one day as I sat glued to the television as usual, thinking about world politics and scanning the afternoon talk shows for moments of redeeming social value. On one of these shows, the featured guest was a travel agent who was describing herself as "ugly." Her problem was apparently that she was slightly overweight, had dark skin, and was blessed with a broad nose that turned under rather than up at the end. She was extremely proficient at her job, but found herself passed over for higher-paying "client-contact" jobs in the front office, because her employer felt that image was one of the qualifications for front office jobs. "Image" was supposedly related to consumer tastes and "expectations." The "ugliness" with which she was afflicted, in other words, turned out to be the inability to please hypothetical clients desiring the exotic—clients whose keenly acculturated consumer appetites were purportedly better whetted by flat tummies, little noses, golden but not brown skins, and long hair tousled as though by soft tropical rainfall.

Lawyer that I am, I was immediately certain that this program was about employment discrimination. Sounded like a bias case to me. But

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26. Robert Jobson, Royal Reporter, *Ma'amy: Fury as benneton blacks up the Queen*, THE SUN, Mar. 26, 1993, at 1. (While I recognize that *The Sun* is a tabloid of questionable reputation, it also enjoys a daily circulation of at least three and one half million; its copy at least offers a general reflection of a fairly widespread popular consensus on matters like race.)

27. *Id.*

I am always *so* wrong. In the seat where Gloria Allred should have been sitting was another panelist, the requisite psychologist–the expert whose presence always assures us that closet cannibalism with a taste for lizard blood (or whatever) really is a treatable condition, but the first step of *Reaching Out* is up to you . . . . In this particular instance, the eager psychologist was reassuring the Ugly Black Travel Agent that more self-assertion, more self-confidence, and more aggressive sales techniques were all she needed to turn the situation around. "Just say yes to yourself," she glowed happily.

Eager for comparative data, I switched channels. In two flicks of the wrist, I was beamed aboard the world of another well-known talk show. The famous talk-show host, it turned out, was having a plastic surgery sweepstakes: prizes were being awarded for the most complete surgical makeover by a member of the audience. Again there was a panel of people all of whom were testifying about how they were going nowhere with their jobs, but then they decided to get liposuction, rhinoplasty, a nice Armani suit with big shoulderpads, and some cheek implants–and now they're running the company. Over by the edge of all these testimonials, sitting in more or less the same seat in which the psychologist had been on the first program, was an eager plastic surgeon. He too was preaching the virtues of self-assertion and self-confidence that flow from the choice to go under the knife. "Just say yes to yourself," he glowed repeatedly.

As I searched for a moral in the middle of this morass, it occurred to me that what linked my discomfort about both shows was the underlying espousal of the very worst kind of assimilationist platitudes. I don't simply mean that they were advocating assimilation into a particular cultural aesthetic or ideology, although that was obviously an important part of what was going on. What made it "the very worst kind" of assimilationism was that it was also assimilation out of the very right to coexist in the world with that most basic legacy of our own bodies. What made it so bad was the unself-conscious denial of those violent social pressures that make so irresistible the "choice" to cut off that perfect replica of one's grandmother's nose in favor of a trendier, more acceptable model.

Both programs redirected attention away from the powerful, if petty, call to conform–absolutely, in these cases–that is the perpetual risk of any socializing collective, whether family or polis. And rather than acknowledging the extent to which this is an interactive problem, both styled the issue as a mere matter of individual appearance, attitude, and control. Neither effectively addressed how the politics of prettiness comes to be so dominating that ordinary people's economic survival depends on aenesthisized self-mutilation, or that "image" has shaken itself free of illusion and become a power-concept. Put on a happy face,

was the bottom line of both programs–literally, according to the second show, and figuratively, in the first.

While I have to confess that I am a passionate fan of afternoon talk drama–this general philosophy of happy self-denial is perhaps what makes such shows so popular among mainstream America. Consider, for example, the following description of the *Oprah Winfrey Show*:

> Although she has a frank-talking, even combative manner, Ms. Winfrey does not seem to be looking for trouble. When a white woman in the always well-integrated audience mentioned that her decision about whether to help a person being physically attacked would depend on the size and color of the attacker, Ms. Winfrey did not inquire into exactly what was being implied. The daily scenes . . . of blacks and whites engaging in spirited discussion about something besides race and dividing along racial lines is refreshing.[28]

TV blacks as "combative" but not confrontational. TV whites as racist but "refreshing." TV-land as the mirror of America: simulated confrontations about race that we can all, black and white, pretend never happened; masturbatory moments of mock fear in which a white woman can express her fear of large black people to a large black person and no one will mind, not even the large black person, because after all the only reason the white woman and the large black person are even standing side by side is that we live in a world in which size and color Make Absolutely No Difference–certainly not one in which large black people frequently find themselves lost in the invisible vacuum, the self-denying silence, between the predator's rage and the mammy's indulgence.

At what cost, this assemblage of the self-through-adornment, this sifting through the jumbled jewelry box of cultural assets, selected body parts, and just the right accessories. Suspect profiles have been given demographic reality and market outcome in the politics of race and gender, displacing the lived body with alien shape, the aura that dazzles, the shadow that follows, the disfigurement that devalues. In battling the power of great social stereotypes, individual will has purified itself into a glimmering will o' the wisp: simultaneously signifying the whole self *and* the light-headed cleanliness of disembodiment. In this atmosphere of cultural anorexia, survival becomes a matter of leapfrogged incarnations, the body's apparition a mere matter of fleshy rearrangements, the purchase of self-negation all flash and desperate hoarding, symbolizing nothing.

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28. Walter Goodman, *3 Queens Of Talk Who Rule the Day*, N.Y. TIMES, July 29, 1991, at C11, C14.

ARTICLES

Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies

Joan Zorza*

I. INTRODUCTORY SUMMARY

From 1985 to 1990 experiments were conducted to determine the relative deterrent value of three different police responses to domestic violence: (1) arrest of the abuser, (2) mediation between the parties, and (3) physical separation of the parties. These experiments followed a 1983 report of the National Institute for Justice finding that arrest was more effective in deterring abuse than the other two responses, the Institute funded six "police replication experiments"; five reports have been published concerning those experiments in Omaha, Milwaukee, Colorado Springs, Metro-Dade, and Charlotte.

This article reviews the experiments, which have been popularly cited for the propositions either that (1) arrest does not deter abusers or that (2) arrest does not deter unemployed abusers. This review and analysis conclude that these commonly held views of the experiments are erroneous. In fact, as demonstrated in this paper, the published studies show that arrest generally is the superior method of deterring future violence.

A. *Findings*

The Omaha experiment found that victims were assaulted less often and injured less often within six months after the initial incident when the abuser had been arrested. The Milwaukee experiment found that repeat violence was lower in the first six months when the offender was arrested. The Colorado Springs experiment found that the police data showed a slight deterrence effect for employed abusers, while victim

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interviews found arrest was a deterrent for both the unemployed and employed. The Metro-Dade experiment found that between one and six months after the incident, the number of repeat offenses was higher when the suspect was not arrested. The Charlotte experiment found that, according to police records, arrest had the greater deterrence in the first three weeks after the incident. By six months, those abusers who received citations were somewhat less likely to commit new offenses than those arrested. Abusers had the worst recidivism rates in cases in which the parties were merely advised. According to victims, however, arrest had the greatest deterrence. The Omaha experiment also found that when offenders who were absent when the police arrived received a warrant, they were half as likely to commit another offense as those who did not receive a warrant.

However, some of the experiments found arrest was less of a deterrent for unemployed abusers. The Metro-Dade experiment found that, according to victim reports, but not police reports, after six months there was a slight increase in violence by unemployed abusers. The Milwaukee experimenters concluded that arrest did not deter the unemployed. The Omaha experiment reported that arrested unemployed suspects were more likely to re-offend than employed suspects. Colorado Springs, which also studied the issue, found only a slight difference when analyzing victims' interviews. Finally, the Charlotte experiment also found that the abuser's economic status was unrelated to the likelihood of re-offending while the abuser's prior criminal history was related.

B. *Fundamental Flaws*

The experiments themselves were fraught with fundamental design flaws that tended to understate the deterrent value of arrest. First, the studies ignored the fact that domestic violence, unchecked, usually escalates in frequency and severity. Thus, repeat offenses are to be expected, and the recidivism rate in an experimental setting should be measured not against zero but against the normal recidivism rate. Accordingly, an intervention strategy could be considered to yield a net improvement based on either an absolute decrease in abuse or a reduced degree of escalation of abuse.

Second, the experiments did not take into account the impact of decisions by prosecutors and courts subsequent to arrest. More specifically, the few studies which provided data on these responses showed very low rates of prosecution and conviction. It is likely that this failure to follow through undercut the ability of the arrest response to achieve its maximum potential for deterrence. In Milwaukee, for example, only 5% of the offenders were charged with a crime and only 1% convicted. In Charlotte, fewer than 1% of offenders were convicted and incarcerated. Thus, these experiments really studied arrest in the

absence of criminal justice follow-up. The experiments did not examine the effectiveness of arrest when there was in fact a coordinated criminal justice involving arrest, prosecution, conviction, and punishment.

C. *Major Flaws*

In addition, the experiments had numerous additional design flaws which would tend to undercut the accuracy of the results. For example, at least one experiment directed the police to make oral statements to the victim and the abuser that contained messages that discouraged victims from seeking police protection in the future. As another example, the high level of female abusers that were identified suggests that the experiments included cases of self-defense which should have been excluded. While the studies have shown women nationally represent only 6% of domestic violence perpetrators, in Colorado Springs, for example, 11% of the perpetrators were women. It is believed that 96% of women arrested for domestic violence are self-defending victims. The large number of women perpetrators raises questions about whether the experiments included a significant number of self-defense cases, each of which would have been excluded because the deterrent value of arrest would logically seem to be less with respect to efforts to protect oneself from assault.

Yet another example of the flaws found in this review was the assigning of bad risks to the arrest category. All the experiments assigned offenders who misbehaved to be arrested regardless of the police response they were originally assigned and then counted them in the arrest category.

D. *The Limited Policy Value of the Studies*

Beyond the design flaws, it is important to understand when evaluating the significance of the experiments several facts. The police experiments were limited to misdemeanors and did not study or include felonies or violations of protection orders. Moreover, the experiments were not designed to, and did not, address the effect of non-arrest on the victim, the children, or the rest of society.

More fundamentally, it should be noted that arrest has many important purposes of which deterrence is only one. Thus, the police replication experiments simply did not recognize two important values of arrest in domestic violence situations—arrest offers the victim a window of opportunity to secure safety and it can place her in touch with services that can be of help. Also of great importance is the fact that the mere act of arrest communicates a message that domestic violence is a crime. Given the long history of nonintervention in such cases, indeed of condonation of domestic violence by society, a failure to arrest tells the parties and others that domestic violence is a private matter and is acceptable.

Thus, even if arrest was no more effective as a deterrent than other forms of police intervention, it would remain an essential criminal justice system response for the protection of victims.

This article examines the police experiments which were conducted to test whether arrest on misdemeanor charges deters batterers more effectively than the traditional police responses of mediating or separating the parties. It first looks at the 1983 Minneapolis domestic violence police experiment, which was widely cited for the proposition that a proarrest policy would deter batterers. It then examines each of the police replication experiments performed in other cities, which are being cited to cast doubt on the first experiment in Minneapolis. Each experiment is individually analyzed. Then the experiments are examined as a whole. Finally, the paper draws some conclusions concerning the validity of other experiments and their policy implications.

E. *Overview*

The phenomenon of wife-beating exists in all parts of the world, and is far more prevalent than the physical abuse of children and other forms of domestic violence.[1] Anthropologists have found that physical abuse of husbands never occurs unless wife beating is present and, furthermore, that husband-beating is considerably less frequent and less serious where husband-beating occurs.[2] In almost half of all societies wife-beating occurs in most households, being present in virtually all households in 18.8% of the studied societies and in a majority of households in 29.9%. Wife beating is absent or only rarely happens in only 15.5% of societies.[3]

Domestic Violence advocates have long believed that men beat their wives and girlfriends in large part because society tolerates or encourages their behavior.[4] Those working with batterers report that abusive men find their abusive behavior to be highly rewarding since the use or threat of further violence enables them to win every argument, keep control of their partners, and maintain their identities,[5] all without much risk of prosecution or imprisonment.[6]

Consistent with this view, David Levinson's anthropological review of societies throughout the world found that a victim's friends, neighbors,

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1. DAVID LEVINSON, FAMILY VIOLENCE IN CROSS-CULTURAL PERSPECTIVES 31 (1989).

2. *Id.*

3. *Id.*

4. MILDRED D. PAGELOW, WOMAN BATTERING: VICTIMS AND THEIR EXPERIENCES 45 (1981).

5. SUSAN SCHECHTER, WOMAN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 219 (1984).

6. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence*, 1970-1990, 83 J. CRIM. L. & CRIMINOLOGY 46, 71 (1992).

and relatives were far more successful at stopping such abuse than the police and courts.[7] But in the United States and other societies where the public largely ignores incidents of wife abuse, the police, the courts, and domestic violence shelters have become the primary intervenors. Recently, the medical profession has begun to recognize its complicity in domestic violence. Some doctors have endangered women victims and increased the power and control which batterers have over them by failing to recognize the occurrence of domestic violence, by tranquilizing its victims or subjecting them to inappropriate mental health treatment. The medical profession is just now beginning to question its response to domestic violence and to ask whether to implement changes which would take years to complete.[8]

In the United States, the police are still most likely to be the first to respond to incidents of domestic violence,[9] making their actions extremely important. Yet, although battered women turn to the police for help more often than any other source, only 39% of battered women rated police services as at least somewhat effective in helping them to deal with the violence.[10]

Battered women's advocates have long been critical of police for refusing to treat domestic violence as a serious crime and for treating such violence as a private dispute between lovers.[11] But whether arresting domestic abusers is the best policy has been long debated by both criminologists and battered women's advocates.[12]

This article will examine the police experiments that were conducted in order to test the efficacy of using a mandatory arrest policy on domestic abusers. It will first examine the Minneapolis domestic violence experiment, a widely cited study that suggested that a mandatory arrest policy would deter batterers. The article will then discuss the

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7. LEVINSON, *supra* note 1, at 31, 98-107.

8. *See, e.g.*, Evan Stark & Anne Flitcraft, *Violence Among Intimates: An Epidemiological Review*, in HANDBOOK OF FAMILY VIOLENCE 293-317 (Vincent B. Van Hasselt et al. eds., 1988); SUSAN SCHECHTER, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, GUIDELINES FOR MENTAL HEALTH PRACTITIONERS IN DOMESTIC VIOLENCE CASES (1987); Lee H. Bowker & Lorie Maurer, *The Medical Treatment of Battered Wives*, 12 WOMEN & HEALTH 25-45 (1987); COLORADO DEPT. OF HEALTH & COLORADO DOMESTIC VIOLENCE COALITION, DOMESTIC VIOLENCE: A GUIDE FOR HEALTH CARE PROVIDERS (4th ed. 1992).

9. *See* David B. Mitchell, *Contemporary Police Practices in Domestic Violence Cases: Arresting the Abuser: Is It Enough?* 83 J. CRIM. L. & CRIMINOLOGY 241, 245 (1992); Bowker & Maurer, *supra* note 8, at 39; SCHECHTER, *supra* note 5, at 157.

10. Bowker & Maurer, *supra* note 8, at 39.

11. Zorza, *supra* note 6, at 47.

12. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 31 (1990); Caroline Forell, *Stopping the Violence: Mandatory Arrest and Police Tort Liability for Failure to Assist Battered Women*, 6 BERKELEY WOMEN'S L.J. 215-61 (1991).

police replication experiments performed in other cities, which cast doubt on conclusions of the Minneapolis study. Each of these experiments will be analyzed individually as well as in the context of other experimental policies. Finally, the article will draw conclusions and suggest a number of recommendations regarding the mandatory arrest policy.

II. THE MINNEAPOLIS DOMESTIC VIOLENCE POLICE EXPERIMENT

From early 1981 to the middle of 1982, the Minneapolis Police Department and the Police Foundation conducted the first scientifically controlled experiment to test the effect of arrest on domestic violence crimes.[13] Funded by the National Institute of Justice, the study considered 314 cases involving domestic violence.

When the results of the Minneapolis police experiment were first released, domestic violence advocates were generally pleased to find that the results seemed to support their belief that the threat of criminal arrest deters domestic abusers, and that the prevalence of domestic violence is mainly due to society's failure to treat battering as a serious crime.

In the Minneapolis experiment, official records showed that six months after police responded to misdemeanor domestic violence and either arrested, advised, or removed the alleged perpetrator, 10% of those arrested, 19% of those advised, and 24% of those removed from the scene had subsequently repeated their violence.[14] Those victims who were later interviewed confirmed that arresting their abusers put them at considerably less risk than the other two possible police responses: 19% of the suspects arrested, 37% of those advised, and 33% of the suspects removed had repeated their violence.[15] Both the official and victim reports strongly suggested that arrest was the most effective police response and had the strongest deterrent effect.[16]

However, the Minneapolis study results were questioned for a number of reasons. In this study, only 49% of the victims participated in a follow-up interview six months after the initial incident. The reasons cited were that many victims had relocated or refused to cooperate.[17] Another problem that could have contributed to the study's inaccuracy arose because responding officers had advance knowledge of which response to a domestic violence situation they would be using prior to

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13. Lawrence W. Sherman & Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, POLICE FOUNDATION REPORTS (Police Found., Washington, D.C.), Apr. 1984, at 1.

14. *Id.*

15. *Id.* at 6.

16. *Id.* at 1.

17. *Id.* at 4-5.

arrival on the scene. Officers may have violated the study's assumption that cases were randomly allocated by failing to respond to domestic disturbance calls or by reporting incidences of misdemeanor domestic abuse cases as "felony assaults" or "nonmisdemeanors."[18] For example, an officer might misclassify a misdemeanor as an incident involving an acquaintance or friend, or fail to make an arrest near the end of his or her shift or before a vacation to avoid spending extra time on duty. Additionally, the fact that only a few police officers from two precincts contributed the vast majority of cases included in the study also could have compromised the results.[19]

Before concluding that the study had a major impact on police responses to incidents of domestic violence, it should be remembered that the impetus to arrest domestic abusers cases predates the release of the Minneapolis domestic violence police experiment in the early 1980s. In 1976, police departments in Oakland[20] and New York City[21] were sued for failing to protect adequately battered women. Both cases resulted in judgments that required police to protect battered women, through such measures as mandatory arrest in cases in which a protective order had been previously issued.[22] The success of these actions spurred an awareness of the inadequacy of the standard police response to domestic violence and the need for change. Although many police departments settled similar lawsuits, others agreed to revamp their policies and practices prior to the institution of any legal action.[23] Municipal insurers were quick to identify the financial implications of the police's continual refusal to arrest husbands who beat their wives, particularly after *Thurman v. City of Torrington*,[24] in which the court awarded Tracey Thurman and her son $2.3 millon dollars in damages for the police department's negligent failure to protect her from her abusive husband. Police departments that resisted efforts to compel them to change their arrest practices and policies after the Oakland and New York City cases were forced to do so by the threat of huge monetary damages available under *Thurman*.[25]

Oregon enacted the first statute in the country that required police to arrest anyone if they had probable cause to believe the person had

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18. Helen J. Mederer & Richard J. Gelles, *Compassion or Control: Intervention in Cases of Wife Abuse*, 4 J. INTERPERSONAL VIOLENCE 25, 28-29 (1989).

19. *Id.* at 29.

20. Scott v. Hart, No. C-76-2395 (N.D. Cal., filed Oct. 28, 1976).

21. Bruno v. Codd, 396 N.Y.S.2d 974 (N.Y. Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 407 N.Y.S.2d 105 (N.Y. App. Div. 1978).

22. Laurie Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7, 14-15, 21-23, 32-33 (1978).

23. BUZAWA & BUZAWA, *supra* note 12, at 75.

24. 595 F. Supp. 1521 (D. Conn. 1984).

25. Zorza, *supra* note 6, at 60.

committed a domestic violence assault or had caused an individual subject to an order of protection to be in fear of serious physical injury.[26] By mid-1983 and prior to the release of the Minneapolis study, thirty-three states had enacted statutes that permitted police to make arrests in misdemeanor domestic violence cases, and six states had made arrest mandatory in some domestic violence situations.[27] Before the results of the Minneapolis experiment were released, battered women's advocates could only infer from experience the deterrent effect that arrest would have on a batterer. Advocates also knew that arresting domestic abusers would send a message to their victims, as well as to society as a whole, that domestic violence was a crime that would not be condoned. The victim's perception of domestic violence as a serious crime was at least as important as the abuser's understanding that his behavior was wrong.

While deterrence was not the sole rationale for the enactment of most laws encouraging arrest, once the Minneapolis study was released, a number of police departments and policymakers questioned whether the Minneapolis experience was universal and whether its results could be replicated elsewhere.

The Minneapolis experiment tested the hypothesis that arrest had a deterrent effect on batterers and concluded that it did.[28] However, the mechanism driving the policy's deterrent effect was not studied and the study's conclusion on this topic remained speculative. "[F]ear of further criminal sanctions . . . the implications of arrest for relationships with friends, family and neighbors . . . concern about what an arrest will do to their employment prospects" and other factors were all considered possibilities.[29]

Combining social sanctions with formal criminal sanctions is believed to enhance the deterrent effect. Embarrassment, loss of job, and/or loss of valued relationships all combine to deter further the domestic abuser.[30] A study of men's perceptions of a hypothetical domestic assault arrest policy indicated that these very factors made men fear being arrested for beating their wives.[31] Yet, because this study was

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26. OR. REV. STAT. §§ 107.700-.730 (1991).

27. Lisa G. Lerman & Francis Livingston, *State Legislation on Domestic Violence*, 6 RESPONSE 1, 4 (Sept./Oct. 1983).

28. Antony M. Pate & Edwin E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM. SOC. REV. 691, 691 (1992).

29. Richard A. Berk & Phyllis Newton, *Does Arrest Really Deter Wife Beating? An Effort to Replicate the Findings of the Minneapolis Spouse Abuse Experiment*, 50 AM. SOC. REV. 253, 262 (1985).

30. Pate & Hamilton, *supra* note 28, at 692.

31. Kirk R. Williams & Richard Hawkins, *The Meaning of Arrest for Spouse Assault*, 27 CRIMINOLOGY 163, 167, 178 (1989).

based on a hypothetical arrest, it remains unclear whether men who were actually arrested would have responded in the same manner.[32]

Those who were to conduct police replication experiments hypothesized that abusers who were married and/or employed had more to lose by being arrested than those who were not. Thus the deterrence value of a mandatory arrest policy would be highest for abusers who were married and employed, moderately high for those who were either married or employed, and least effective for those who were neither married nor employed. The experimenters assumed that a married abuser subject to arrest would not risk the loss of his spouse as well as humiliation, a risk which, they conjectured, would affect an unmarried but cohabiting abuser less strongly.[33]

III. THE POLICE REPLICATION EXPERIMENTS

The designers of the six police replication experiments were eager to test these new deterrence theories as well as to see if the arrest of abusers in other communities would result in the same deterrent effect that occurred in Minneapolis. Within two years of the release of the results of the Minneapolis police experiment, the National Institute of Justice funded another project in order to determine whether the findings in the Minneapolis experiment could be replicated elsewhere, this time in Omaha, Nebraska.[34] Subsequently, the National Institute of Justice funded five more police studies.[35] To date, the results of five of the six replication studies have been released.

Each experiment team designed its own experiment. Consequently, none of the police replication studies were identical to either the other studies or to the original Minneapolis police domestic violence experiment. Each team chose its own mechanism to document its experiment, including the report's content and emphasis.

Each replication experiment is described and analyzed below.

A. *Omaha Domestic Violence Police Experiment*

1. Summary

The Omaha Domestic Violence Police Experiment found that victims were assaulted less often and injured less often within six months after

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32. Pate & Hamilton, *supra* note 28, at 692.

33. *Id.* at 693.

34. FRANKLYN W. DUNFORD ET AL., NAT'L INST. OF JUSTICE, THE OMAHA DOMESTIC VIOLENCE EXPERIMENT: FINAL REPORT 2 (1989) [hereinafter THE OMAHA DOMESTIC VIOLENCE EXPERIMENT]

35. Franklyn W. Dunford et al., *The Role of Arrest in Domestic Assault: The Omaha Police Experiment*, 28 CRIMINOLOGY 183, 184 n.1 (1990) [hereinafter *The Omaha Police Experiment*].

the incident when the abuser had been arrested than when he had not been. However, it found that within one year after the incident victims had been injured as often, and hit slightly more often. Significant differences were found in incidents where the offender was no longer present when the police arrived, depending on whether warrants were issued for the offender's arrest. Those offenders who did not receive a warrant were twice as likely to commit another offense as one for whom a warrant had been issued. The experiment also found that a significant number of offenders reabuse their victims for the first time more than a year after the first incident.

The Omaha experiment expanded on the Minneapolis study in which the police had responded randomly to eligible domestic violence situations (where both parties were present when the police arrived). The officers would either (1) arrest the abuser, (2) separate him from the household, or (3) use mediation to advise the parties on the appropriate conduct that would either best prevent violence or resolve the conflict.

2. Discussion

In Omaha, occurrences of domestic violence where both parties were present when police arrived were also randomly assigned to one of the three groups. Separation of the parties, however, was achieved by either forcing the suspect to leave the scene, as was done in Milwaukee, or by convincing the victim to do so. Suspects were persuaded to leave in 68% of cases and victims in 32% of the Omaha separation cases.[36] In addition, for the more than 40% of Omaha cases where the perpetrator had already left the scene by the time the police had arrived, a second experiment additionally called for the police to respond randomly to eligible cases by either issuing or not issuing a warrant for the suspect's arrest. These two Omaha experiments became known as the replication experiment (for eligible cases where the offender was present) and the offender-absent experiment.[37]

As in the Minneapolis experiment, eligibility for inclusion in the Omaha police replication experiments depended on state laws or policies governing domestic violence and arrest criteria. Eligibility for incorporation in the two Omaha experiments depended upon whether the following criteria were found: (1) the case must involve a clearly identified victim and suspect, (2) parties eighteen years of age or older, (3) parties that had lived together sometime during the year preceding the assault, and (4) the police had probable cause for an arrest for misdemeanor assault. For the replication study there was a fifth

36. THE OMAHA DOMESTIC VIOLENCE EXPERIMENT, *supra* note 34, at 24.
37. *Id.* at 5 n.3.

criterion, no arrest warrant could be on file for either party, presumably because the police would arrest those abusers.[38]

In contrast to Minneapolis, where the study had considered all domestic violence cases in particular areas of the city, Omaha considered selected calls from all parts of the city.[39] Omaha victims included in the study were interviewed three times by female interviewers matched to their ethnic background. The first interview occurred approximately one week after police intervened, the second about six months after the incident, and the third approximately one year following the incident. Interviews were always conducted in absolute privacy and almost always in the victim's home. In the Omaha replication study, however, 20% of the victims failed to complete the initial interviews and 27% did not complete the six month interviews. In the offender-absent cases, 16% of victims did not complete the initial interviews and 21% failed to be interviewed after a six month interval.[40] All but three of the thirty-two victims lost between the two interviews had moved and could not be located by police.[41] The police, court, and jail record searches, and the third interviews, scheduled twelve months after the incident, were not included in the original analysis because of funding and time limitations. However, they were included in a 1992 article.[42]

3. Results of the Omaha Replication Experiment

In the Minneapolis experiment, when the police were directed to separate the parties in a domestic violence situation, they invariably removed the abuser. In contrast, the police in Omaha, perhaps aware that they had no legal authority to compel either party to vacate their home,[43] persuaded the abuser to leave in 68% of the ninety-one cases and convinced the victim to leave in the remaining 32% of these cases.[44] Most of those who left the residence in the Omaha replication study stayed with either a relative (40%) or a friend (16%), with the average separation lasting seventy hours.[45]

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38. *Id.* at 5.

39. Throughout the eighteen-month Omaha experiments, calls to the "C" shift from 4:00 p.m. to midnight were included. Approximately sixty percent of all disturbance calls in the city were reported during the "C" shift hours. "D" shift calls (8:00 p.m. to 4:00 a.m.) were also included for the first six months of the Omaha experiment, until that shift was disbanded. *Id.* at 4 n.2.

40. *Id.* at 19.

41. *Id.*

42. Franklyn W. Dunford, *The Measurement of Recidivism in Cases of Spouse Assault*, 83 J. CRIM. L. & CRIMINOLOGY 120 (1992) [hereinafter *Recidivism*].

43. THE OMAHA DOMESTIC VIOLENCE EXPERIMENT, *supra* note 34, at 24.

44. *The Omaha Police Experiment*, *supra* note 35, at 190.

45. *Id.*

The eighty-one victims reporting on mediation indicated that the police advised the victim to leave 21% of the time; offered legal advice in 17% of the cases; asked the victim her preference 10% of the time; offered advice on the marital relationship to 6% of the couples; gave advice on available services in 11% of the situations; talked with both parties in 10% of the cases; told 6% of the couples to calm down; asked 4% of the parties if they would be alright; gave personal advice to both parties 5% of the time; and used an unreported response in 7% of the cases. Counseling was seldom suggested. Twenty-six victims reported two responses; the rest just one.[46]

The police operating in the mediated response mode primarily advised separation and likely spent considerable time in the separation response persuading couples to separate. This, however, caused victims much legitimate confusion in distinguishing between these two responses.[47] This confusion caused the two response categories to be combined into a single category,[48] the informal nonarrest police response.

In the ninety-seven cases where the victim reported that police had arrested the suspect, 60% of the victims indicated that they had not wanted an arrest made, 65% said that the abuser had blamed them for the arrest, and 21% indicated that the abuser had threatened them because of the arrest. However, 93% of the victims reported that the presence of police stopped the violence (versus 87% when the parties had been separated and 77% when mediation was used).[49] In cases where the police made an arrest, victims may well have been confused as to whether the police presence or the arrest of the abuser was responsible for the termination of physical abuse. Because the violence stopped at least during the interval while the suspect was in police custody, the 7% of victims who responded that the police presence did not stop the abuse may have been interpreting the question as asking whether violence stopped on a long term basis.

Length of arrest of offenders varied enormously when the domestic abuser was arrested. Less than 30% of the suspects were released within two hours, the average time before release was fifteen hours and forty-six minutes, and 48% of offenders remained in jail for at least twenty-four hours.[50] Bail amounts ranged from $50 to $850, with 65% of the abusers paying $350 and 26% paying $100. Almost half (47%) of the

46. THE OMAHA DOMESTIC VIOLENCE EXPERIMENT, *supra* note 34, at 22-23.
47. *Id.* at 11-12.
48. *The Omaha Police Experiment*, *supra* note 35, at 199.
49. THE OMAHA DOMESTIC VIOLENCE EXPERIMENT, *supra* note 34, at 22, 24.
50. *Id.* at 25-26.

abusers were released on bond, 50% were released after being arraigned in court, and the remaining 3% were transferred to other facilities.[51]

Of the male suspects in the Omaha replication experiment, 65% had previously been arrested as compared to 59% in the Minneapolis experiment. Omaha courts clearly took domestic violence more seriously than did Minneapolis courts; 64% of repeat offenders were sentenced to jail, probation and/or fines in Omaha as compared to only 2% in Minneapolis.[52]

Based on official police, court, and jail records searched both six and twelve months after the initial incident, there was little statistical difference in the rates of recidivism regarding the same suspect and victim based on the number of suspects rearrested and the number of new complaints naming the suspect. Although a slightly higher percent of those originally arrested showed no recidivism, a higher percent of cases having two, three, or four repeat offenses occurred where the offender had been arrested.[53]

Domestic abuse victims reported that six months after the initial incident they had been assaulted less frequently and were less often injured when their abuser had been arrested than when he had not been. However, victims did indicate that they were more afraid of the abusers after arrests had occurred. After one year had passed, however, the victims' fears were shown to be justified, as they again began to be injured as often, assaulted somewhat more often, and continued to be more afraid than those whose abusers had not been arrested.[54]

The data obtained one year after the initial police response for the 247 offender absent cases and the 330 replication studies were combined for purposes of analysis.[55] Based on the total population of 577 cases ending in the *arrest* of the abuser, 10% of the offenders recidivated for the first time within the first six months as compared to 7% during the second six months. The occurrence of recidivism as officially documented by the study decreased from 17% to 13% within these two periods when suspect failure (i.e., recidivism) was broadened to include cases in which the police were called and filed an official complaint report. Based on data from interviews with the victims, recidivism decreased from 26% for the second six months to 20% for the second six months for new incidents of injury, from 41% to 33% for repeated episodes of hitting and/or pushing, and from 52% to 41% for instances in which victims reported being fearful of injury.[56]

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51. *Id.* at 25.
52. *The Omaha Police Experiment, supra* note 35, at 193-94.
53. *See Recidivism, supra* note 42, at 122-30.
54. *See* Tables I & II, *infra* at notes 289-90.
55. *Recidivism, supra* note 42, at 125, n.10.
56. *Id.* at 128. *See* Table I, *infra* note 291.

Surprisingly, few repeat cases involved recidivism in both the first and second six month time periods. The more official the police response (i.e., when police arrested or issued a warrant) or serious the offense, the less likely that recidivism was reported in both time periods. Only 5% of arrest reports, 20% of police complaints, and 32% of victim reports of injury show recurrent violence in both time periods.[57]

4. The Offender-Absent Experiment

In cases where the offender was not present when the police arrived, the officers randomly informed the victim that a warrant would be issued for the suspect's arrest. The eighty-three victims interviewed where warrants had been issued reported that the suspect had remained away after the assault for two and one-half days. Almost a third of the suspects (32%) had not returned within one week, 30% were absent for two hours or less, and 48% left for at least twenty-four hours. According to the victims, about 50% of the suspects knew that a warrant was issued, primarily because 51% of these victims had informed the offender. Another 26% of the suspects were informed about the warrant by a relative or friend.[58] The prosecutor's office, in fact, issued eighty-seven warrants (78%) of the suspects in the 111 cases assigned to receive warrants. In five cases (4.5%), the prosecutor declined to issue a warrant, and in nineteen cases (17%) no record of any warrant was ever located.[59]

Slightly more cases (136) were randomly assigned have no arrest warrant issued. The 115 victims who reported on this treatment reported that in 100 (87%) of these cases, the police discussed the assault incident and in 106 (92%) the police asked if they wanted to file a complaint against the offender. In the seventy-seven cases (67%) where the victim desired a complaint filed, the police did take a formal complaint. Seventy-nine victims (69%) said they had wanted a warrant filed for their abuser's arrest. The police had presumably advised them, as part of their standard response, of their right to seek an arrest warrant from the prosecutor's office. Abusers spent an average of two days away from their victims; 32% of the offenders returned within two hours, and 31% after twenty-four hours or more.[60]

The results of the offender-absent experiment, unlike the replication study, showed significant differences in outcome. Those offenders assigned to be the subject of an arrest warrant scored much lower on both prevalence and frequency of repeat offenses, while those not subject to a warrant had a much higher rate of repeated conflict. An

57. *Recidivism, supra* note 42, at 128. *See* Table II, *infra* note 290.
58. *The Omaha Police Experiment, supra* note 35, at 25-26.
59. *Id.* at 26.
60. *Id.* at 26-27.

offender was more than twice as likely to commit another domestic abuse offense when no warrant for his arrest was issued (11.8% versus 5.4%).[61]

Experimenters reported that victims assigned to the warrant group felt less threatened (48.8% versus 58.0%), were less likely to be pushed or hit (34.5% versus 47.3%), and were less likely to be physically injured again (21.4% versus 36.6%).[62]

5. Analysis of the Offender-Absent Experiment

The offender-absent experiment suggests that in jurisdictions where the prosecutor largely follows through in issuing warrants, a pending arrest may have more of a deterrent effect than an actual arrest that is not followed up with a criminal prosecution, a conviction, and punishment. Before assuming that issuing a warrant is more effective than arrest, however, one should realize that offender absent cases give responding officers little room to confuse the identity of the parties. There is no possibility of arresting both parties and less likelihood of inappropriately responding to the victim. Either the officer finds that there was probable cause to issue a warrant against the absent offender, or the officer does not. It is possible that the simplicity of this analysis was largely responsible for the success of the offender absent experiment.

Furthermore, the experiment looked only at those suspects for whom warrants were to be issued. It might have been useful to have compared the cases where warrants were actually issued with those where warrants were to have been issued, but were not. Were the two groups statistically similar or were there major differences? Was the effect, which was characterized as a deterrence, caused by the uncertainty of the long wait? Did the two subgroups have similar recidivism rates? If there was less recidivism in the group which actually received a warrant, then the results of the offender-absent experiment are even more persuasive, suggesting that follow through within the entire criminal justice system could further enhance the results.

Before rushing to recommend that warrants be issued for all misdemeanor domestic violence assaults, it must be determined whether racial, ethnic, or socioeconomic bias will be greater when the prosecutor's office becomes involved. Whether abusers in other jurisdictions would respond as strongly to an arrest warrant as they did in Omaha, whether the deterrent effect applies equally to all segments of the population (especially the unemployed, for whom the studies allege arrest was less of a deterrent than for the employed), and whether

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61. *Id.* at 50-51, 53; *see* Table III, *infra at* note 291.
62. *The Omaha Police Experiment, supra* note 35, at 52.

warrants keep working for repeat offenders. Policymakers will also want to know the relative cost of arresting each abuser at the scene of the crime as compared to the expense of sending the case to the prosecutor's office for issuance of a warrant and arrest.

Given that the Omaha experiments were only eighteen months in duration, it is unsettling that only 577 cases were identified in that time which met the criteria for either experiment. Clearly the level of police discretion involved explains why so many cases that were screened out of the experiment should have been investigated. The experiment was designed to eliminate some of this discretion by not assigning a police response until after a case had been identified as meeting the experiment's criteria.

Finally, Omaha, like a small number of other jurisdictions, forces victims to pay a fee to the prosecutor to prosecute their domestic violence cases. In Omaha the fee was twenty-five dollars for the issuance of a warrant.[63] Any cost imposed in order to prosecute a crime are inappropriate, counter-productive, and possibly unconstitutional, particularly for indigents. Victims of domestic violence are far more likely to have no access to funds as part of the control which their abusers exercise over them.[64]

6. Conclusions About the Omaha Experiments

A follow-up search of police records for any new arrests or complaints in the 577 Omaha cases conducted forty-five months after the study began found that some suspects committed their first act of recidivism against the same victim years after the initial incident. While victims were most at risk immediately after the first incident, between twenty and thirty percent of the perpetrators re-abused their victim for the first time long after the first year concluded.[65] This suggests that while some deterrent effect was evident, sentences and probationary periods imposed on offenders should routinely be much longer. Similarly, protection orders should be issued for a *minimum* of three to five years if they are to aid the average victim. Even these suggested time periods may be insufficient because the study did not detail the number of repeat incidents of violence that were committed and how long after the initial incident they occurred, but only described the first repeat incident.

Unfortunately, the study never examined the perpetrators' state criminal records, let alone those in other jurisdictions, nor did it

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63. *Id.* at 66.

64. Yet, in many jurisdictions which have court fees (which we find equally objectionable in protective order cases), a spouse's income and assets are deemed available to the victim, thus effectively preventing her from having access to court.

65. *Recidivism, supra* note 42, at 132-35.

consider acts of violence by the offender against other victims. Society's tendency to see domestic violence as only a private matter between two people in a relationship masks the reality that too often if abusers stop battering former lovers, it is only because they abuse new ones.

As the study also noted, police do not always respond to every call, and many incidents of domestic violence are never brought to their attention. Furthermore, if one or both of the parties moved, as does one in seven Americans every year, continued violence is unlikely to be discovered.[66]

B. *The Milwaukee, Wisconsin Police Replication Experiment*

1. Summary

The Milwaukee Replication Experiment found that repeat violence was lower during the first six months when the offender had been arrested, as contrasted to merely warned. The experiment found that the rate was the same for six to eleven months, but that in months eleven through eighteen the warning group showed less recidivism. The experimenters also concluded that arrest deterred the employed, but not the unemployed.

The study compared cases where the abuser was held in custody after arrest for only three hours and no bail (short arrest), with cases where the abuser was held in custody for twelve hours and had $250 bail (full arrest). The study found that full arrest had an only slightly greater deterrent effect than short arrest.

The study included abusers and victims who knew about the city's mandatory arrest policy; required the police to give a warning message which would discourage victims from seeking further police protection; had a high level female offenders; and, arrested abusers after their victims were asked if they wanted an arrest and said no. In addition, few abusers were charged and convicted.

2. Discussion

The most carefully executed police replication study was completed in Milwaukee, Wisconsin. Virtually every police response was carried out as if it had been randomly assigned. Less than 2% of cases received a response other than the one which had been assigned.[67] Once it was determined that a case was eligible for inclusion in the study, the responding officer radioed to police headquarters for

66. *Id.* at 132.

67. Lawrence W. Sherman et al., *Crime, Punishment, and Stake In Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680, 684 (1992) [hereinafter *Legal and Informal Control*].

assignment of one of the three possible responses.[68] Eligible domestic violence cases included those occurring in the four racially mixed police districts which contained the city's highest concentration of poor minorities during the power shift (7 p.m.–3 a.m. except 8 p.m.–4 a.m. some Saturday nights).[69] Only 6% of the cases did not involve a currently or formerly married couple or cohabiting intimate partners.[70]

The Milwaukee experiment sought to test not only whether arrest deters abusers, but whether the length of time that an abuser is held in custody after arrest makes any difference. In Milwaukee, the average time for a full arrest (as opposed to a short arrest) was almost twelve hours; but over half of all small police departments surveyed in Wisconsin held abusers arrested for misdemeanor domestic violence offenses for less than three hours,[71] and detention times of less than two hours were common around the nation.[72] The Milwaukee experiment designers wanted to test the hypothesis that a short arrest and detention time (two to three hours) would actually increase the incidence of retaliation against the victim in both the short-term and the long-term on the theory that arrest would anger the abuser but not be a sufficiently unpleasant experience to deter them from a repeat offense.[73]

Accordingly, the designers devised three responses that would include a test of their hypothesis that short arrests would increase retaliation against victims. The three responses were full arrest, short arrest (two to three hours), and a warning to both parties. To standardize the responses, police were trained and given a laminated card with the script to read depending on which of the three responses was randomly assigned. The scripts read:

> FULL ARREST: 1. You are under arrest for battery. 2. Battery is a crime against the state. 3. We are pressing charges against you, not the victim ([hand]cuff suspect before conveyance). SHORT ARREST: 1. You are under arrest for battery. 2. Battery is a crime against the state. 3. We are pressing charges against you, not the victim ([hand]cuff suspect before conveyance). 4. If you cooperate, you may be released in a few hours. 5. If we have to come back here tonight for the same thing, you will be arrested and held for $200 cash bail ([hand]cuff suspect

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68. Lawrence W. Sherman et al., *From Initial Deterrence to Long-Term Escalation: Short-Custody Arrest for Poverty Ghetto Domestic Violence*, 29 CRIMINOLOGY 821, 828 (1991) [hereinafter *Short-Custody Arrest*].

69. *Id.* at 826.

70. *Id.* at 827.

71. *Id.* at 824.

72. Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 147 (1992) [hereinafter *The Milwaukee Experiment*].

73. *Short-Custody Arrest*, *supra* note 68, at 825.

> before conveyance). WARN: 1. We're not going to arrest anyone here tonight. 2. If we have to return, someone will go to jail. 3. This is a list of people that can help you, both of you, with your problem. 4. The D.A.'s office is on that list and you can contact them if you want to press charges.

The "list" was the same one handed out to all domestic violence victims (including those receiving the full and short arrest responses) under the city's mandatory arrest policy.[74]

Although not discussed or not emphasized, another major difference between the full and short arrest responses was that for a long arrest bail was set at $250, while no bail was set in the case of a short arrest.[75] Obviously, no bail was set for the warning response as the suspect was not arrested.[76]

The experiment called for the first 900 victims (out of 1200) to be interviewed soon after the incident, and for all 1200 victims to be interviewed six months after the presenting incident. In addition, other records were checked for recidivism: "(1) arrest reports on the suspects involving the same or other victims, (2) offense reports filed by the same victim against the same suspect, and (3) hotline records" of all probable cause domestic violence cases which the police routinely provide the local shelter.[77] The hotline records were judged by researchers to be the best data source for evaluating the experiment.[78]

3. The Results of the Milwaukee Experiment

In Milwaukee, surprisingly few batterers were convicted. Only thirty-seven (5%) of the 802 offenders were ever charged with the crime for which the police had responded and only eleven (1%) of the 802 were actually convicted.[79]

In cases with at least one instance of repeat violence, the "prevalence of recurrence" was much lower when the couple next spent any time together after the initial police response where the offender had been arrested, than where the police merely issued a warning. In the warning group, 7% of victims were beaten as soon as the police left.[80] Full arrest had only a slightly greater deterrent effect than short arrest (1.7% versus 2.2%).[81] This difference was so small that it is considered to

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74. *Id.* at 829 n.3.
75. *The Milwaukee Experiment, supra* note 72, at 147.
76. Further standardization in the Milwaukee experiment was provided by having research staff ride on patrol with the officers to give them feedback on their performance. *Short-Custody Arrest, supra* note 68, at 829.
77. *Id.* at 832-33.
78. *Id.* at 833.
79. *Id.* at 832.
80. *Id.* at 834.
81. *Id.*

have disproved the hypothesis that short arrest would increase retaliation against victims.

As time went on, short term arrest continued to have less of a deterrent effect than long-term arrest.[82] However, during the second thirty days of the experiment the hotline reports indicated that the initial deterrent effect of short arrest, relative to the effects of those warned, had disappeared.[83] Eighteen months after the initial incidents, both the hotline and arrest records showed that the highest rate of recidivism was in the short arrest group.

The experimenters combined the short and full arrest group statistic into one arrest group and compared it to the warning group. They found that the arrest group showed less recidivism for the first six months following the incidents and about the same rate in months six to eleven, but that in months eleven to eighteen the warning group showed less recidivism. The experimenters, however, did not indicate which data were used to reach this conclusion: victim reports, hotline reports, arrest records, or some combination of these records.[84]

In Milwaukee, the experimenters found that arrest did deter employed abusers, but the study did not specifically demonstrate the deterrence of the unemployed.[85]

Based on victim reports, arrest did not escalate the violence in either the first or second six month interval after the initial police response. Yet based on the "official measures" (hotline and arrest records), while arrest did not increase the incidence of violence in the first six months, such an increase did occur in the second six months.[86]

Analysis of the Milwaukee data "show[ed] that neither race nor prior offenses for domestic violence condition[ed] the effect of arrest on recidivism."[87] However, the hotline data showed that more African-Americans committed subsequent offenses than did whites (38% versus 28%), and African-American abusers committed 150% as many subsequent offenses as whites.[88]

4. Analysis of the Milwaukee Experiment

In contrast to the many precautions taken to insure that the experiment would produce unbiased results was the language used by the police in the Milwaukee experiment. Indeed, the warning message

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82. *Id.* at 841.

83. *Id.* at 836. *See* Table IV, *infra* at note 292.

84. *The Milwaukee Experiment, supra* note 72, at 153-54.

85. Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1, 30 (1992) [hereinafter *Misdemeanor Domestic Violence*].

86. *Id.*

87. *Legal and Informal Control, supra* note 67, at 686.

88. *Id.* at 684.

seemed designed to discourage any battered woman from trusting the police and, hence, ever calling them back again. Instead of identifying and warning the abuser, both parties were threatened that "someone will go to jail" if the police have to return. Again, both parties were told they each had a problem and needed help, and both were informed they could contact the district attorney's office to file charges. Such a message would aggravate the dynamic of the situation by enabling the abuser to feel justified in blaming the victim for what should be solely his problem. It would also further confuse and act to blame the victim, and likely frighten her from ever trying to get help again. Such a warning might also lead the victim to believe that the police would not protect her in the future. Indeed, the victims who received this warning were the most likely to disappear and thus be unavailable for follow-up interviews. Experimenters presumed that those victims were not reassaulted by their abusers unless these men later came to police or court attention. Those victims whose abusers had merely been warned reported that they lived together with their abuser for a fewer number of days as compared to victims where an arrest was made.[89] Since none of the parties were separated by an arrest, this surprising result suggests that the inappropriate police advice increased victims' feelings of guilt and made them feel less empowered and less in control.

C. *The Charlotte Domestic Violence Police Experiment*

The Charlotte, North Carolina police replication study compared three different police responses to misdemeanor violence directed by an adult male against his adult wife, ex-wife, cohabitant female partner, or ex-cohabitant female partner.[90] The experiment ran from August 8, 1987 to June 30, 1989 and covered all cases in the city, twenty-four hours per day.[91] To be eligible for misdemeanor arrest in North Carolina, and hence inclusion in the experiment, the offense must have been committed in the officer's presence or the officer must have had probable cause to believe that the offender committed a misdemeanor and would either (a) not be apprehended unless immediately arrested, or (b) potentially cause physical injury to himself or others, or (c) damage property unless immediately arrested.[92] Furthermore, cases were excluded from the experiment when the victim insisted on the

89. *The Milwaukee Experiment, supra* note 72, at 151.

90. J. DAVID HIRSCHEL ET AL., NATIONAL INST. OF JUSTICE, CHARLOTTE SPOUSE ASSAULT REPLICATION PROJECT: FINAL REPORT 12-14 (1991) [hereinafter CHARLOTTE FINAL REPORT].

91. J. David Hirschel & Ira W. Hutchison, *Female Spouse Abuse and the Police Responses: The Charlotte, North Carolina Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 73, 89, 92 (1992) [hereinafter *North Carolina Experiment*].

92. *Id.* at 88-89.

arrest of the offender, the suspect threatened or assaulted the responding officer, or the officer believed that the suspect posed an imminent danger to the victim.[93]

A full 42% of victims insisted on immediate arrest, making those cases ineligible for inclusion in the experiment.[94] All cases were assigned a random number based on the time when the calls were received which was correlated to a police response when received by the police department's computerized dispatch system. However, this number was not made available to the responding police officer until after the case was determined to be eligible for inclusion in the experiment.[95]

The three different possible responses were "(a) advising and sometimes separating the couple; (b) issuing a citation for the offender to appear in court; and (c) arresting the offender at the scene of the incident."[96] All three responses had two features in common: the officer first "calm[ed]" matters down and restored order, and then gave each victim a referral card listing the local resources of the Victim Assistance Program and battered women's shelter. In addition, police procedures allowed the officer to transport any person to another location.[97]

The advise and separate response required the officer to help solve the couple's immediate problem by "possibly referring them to an appropriate social service agency or [by] asking one of them to leave the residence" temporarily.[98] Police could request that the parties separate, but they had no legal authority to order such a separation.[99]

The arrest response required the officer to arrest, handcuff, and transport the offender to the local jail for an appearance before the local magistrate.[100] The citation response required the officer to issue a standard citation to the offender and explain to both parties that they were required to appear in court.[101]

Charlotte police have the authority to transport any party away from a domestic violence scene. In the 640 cases in which probable cause for arrest was not found and which were not a part of the experiment, when one party was transported, the woman was transported in 344 cases (53.75%) and the man in the remaining 296 incidents (46.25%).[102]

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93. *Id.* at 90.
94. CHARLOTTE FINAL REPORT, *supra* note 90, at 25.
95. *Id.* at 33-34.
96. *North Carolina Experiment, supra* note 91, at 74.
97. *Id.* at 91; CHARLOTTE FINAL REPORT, *supra* note 90, at 16-17.
98. *North Carolina Experiment, supra* note 91, at 91.
99. *Id.* at 91 n.116; CHARLOTTE FINAL REPORT, *supra* note 90, at 61.
100. *North Carolina Experiment, supra* note 91, at 91.
101. *Id.*
102. *Id.* at 95.

1. Charlotte Experiment Results

The percentage of offenders that had at least one repeat arrest for a subsequent offense against the same victim within six months was 16.5% for the entire experiment offender population: 11.8% for those in the advise/separate response, 19.2% for those in the citation response, and 18.2 for those in the arrest treatment.[103] Of the twenty-five advise/separate failures, twenty-four were a first subsequent arrest and one was a second subsequent arrest. Of the forty-three citation failures, thirty-three were first subsequent arrest, seven second subsequent arrests, three were third arrest, and two fourth arrests. Of the thirty-nine arrest failures, thirty-six were first arrests, two second and one third arrest.[104] The vast majority of offenses comprising the failures (76.4%) were for first (versus subsequent) reassaults against the victim. There were no significant differences between the three response groups in the types of offenses which resulted in rearrests.

Analyzing the data by the rates of arrest recidivism, the average number of failures per offender was .195, with .123 being the average for the advise/separate offenders, .259 for the citation offenders, and .201 for arrest offenders.[105] If valid, these results may mean that women in Charlotte, North Carolina would be in the greatest danger of being subject to a subsequent domestic violence incident when a citation was issued and in the least danger when police advised/separated the parties.

During the first three weeks after the first incident, the arrest response resulted in fewer subsequent domestic violence incidents against the women victims than did the other two responses. However, the difference was small and the trend did not continue over time.[106]

Yet, if one analyzes the recidivism rates of the offenders by looking at any offense committed against any victim, those who received citations were actually the least likely to reoffend (30.4%), those arrested the most likely to do so (34.1%), and those advised/separated were in the middle (33.5%).[107]

Based on the initial interviews, however, abusers reoffended against their victims more often when the police responded with the advise/separation response than with either the citation or arrest response.[108] Six months later, however, the victims reported that the citation response produced the highest incidence of new offenses.[109]

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103. CHARLOTTE FINAL REPORT, *supra* note 90, at 99.
104. *Id.* at 100.
105. *Id.* at 101.
106. *Id.* at 109.
107. *Id.* at 114-15.
108. *Id.* at 127.
109. *Id.* at 128.

The strongest predictor of recidivism was the abuser's prior criminal activity. In fact, the abuser's age, race, and marital and economic status were unrelated to his likelihood of reoffending in the Charlotte study.[110]

2. Analysis of the Charlotte Replication Experiment

Regardless of how the police responded, well over half of the women in each category experienced at least one other domestic violence incident during the six month follow-up period. Overall, 61.5% of the abusers in the experiment reoffended within 180 days.[111] This suggests that none of the police responses were very effective in deterring domestic abuse.

Given that Charlotte police were permitted to take all the necessary measures in the advise/separate response, it is not surprising that, when they engaged in the other two responses,[112] their results were ambiguous. While referrals to shelters and the courts were always appropriate, some of the old mediate and referral ideas used in this experiment are believed to be counter-productive. The designers of the experiment obviously lost sight of the fact that arrest was to be used as an alternative to mediation, not as an addition to it. The police themselves admitted that they had helped the couple discuss their problems and work out solutions in 37.1% of the advise/separate cases, in 36.6% of the citation cases, and in 15.0% of the arrest cases.[113] Similarly, officers recommended family counseling, which has been shown to be inappropriate and to actually increase the incidence of domestic violence,[114] in 29.7% of advise/separate cases, 39.4% of citation cases, and 31.1% of arrest cases.[115] The police admitted that they had asked the victim to leave in 40.3% of both the advise/separate and citation cases. Police were not asked if they had instructed the victim to leave when they arrested the abuser.[116] Thus the effect of arrest or of the issuance of a citation may have been completely offset by the use of mediation techniques and referral to family counseling by responding police officers. Advocates have established that these approaches blame the victim and perpetuate domestic violence.[117]

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110. *North Carolina Experiment, supra* note 91, at 104.

111. *Id.* at 116; CHARLOTTE FINAL REPORT, *supra* note 90, at 130.

112. CHARLOTTE FINAL REPORT, *supra* note 90, at 62.

113. *Id.* at 65.

114. John W. Taylor, *Structured Conjoint Therapy for Spouse Abuse Cases*, 65 J. CONTEMP. SOC. WORK 11, 11-18 (1984).

115. *Id.*

116. CHARLOTTE FINAL REPORT, *supra* note 90, at 65.

117. U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE (1982).

Some commentators ignored the surprising fact that the pretest period averaged 1.4 eligible cases per day, while the test period (which included more categories of cases, some of which officers had wrongly excluded in the pretest period) averaged less than one each day.[118] This suggests that although more cases were included in the experiment, police were incorrectly excluding cases once the actual experiment began. With more kinds of cases that needed to be included during the time period of the experiment, the daily average should have exceeded 1.4 cases.

The implied assumption in the tabulation of the experiment that in cases where there were no follow-up interviews, the offender either committed no new offense or behaved no worse than others did in his police response group was disturbing. When one realizes that far more women in the advise/separate group disappeared and hence could not be relocated for follow-up interviews,[119] any apparent statistical advantage shown by offenders in that group is probably illusory. Furthermore, the interviewers were one and one-half times as likely to terminate an interview because they believed a victim to be drug or alcohol impaired when she had been in the advise/separate police response group than in either of the other two groups.[120] That women subjected to the advise/separate response turned to drugs or alcohol suggests that this treatment may have negatively affected self-esteem to a greater degree than either of the other police responses.[121] Some battered women use alcohol to reduce distress and emotional pain. For battered women present at medical sites unequipped to deal with trauma, alcohol abuse increased fivefold, from 3% before their first identified occurrence of abuse to 15% after that incidence.[122]

The fact that only one separated couple and no divorced couples were in the advise/separate group, whereas the other groups had seven times as many divorced or separate couples,[123] would also effect the study results. Divorce and separation greatly increase the rates of domestic violence against women.[124] All of the statistical advantage attributed to the advise/separate response might well have been entirely based on the statistical fluke that group had a disproportionately small number of separated or divorced couples.

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118. CHARLOTTE FINAL REPORT, *supra* note 90, at 24, 28.

119. *Id.* at 84, 91-92, 133.

120. *Id.* at 84-85, 91.

121. JUDITH L. HERMAN, TRAUMA AND RECOVERY 44 (1992); MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN: A MODEL FOR ASSESSMENT AND INTERVENTION 60 (1992).

122. DUTTON, *supra* note 121, at 64.

123. CHARLOTTE FINAL REPORT, *supra* note 90, at 35.

124. MILDRED D. PAGELOW, FAMILY VIOLENCE 43 (1984); CAROLINE W. HARLOW, U.S. DEPT. OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 5 (1991).

Also surprising was the fact that police classified thirty-two cases involving knife wounds and ten cases involving broken bones as misdemeanors, rather than felonies, and thus caused these cases to be included in the study.[125] It is significant that in less than 1% of the Charlotte cases where the offender was arrested did he spend any time in jail beyond the initial arrest.[126]

In Charlotte, 69.4% of the offenders had previous criminal histories. Some commentators point out that in such a situation arrest alone may not constitute a strong societal response to domestic violence. The time domestic abusers spent in jail, an average of 9.4 hours in Charlotte, may have been too brief.[127] In addition, the low rate of domestic violence arrests appears not to have been a source of alarm for other parts of the Charlotte criminal justice system. The criminal justice system's perception of domestic violence as a crime which is trivial in the scheme of things may have further undermined the deterrent effect that arrest was meant to generate. Only 35.5% of abusers receiving the citation or arrest response were actually prosecuted, and fewer than 1% of the abusers spent any time in jail, other than during the initial arrest.[128] This means that district attorneys seldom prosecuted batterers, and when they did the abusers were rarely convicted and sentenced to jail. Some justify the low incarceration rate on the grounds that "as jails become more crowded, and as the public learns that even felons are receiving community based punishments and early releases from correctional institutions, it does not take much imagination to conclude that premium jail space will not be used on misdemeanant spouse abusers."[129] When even the experiment designers concede that few batterers will be incarcerated for misdemeanor spousal assaults and when 69.4% of the male offenders had previous criminal histories,[130] it is unlikely that the other players in the criminal justice system would adequately reinforce the basic message that spousal abuse is a crime that will not be tolerated by society. Furthermore, such an apathetic response from the rest of the criminal justice system was bound to have had a demoralizing effect on the police.[131]

Another troublesome issue raised by the study was that, unlike those cases that were omitted from the study as a result of classification, either as domestic disturbances or as more serious felonies, the probable cause misdemeanor cases had a much higher percent of cases (8.55%)[132] in

125. *North Carolina Experiment, supra* note 91, at 97.
126. *Id.* at 118.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 117.
131. BUZAWA & BUZAWA, *supra* note 12, at 31.
132. CHARLOTTE FINAL REPORT, *supra* note 90, at 51-52.

which females were the perpetrators and males the victims. Although the Charlotte experiment did not include these cases in tabulating the results of its experiment, one wonders why the police judged women to be the offender far more often in this category. Some postulate that it may have been "that female offenders were less likely than their male counterparts to pose further danger to their victims or to leave the scene" faster.[133] But it may also be that police are more willing to find probable cause against a female suspect, particularly one with a male victim. Nowhere in the study does it appear that either the responding officer or the experimenters analyzed the situation to determine whether any female perpetrators were acting in self-defense.

We have no way of assessing how the exclusion from the experiment of all cases in which the victim asked that the abuser be arrested influenced its results. These 603 cases comprised 68.4% of all probable cause misdemeanor warrantless arrest cases involving spouse-like situations.[134] Similarly excluded from the experiment were 182 cases (20.6%) in which the responding officers believed arrest was necessary to insure the safety of the victim.[135] It would have been preferable for the experimenters to have followed up on all of these arrest cases to determine whether they should have been merged into the other arrest statistics (as statistically like them) or tabulated as separate arrest categories (because they statistically differed). Because these cases were excluded, the arrest data included only women who were opposed to or indifferent to the arrest of their abusers, and whom the police felt were not in any substantial physical danger. Indeed, the number of these rejected cases (785) was greater than the 686 which were included in the entire experiment, and 3.6 times the 220 arrest cases in the experiment.[136] The victims whose abusers' arrests were included in the study included all of those opposed to the arrests of their abusers because they knew or believed that the offenders would retaliate against them. It is also troubling that responding officers probably asked at least some of the women whether they wanted an arrest within the presence of their abusers (particularly where only one officer was at the scene of the crime).[137] This very question would have set up for retaliation any woman who replied in the affirmative, since the abuser would have perceived the question as empowering his victim. Similarly, the question would have played into the "woman-is-sick or powerless" stereotype in instances where the victim did not approve arrest, even if the police arrested the abuser on the spot or issued him a citation. In any event,

133. *North Carolina Experiment, supra* note 91, at 96.
134. *Id.* at 95.
135. *Id.*
136. *Id.* at 99-100.
137. *Id.* at 95.

the police inquiry into the victim's wishes regarding arrest may have made the situation worse for the abuser and especially so for the victim. Seeing the victim as sick or powerless would only reinforce the abuser's feelings of power and control, thereby making the victim more vulnerable to subsequent assaults and controlling behavior.

D. *The Colorado Springs Police Replication Experiment*

The Colorado Springs, Colorado police replication experiment was headed by Richard A. Berk, one of the two people responsible for the Minneapolis experiment. After cases were judged eligible for inclusion in the Colorado Springs experiment, the police department randomly assigned abusive suspects to one of four police responses: "(1) an emergency order of protection for the victim coupled with arrest of the suspect; (2) an emergency order of protection for the victim coupled with immediate crisis counseling for the suspect[/] at another location; (3) an emergency order of protection only; or (4) restoring order at the scene with no emergency order of protection."[138] The Colorado Springs experiment involved the largest number of eligible cases: 1658 incidents of misdemeanor violence over a period of about two years beginning in June 1987.[139] Married couples living together comprised 64% of the parties, 4% were married but not living together, and 28% were lovers.[140]

Unlike all of the other sites for the domestic violence police studies, Colorado Springs, located near Fort Carson Army base and the U.S. Air Force Academy, has a sizable military population: 7% of victims and 24% of suspects were in the military.[141] Another way that the Colorado experiment differed from its predecessors was that only approximately 38% of the cases involved an assault.[142] The remaining crimes involved were harassment (54%), menacing (3%), and false imprisonment (2%).[143]

In tabulating the results of the experiment the responses were divided into two categories so as to be better compared with the other replication experiments: arrest and everything which was not an arrest.[144] The study compared "people who were unemployed or for whom the police recorded no employment information," (the

138. Richard A. Berk et al., *A Bayesian Analysis of the Colorado Springs Abuse Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 170, 170 (1992).
139. *Id.* at 174.
140. *Id.* at 176.
141. *Id.*
142. *Id.* at 177.
143. LAWRENCE W. SHERMAN ET AL., POLICING DOMESTIC VIOLENCE: EXPERIMENTS & DILEMMAS 137 (1992) [hereinafter POLICING DOMESTIC VIOLENCE].
144. Berk, *supra* note 138, at 178-79.

experimenters' so-called "bad risks"), with those "employed in the civilian labor force or in the military" (their so-called "good risks").[145]

1. Results of the Colorado Springs Experiment

The results of the police data showed that the arrest response had a small, but noticeable deterrent effect on the good risk (employed) abusers, and no deterrent effect on the bad risk (unemployed) abusers.[146] However, the victim interview data clearly showed that arrest generally acted as a deterrent.[147] The effectiveness of arrest in the Colorado Springs study did not vary based upon the race of the abuser or the victim.[148]

2. Analysis of the Colorado Springs Data

Berk notes that when the data is analyzed based on which treatment was randomly assigned, the results show that arrest did deter abusers. However, when the analysis focuses upon which treatment is actually given, arrest had much less of a deterrent effect. This occurred because the police were more likely to arrest abusers who were intoxicated, assaultive, or uncooperative–the very people who were more likely to be the bad risks. Furthermore, the victims linked to bad risk subjects were harder to recontact for follow-up interviews since they are more likely to move.[149]

Although not mentioned in the study, military personnel, who compose 24% of the Colorado Springs population, move more frequently and further away than do civilians. Whether this factor effected the study results and, if so, how, is not clear.

Little statistical information has been provided to date regarding the Colorado Springs experiment. Berk's analysis of the available data supports the conclusions of the original Minneapolis experiment: arrest has a deterrent effect on domestic abusers, particularly those who are employed.

Due to greater employment opportunities in Colorado Springs than in other replication study sites, Sherman postulates that the small escalation effect of arrest on unemployed abusers in Colorado Springs may be due to the fact that the city's unemployed offenders have much better long-term job prospects and might therefore feel more vulnerable to a deterrence effect.[150]

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145. *Id.* at 181.
146. *Id.* at 183.
147. POLICING DOMESTIC VIOLENCE, *supra* note 143, at 137.
148. *Id.* at 183.
149. Berk, *supra* note 138, at 196-97.
150. POLICING DOMESTIC VIOLENCE, *supra* note 143, at 337.

Three of the four possible police responses in Colorado Springs involved obtaining protective orders. Since few victims of domestic violence outside of the Colorado Springs experiment actually obtain protective orders, however, this effort to protect victims may have muddied the results of the experiment. Nonetheless, the experiment should have been analyzed in order to determine whether protective orders helped the victims. Finally, one wonders whether victims of domestic abuse received counselling or were offered a choice regarding protective orders. There are some situations where procuring a protective order against a domestic abuser may be inadvisable, e.g., if the victim is an undocumented alien whom hostile court personnel might report to the Immigration and Naturalization Service; or when the paternity of a child of an unmarried woman has never been acknowledged or determined, and a protective order is likely to precipitate a custody case, especially for a vulnerable victim. However, there is nothing in the study results to suggest that a victim was given the option of refusing a protective order when called for by the police response.

Finally, this article questions the study's assumption that military abusers are "good risks" who are less likely to repeat acts of domestic violence. The frequency of spousal violence by veterans is known to be higher than the non-military population.[151] Furthermore, the frequency of such abuse is the same whether the offender is a combat or noncombatant veteran.[152] Therefore, even if many Colorado Springs military personnel were not combat veterans, much higher rates of violent acts than were reported would be expected. Although military men are responsible for committing acts of domestic violence more severely and more frequently than their civilian counterparts, their victims are considerably less likely to report the abuse, especially if they are officers' wives.[153]

E. *The Metro-Dade Police Experiment*

The Metro-Dade Police Department in Florida selected 907 cases in which officers would have the discretionary authority to arrest a male who had battered his adult female partner. Initially, only couples who had once been married to each other were included in their study, which ran from August 24, 1987 to July 16, 1989. However, current and former unmarried cohabitants were added to the study thirteen months later, when Florida's domestic violence law was expanded to include them. For a case to be included in the study, police had to establish

151. Gary Gibbens, *Research Update*, 2 THE CATALYST 1, 5, 7 (1993).

152. *Id.*

153. ANSON SHUPE ET AL., VIOLENT MEN, VIOLENT COUPLES 72-73 (1987); *see also* David Freedman, *Domestic Violence Pervasive at Presidio Army Base*, THE OBJECTOR, July-Aug. 1991, at 4.

other criteria: that no felony had occurred; that probable cause to believe that a misdemeanor spouse battery existed; that both parties were present when the police arrived; that the victim was a female over the age of eighteen; that the officer had not been assaulted by either party; that the victim was not in immediate danger; and that there was no outstanding arrest warrant, injunction, or criminal protective order against either party.[154]

Once a case was selected for inclusion in the study, it was arbitrarily assigned to a study category in two stages. The first stage determined whether the man was to be arrested. An arrested man who was not transported from a district police station was screened by the receiving officer for whether he should be released on a "promise to appear" or whether, like all men who were transported from a district police station, he would have to post bond to be released. The average suspect spent 14.6 hours under arrest, although there was substantial variation.[155]

The second stage consisted of random assignments of follow-up intervention by the Safe Streets Unit, which consisted of twelve detectives, two sergeants, one lieutenant, and two support staff. The detectives had received over 150 hours of specialized training. For each assigned case, the Unit received the initial police report indicating the existence of an abusive situation, a Domestic Violence Continuation Report, and, where applicable, an arrest report. The Safe Streets Unit detectives determined whether the family had been involved in prior abusive incidents or had been referred to social service or other agencies, and if any remedial steps had been taken. With this preliminary data, a detective then arranged an interview with the couple to determine "the frequency of abuse and the conditions that might have precipitated the incident," to help the couple understand the long-term consequences of the violence, to help them "arrive at an acceptable solution to the problem," and to "refer the couple to an appropriate agency and inform them of the resources that were available if needed."[156]

Fifteen percent of the suspects in the study were 18-25 years old, 43.8% were 26-35 years old, 34.3% were 36-50 years old, and 7% were at least 50 years old.[157] The suspects were racially classified as white (36.2%), black (41.7%) or Hispanic (22.2%).[158] Responding officers

154. Pate & Hamilton, *supra* note 28, at 693.
155. *Id.*
156. Hubert Williams, *Spouse Abuse Research Raises New Questions About Police Response to Domestic Violence*, POLICE FOUND. REP. 3-4 (October 1992).
157. *Id.* at 2.
158. *Id.*

believed that nearly 70% of the suspected abusers were under the influence of drugs or alcohol.[159]

The average suspect spent 14.6 hours under arrest. At his arraignment, required to be held within 21 days of arrest, the court could accept his guilty plea, bind his case over for trial, or release him based upon a finding of no probable cause.[160] The study does not reveal any more information about the fate of these suspects at or after their arraignments.

1. Outcome by Treatment Assignment

a. The Safe Street Unit Experiment

Assignment to the Safe Streets Unit resulted in no significant increase in victim safety one month after the initial police response.[161] Six months after the experiment those victims assigned to the Safe Streets Unit did marginally better than those whose cases had not been assigned to the unit. Over eighteen percent (18.8%) of the referred victims reported that they had been subjected to subsequent acts of domestic violence, versus a 22.4% rate of repeat violence for those victims not referred.[162] However, this difference is statistically insignificant.[163] Furthermore, the study also indicated that there was no statistically significant difference in the number of subsequent assaults or in how soon the subsequent assaults occurred, although it did not disclose detailed data.

b. Arrest versus Non-Arrest Experiment

Interviews with the victims one month after the initial police response indicated that the percent of repeat offenses was much higher when the suspect was not arrested than when he had been arrested.[164] Based on the initial interviews, 10.9% of those men arrested had repeated their violence within one month, while 18.3% of those men not arrested had done so.[165] After six months, a total of 14.6% of abusers who were arrested and 26.9% of those not arrested had reoffended.[166] The source for this data was victim interviews, police reports, and arrest reports regarding acts of domestic violence committed by the same

159. *Id.*
160. *Id.* at 3.
161. *Id.* at 4.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 2, 4.
166. *Id.* at 3.

suspect against the same victim.[167] Furthermore, those reoffenders who were not arrested committed more domestic assaults than those who had been, as well as reoffending in a shorter period of time after the original incident.[168]

The Metro-Dade police reports also confirmed that a suspect was more likely to reoffend against a victim if he had not been arrested (1.1%) than if he had been arrested (3.8%).[169] Likewise, those reoffenders who had been arrested took longer to commit another assault than those who had not.[170]

Whether suspects were married seemed not to influence their recidivism rate.[171] When suspects were employed, arrest had a far greater deterrent effect reported the victims, at both the initial interview (8.4% of arrested suspects repeated violence versus 18.8% of those not arrested), and at the six month interview (8.6% for arrested subjects versus 26.2% for those not arrested). However, the victim interviews indicated that only a small increase in the rate of violence against them by unemployed suspects who had been arrested (18.4% at initial interview and 33.3% at six month interview) as compared to unemployed suspects who had not been arrested (17.2% at initial interview and 28.8% at six month interview).[172] While the increase reported at the initial interview regarding unemployed suspects was statistically insignificant, the difference at the six month interview is considered to be statistically significant.[173] Yet even this small deterrent effect is not apparent in the Metro-Date police records.

2. Analysis of Metro-Dade Policy Study

a. Analysis of the Safe Streets Unit Experiment

The Safe Streets Unit's approach to domestic violence had some questionable aspects. To the extent that the Unit validated the woman's victimization by focusing on what had happened to her, how often she was being abused, and what the long-term consequences of violence would be on her and any children, it was helpful. Depending on what referrals the Unit officer made (e.g., to a court or shelter for the woman), the approach was potentially positive. But, the Police Foundation Report alludes only to referring couples to appropriate state or local agencies. The Safe Street Unit may have referred couples to

167. *Id.*
168. *Id.* at 4.
169. *Id.* at 4, 5.
170. *Id.* at 5.
171. *Id.*
172. *Id.*
173. *Id.*

marital counseling or other programs which would treat the couple together. Such programs are contraindicated because they are known to increase the violence.[174] Furthermore, very few therapists in the United States are trained to identify or handle domestic violence situations, so treat most domestic violence cases inappropriately, often committing malpractice.[175] By focusing on "the conditions that might have precipitated the incident, e.g., alcohol or drug abuse, property disputes, treatment or discipline of children, money problems, jealousy, unemployment, health and mental problems, and destitution,"[176] the Safe Street Unit incorporated in its program the ill-conceived family dynamic/mental health approach to dealing with domestic violence. This view incorrectly shifts responsibility for the situation away from the abuser and onto the victim. Unless such a program puts forth divorce or separation as the only "acceptable solution to the problem,"[177] with the abuser accepting full responsibility for his violence, programs of this type inevitably make assumptions regarding the victim's role in the violent situation which are detrimental rather than constructive. Presumably, the Safe Streets Unit approach was conceived and implemented without any meaningful input from domestic violence advocates.

b. Analysis of the Arrest v. Non-Arrest Experiment

Overall, arrest did have a strong deterrent effect during the subsequent six months, whether that conclusion was based on arrest records (only 1.1% of arrested abusers versus 3.8% of non-arrested abusers repeated their violence) or on interviews with victims (14.6% of arrested abusers versus 26.9% of non-arrested abusers repeated their violence). This level of deterrence is quite an impressive accomplishment.

However, among the 29% of abusers who were unemployed,[178] those who were arrested continued their violence at least as often as abusers who had not been arrested. Police records showed a statistically insignificant difference between the recidivism rates of the two groups. But the victim's reports, records which the experimenters in other studies regarded as being much less reliable,[179] indicated a slight but

174. Taylor, *supra* note 114, at 11-18.

175. Michele Harway & Marsali Hansen, *Therapists' Recognition of Wife Battering: Some Empirical Evidence*, 6 FAM. VIOLENCE BULL. 3, 16, 17-18 (Fall 1990); Michele Harway, *Training Issues in Working with Violent Families*, 8 FAM. VIOLENCE & SEXUAL ASSAULT BULL. 2, 18-20 (Summer 1992).

176. Williams, *supra* note 156, at 3-4.

177. *Id.* at 4.

178. Pate & Hamilton, *supra* note 28, at 693.

179. *Short-Custody Arrest*, *supra* note 68, at 833; *North Carolina Experiment*, *supra* note 91, at 112-13.

significant increase in repeat violence for unemployed arrested abusers (33.3%) as compared to the rate for unemployed non-arrested abusers (28.8%).[180] Despite this disturbing index, the study report does not reveal any statistics on the number of victims still available for later interviews. It could be conjectured that the victims of unemployed abusers were poorer than victims of employed offenders and either more likely to be in homeless shelters or less likely to leave the area. Victims who could not be found later or who were not reassaulted within the Metro-Dade police catchment area were assumed by the study to be safe. Yet a "success" based on the victim successfully fleeing does not indicate whether the offender was successfully deterred from continuing his abuse. Nor did the study trace any of the couples to a relocation site outside of the reporting area.

IV. WERE THE EXPERIMENTERS' CONCLUSIONS CORRECT?

This article has attempted to summarize the police replication studies by discussing the methods used and the results obtained by the experimenters in each experiment. The studies were all conducted independently of each other, and with a lack of consistency that makes overall comparison and analysis difficult. Issues explored in one experiment were completely ignored by others. Methods utilized in one study often differed from those used in others, and some studies never revealed their methodologies. To date, the Atlanta study has not been released, and attempts to obtain copies of the final studies from either the National Institutes of Justice or the Atlanta experimenters failed. However, the author was able to procure copies of the final reports submitted in the Omaha and Charlotte studies.

Because police behavior in domestic violence situations has changed considerably since the original Minneapolis experiment, mediation techniques now in use may be far less supportive of the abuser's position than during the original study. Most police departments train their new recruits in appropriate responses to domestic violence. The mediation response originally used in Minneapolis was probably different from that used in the replication experiments.

Although the results of a number of replication experiments indicate that mandatory arrest has no greater deterrent effect on abusers than do other police responses, the experimenters were divided as to whether these studies lead to the conclusion that "arrest [is] less effective overall than any of the other interventions"[181] in deterring the batterer. Berk's Colorado Springs team, one of the last to release its results, performed a sophisticated mathematical analysis of all of the studies. It

180. Williams, *supra* note 156, at 5.
181. Berk, *supra* note 138, at 200.

concluded that the results of all the studies consistently showed that arrest was not less effective than the nonarrest responses. However, experimenters led by Sherman and by Hirshel and Hutchinson concluded that arrest was the less effective response.

It is important to remember that because only batterers' responses were examined, the studies do not indicate whether victims of domestic abuse tend to perceive mandatory arrest as having a deterrent effect.

Because offenders may have had police contacts prior during the experiment period, the experimenters cannot properly claim that the studies only measured the effect of current police response to domestic violence. Even those offenders with no prior police contact may have learned from other offenders of their policy of arresting batterers. The deterrence experienced by offenders who had previously been arrested or were warned during the experiment that further incidents of abuse would lead to their arrest could be a response to all of their prior treatment by police, and not merely those occurring during the study. None of the experiments identified or screened out those offenders with previous contacts with law enforcement agencies regarding domestic violence offenses.

Furthermore, because only the police response to domestic violence was controlled in the studies, the effect of a coordinated response by the whole criminal justice system remains unknown: i.e., whether arrest would be more effective as a deterrent when followed by prosecution, conviction, and punishment.

The results of all the domestic violence police studies show that arrest decreases the chance that employed abusers would be reported to the police for future domestic violence incidents. In Milwaukee, arrest also deterred those offenders who were married, high school graduates, or white.[182]

That any police response can result in a decrease in the abuse of women should be considered very encouraging, especially because, in any given relationship, domestic violence is believed to increase in both frequency and intensity over time.[183] Instead, the experimenters emphasized in their reports that arrest did not deter unemployed or socially marginal men, especially those with prior criminal records.[184] Offenders with prior criminal records constituted a significant proportion of the abusers in the domestic violence police replication studies. For example, in Charlotte, 69.4% of the men who beat their intimate partners had prior criminal records.[185] It is for these men that another arrest, particularly a short one, was unlikely to decrease their inclination

182. *The Milwaukee Experiment, supra* note 72, at 167-68.
183. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 25-26 (1984).
184. *The Milwaukee Experiment, supra* note 72, at 168.
185. *North Carolina Experiment, supra* note 91, at 117.

to use violence against their mates. Although the criminal justice system has failed to significantly deter socially marginal criminals from committing other crimes, society has never seen that failure as a reason to abandon arrest and imprisonment for crimes not committed within the context of the family.[186]

A. *Design Flaws in the Experiments*

As Sherman admits, none of the police replication studies actually reproduced the research design of the Minneapolis experiment.[187] A variety of police responses were tested on different distinct populations based on distinct domestic violence statutes and police arrest policies.

1. Major Flaws

All of the experiments were similar in that each study compared a randomly assigned arrest to one or more non-arrest responses.[188] Because police practices are seldom scrutinized by researchers, researchers claimed that these similarities made the police domestic violence studies "among the most comparable studies of the effects of police practices ever undertaken."[189] However, since such different things were being compared, the very differences probably make comparison of the studies of questionable validity.

A related problem was raised by the treatment in some studies of subsequent police encounters by the same couple as initial encounters.[190] In addition, none of the offenders were screened for police contact prior to the initial police encounter. Thus, an offender in Milwaukee who had been arrested multiple times prior to the experiment, as a result of that city's mandatory arrest policy,[191] may have received only a warning during the actual experiment. Yet studies would considered the latest contact with the police to have been the offender's first. Similarly, an offender seen twice by the police during the experiment might have received only a warning at each incident. How serious would such an offender consider the second threat of arrest, having once escaped such arrest previously? Clearly, both this abuser and his victim would understand that the subsequent warning was only empty rhetoric. Such knowledge might well make the abuser feel even

186. Lisa A. Frisch, *Research That Succeeds, Policies That Fail*, 83 J. CRIM. L. & CRIMINOLOGY 209, 213 (1992).
187. *Misdemeanor Domestic Violence, supra* note 85, at 25.
188. *Id.* at 27.
189. *Id.*
190. *Short-Custody Arrest, supra* note 68, at 828.
191. *Id.* at 845.

more powerful and vindicated. It would also compromise the study's results.

No interviewers in any experiment asked what either of the parties had expected the police to do, and whether any different response from the one expected would have altered their behavior. The Milwaukee experimenters never justified their inclusion in the experiment of the 19% of abusers and 24% of victims in Milwaukee who were aware of that city's mandatory arrest policy,[192] especially those who received the warning response in lieu of an arrest.

The experiment clearly assumed that abusers would expect police to respond the same way or, if the warning response was given, as promised, in the event of subsequent domestic assaults. However, researchers made no effort to eliminate those cases in which the parties could not have reasonably made that assumption based on their other police contacts. While some abusers and victims had independent knowledge that made such an assumption unreasonable, others might have later learned that other police responses were being used or had been the norm.

How police delivered various oral messages was not monitored nor reported. The method of delivery would have been likely to influence the parties, particularly in the case of the threat of arrest. In addition, if police had conducted an arrest as though it were a mere travesty, their behavior would certainly have prevented the offender, as well as the victim, from taking the arrest seriously. Once again, the designers assumed that police would behave as professionally as they do when responding to more traditional crimes. Yet experimenters failed to confirm this assumption.

In Milwaukee, where the exact words used in the warning response were documented, the threat that one of the parties would go to jail if the police had to return[193] would surely have intimidated many of the victims from ever calling the police again. In Omaha and Charlotte, when the police response called for separating the parties, the responding officers had the victims leave the home in 32 and 40% of the cases respectively.[194] That these victims were punished by the police, rather than assisted, almost surely helped bring about the experiment's relatively poor results, and made victims far less likely to ever request police assistance again.

Several experiments were redefined at the end by combining different responses into the single category of response. For example, the Omaha separation and mediation responses were combined into a

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192. *Id.*

193. *Id.* at 829, n.3.

194. *The Omaha Police Experiment, supra* note 34, at 189; CHARLOTTE FINAL REPORT, *supra* note 90, at 65.

single nonarrest response category because of victims' confusion as to the police response utilized in their cases.[195] Similarly, the Colorado Springs experiment combined the three nonarrest responses and compared them to the one response which had involved arrest with an order of protection.[196] Two of the three nonarrest responses in the Colorado Springs study included an order of protection. Whether redefining the experiments compromised the results of those experiments is impossible to determine.

The ill-advised messages, as previously noted, that were conveyed by the warning response in the Milwaukee study, to those victims evicted in Charlotte and Omaha, and to any couple referred to family counseling as in the Charlotte and probably Metro-Dade experiments, all acted to discourage victims from subsequently seeking police protection. Consequently, these messages may have endangered victims of domestic abuse and resulted in the production of misleading data which call the validity of these experiments into question.

B. *Did Arrest Cause Retaliation?*

Mandatory arrest resulted in lower rates of recidivism in the short term than did the nonarrest police responses.[197] For example, in Milwaukee, only 2% of arrested batterers reassaulted their victims at their first subsequent meeting, as compared to 7% of batterers who received a warning.[198]

In all of the police replication studies, mandatory arrest also reduced the incidence of violence on victims of employed abusers, and it also helped white and Hispanic victims.[199] Yet, the policy was not as effective for black victims and victims of unemployed abusers.[200]

Of all of the police study experiments, Milwaukee had the highest percentage of both black offenders (75%, versus 70% in Charlotte, 43% in Omaha, 42% in Miami, 36% in Minneapolis, and 31% in Colorado Springs) and unemployed abusers (47%, versus 31% in Omaha, 30% in Colorado Springs, 29% in Miami, and 22% in Charlotte).[201] Based on these demographics, Sherman's theory that mandatory arrest would be least effective when applied to unemployed ghetto populations and Milwaukee was the city in which arrest was least likely to deter abuse.[202]

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195. *The Omaha Police Experiment, supra* note 34, at 199.
196. Berk, *supra* note 138, at 178-79.
197. *Short-Custody Arrest, supra* note 68, at 828.
198. *Id.* at 834.
199. Janell C. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, 36 AM. BEHAVIORAL SCIENTIST 601, 603 (1993).
200. *Id.*
201. *Misdemeanor Domestic Violence, supra* note 85, at 29.
202. *Short-Custody Arrest, supra* note 68, 821-49.

The data compiled from victim interviews held six to twelve months after the initial incident showed that victims of domestic abuse were less likely to be reassaulted when the offender had been arrested, studies in Omaha, Charlotte, Milwaukee, Colorado Springs, and Miami indicated.[203] In contrast, police and other official data showed no escalation for arrested offenders over other police treatments in the Colorado Springs and Miami studies.[204] While the three cities which tabulated results by employment status found that the employed were deterred, Omaha and Milwaukee reported that unemployed suspects who were arrested were more likely to reoffend, whereas Colorado Springs data led to no such conclusion.[205]

In their analyses, most of the researchers presumed that any future violence committed by socially marginal batterers was the result of the arrest angering the abuser, rather than an expected and deliberate escalation in violence by the abuser.[206]

If unemployed abusers were increasing their violence in retaliation for having been arrested, this response would be expected to occur extremely rapidly due to the remarkably poor impulse controls present in most abusers.[207] Yet arrest effectively deterred the reoccurrence of domestic violence in the short term, so it is highly unlikely that any later escalation was motivated by retaliation for the arrest.

Furthermore, it is important to remember that domestic violence within individual relationships escalates over time in both intensity and frequency.[208] This suggests that, rather than seeing arrest as failure to deter the domestic abuser, later offense may be expected as a matter of course. Most batterers beat their partners because their coercive behavior works and is very self-reinforcing.[209]

In each of the experiments, the number of cases in the arrest group was inflated by situations in which offenders were originally designated for other police responses but were arrested for misbehavior despite their assigned treatment.[210] Hence, the tabulation of data based on actual police response inflated the number of bad risks in the arrest category, possibly enough to account for the discrepancy of the deterrence results.

Although some of the experimenters made much of the greatly increased level of subsequent violence experienced with arrested black offenders, they largely ignored the fact that all black abusers, including

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203. *Misdemeanor Domestic Violence, supra* note 85, at 30.
204. *Id.*
205. *Id.*
206. Frisch, *supra* note 186, at 213.
207. WALKER, *supra* note 183, at 130.
208. *Id.* at 25-26.
209. *Id.* at 36.
210. *North Carolina Experiment, supra* note 91, at 99.

those not arrested, also increased their levels of violence as compared to all white batterers.[211] Yet even Sherman's conclusion that arrest did not deter blacks was not universally true. Although arrest resulted in a greater rate of recidivism in Omaha, recidivism was reduced in Miami, a city having a virtually identical black population (43% and 42% respectively).[212]

While full arrest showed a very positive effect in deterring white abusers in Milwaukee, the policy showed a very slight negative impact on black abusers, based on the hotline reports. Whites showed a 39.2% reduction in recidivism between full arrest and the warning response, while blacks experienced a 0.8% increase in recidivism during the six-month period after the initial police response.

However, having a relationship with an unemployed abuser, whether black or white, put the victim at a 710% greater risk of repeat violence than associating with a black abuser.[213] Even when the frequency of hotline reports is considered, blacks as a group in the Milwaukee experiment were significantly less likely to reoffend than were unemployed abusers, and only slightly more likely than unmarried abusers or abusers cohabiting fewer than two years to commit further acts of domestic abuse.[214] Yet even the dramatic escalation effect for arrested and unemployed batterers identified in the Milwaukee and Omaha studies was reduced to a marginal level in Colorado Springs,[215] the only other study which reported results based on whether suspects were employed or unemployed. The data showing the slight increase in reoffenses by blacks may only be reflecting their higher rate of unemployment in relation to whites offenders.

While the data from the replication studies does not support the proposition that black women will be significantly endangered by a mandatory arrest, the data also does not indicate that such a policy would help them either. It is also likely that some black women, those whose abusers are unemployed and were previously arrested, will be more seriously impacted. Although the same would be true for white women, the incidence of unemployment and prior arrest are less prevalent among whites. Although it may be inferred that victims are generally battered by abusers of the same race, no data was reported that would confirm this conclusion.

Black women have sometimes complained that police are reluctant to arrest in cases of "black on black" violence, particularly when it

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211. *The Milwaukee Experiment, supra* note 72, at 160-61.
212. Schmidt & Sherman, *supra* note 199, at 603.
213. *The Milwaukee Experiment, supra* note 72, at 159.
214. *Id.* at 161.
215. *Misdemeanor Domestic Violence, supra* note 85, at 30.

involves intimate partners.[216] Police reluctance to intervene in violence against women, which is almost always perpetrated by a husband or lover, is the reason that violence is the primary cause of death for black women under age forty-four.[217]

Black women have also consistently complained that their men are disproportionately arrested and treated more harshly by the police than are other racial groups.[218] Stark hypothesized that police do not arrest predictably in cases involving the abuse of black women by black men because these situations require them to provide a service to black women (generally under-provided), as well as punishment of black men (generally excessively provided).[219]

Although blacks fear that mandatory arrest will impact their communities more harshly, the scant data that exists indicates that blacks are arrested in disproportionate numbers as police discretionary authority increases, and are proportionately arrested only after a mandatory arrest policy is initiated. However, the number of black men arrested will be far higher under mandatory arrest than a pro-arrest or discretionary arrest police policy.[220]

Black men who are arrested for battering are likely to receive worse treatment than abusers of other races. They are more likely than white men to experience police brutality.[221] They may be more likely to lose their jobs if employed, and if they do, less likely to find new employment. Black women in battered women's shelters are far less likely to find housing or employment, and are often forced by these circumstances to return to their abusers.[222] Furthermore, black women are far more likely to be ostracized within their own community for pursuing the arrest or prosecution of their abuser. Such sanctions are likely to be more effective against a minority woman because she is less likely to have options or resources to find a new support mechanism available to white women.

Implementation of a mandatory arrest policy, however, may not cause black men to retaliate against their victims. As Lisa Lerman observes, arrest of the abuser may validate a woman's struggle to escape from her batterer, empowering her to demand greater autonomy, including

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216. Eve S. Buzawa & Thomas Austin, *Determining Police Response to Domestic Violence Victims*, 36 AM. BEHAVIORAL SCIENTIST 610, 618 (1993).

217. Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, 36 AM. BEHAVIORAL SCIENTIST 651, 667 (1993).

218. Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman Abuse*, 67 N.Y.U. L. REV. 520, 534 (1992).

219. Stark, *supra* note 217, at 675.

220. Forell, *supra* note 12, at 220.

221. Schneider, *supra* note 218, at 534.

222. *Id.* at 533.

separation from her mate.[223] Alternatively, the greater sense of autonomy engendered by a mandatory arrest policy may empower black women to call the police, thereby provoking retaliation.[224] Never did the experimenters consider whether other factors could have accounted for some of the reported escalation of violence. For example, if the mandatory arrest policy allowed more white women to escape further abuse, the decrease in domestic violence among whites would cause the rate of domestic violence among blacks to appear to increase, although in reality it may be remaining constant. Alternately, if black offenders were treated more roughly by the police than whites arrested for domestic violence offenses, the police's brutality and not the arrest *per se* might have accounted for an increased level of anger in blacks. Although this phenomenon would not justify retaliation against innocent victims, some correlation between the police action and subsequent abuse may exist.

It is also possible that blacks, who have far more reason to fear discrimination by police, might have been far more insulted by the way the experiment was designed, a fact which would have mitigated any of the positive effects arrest might otherwise have produced. The arrest of a black abuser after his victim had rejected that option may have caused the offender to believe that such an arrest would not have occurred had he been white. Even though this conclusion would have been incorrect, it may have had resonance in the abuser's feelings of paranoia[225] by fueling his fears that his mate was in cahoots with the responding police officer.

Equally possible, as Hirschel and Hutchison suggest, is that the short arrests involved might have been too lenient to have a deterrent effect, especially on men with experience in the criminal justice system. This is even more likely to have been a factor given that few abusers were prosecuted, convicted, and imprisoned.[226] For example, in Charlotte, only 35.5% of citation or warrant case suspects were ever prosecuted, and less than one percent of these abusers spent any time in jail beyond the initial arrest.[227] Thus, it is not proper to conclude, as did many of the experimenters, that arrest angered abusers, causing many of them to retaliate against their victims.

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223. Lisa G. Lerman, *The Decontextualization of Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 217, 229-30 (1992).

224. *Id.* at 229-30.

225. Renata Vaselle-Augenstein & Annette Ehrlich, *Male Batterers: Evidence of Psychopathology, in* INTIMATE VIOLENCE: INTERDISCIPLINARY PERSPECTIVES 139, 147 (Emilio C. Viano ed. 1992).

226. *North Carolina Experiment, supra* note 91, at 117-18.

227. *Id.* at 118.

C. *Failure to Consider Impact of Court and Prosecutor Response or Results*

What domestic violence advocates have long desired is a coordinated community response to domestic violence that involves police, prosecutors, judges, probation officers, shelters, batterer treatment programs, social services, doctors, and the mental health system.[228] The police response is thus only one component of a much larger picture. While it is true that the police can probably sabotage the effectiveness of community response by failing to arrest offenders, it is the system as a whole that must operate effectively to overcome the message sent by many years of societal indifference to the abuse of women.[229]

The problem inherent in police replication studies is that they isolate the initial police response from any other possible responses to domestic abuse and fail to realize that the effect of arrest on domestic abuse is only one of potentially dozens of issues which should have been studied. Although the experimenters occasionally reported the rarity of conviction and especially imprisonment, they failed to evaluate what steps prosecutors and the courts took and why, what sentences the offenders received, what type of batterer treatment programs were utilized and for how long, how batterers were monitored for attendance at batterer treatment programs, were orders of protection issued, or what assistance was provided to victims. The experimenters certainly did not consider how responsive the civil courts were in their effort to protect domestic abuse victims. Did the courts allow victims who had moved to keep their addresses confidential? Did judges always award custody of the parties' children as well as child support to the victims? Was any visitation granted to the abuser to be supervised by an unrelated person knowledgeable in domestic violence and child abuse? In the absence of answers to all these questions, one cannot properly assess whether some other part of the system supported or completely undermined police efforts to stem the tide of domestic violence.

D. *Likely Undercounting of Cases*

One-third of police time is spent responding to domestic disturbance calls,[230] which constitutes the largest category of calls received by the police each year.[231] Yet in each of the police experiments, relatively

228. Jeffrey L. Edelson, *Coordinated Community Response, in* WOMAN BATTERING: POLICY RESPONSES 203-19 (Michael Steinman ed. 1991).

229. PAGELOW, *supra* note 4, at 45.

230. *The Billion Dollar Epidemic,* American Medical News, American Medical Association, *reprinted in* NETWORK NEWS (Nevada Network Against Domestic Violence), Spring 1992, at 4.

231. RICHARD J. GELLES & CLAIRE P. CORNELL, INTIMATE VIOLENCE IN FAMILIES 131 (2d ed. 1990).

few cases involving domestic abuse were considered appropriate for inclusion, resulting in data being collected from an exceedingly low number of occurrences. The choices involved in deciding whether to include a case in a study could profoundly influence its validity.

Success of an experiment depends upon the correct classification of cases by the police as those involving domestic violence and upon an accurate determination of whether the responding officer has probable cause to arrest. Success of all formal police policies depends upon the support of both the command and line personnel.[232] Traditionally, police are very resistant to efforts to require them to conform their behavior to new policies and laws.[233] For example, even while being observed, police in Phoenix made arrests in only eighteen percent of the battering incidents to which they responded after a presumptive arrest policy had been implemented.[234]

A survey performed following the Minneapolis domestic violence police experiment found that ninety-nine percent of Minneapolis officers believed that they should have the discretion to respond as they see fit to problems they encounter on duty.[235] Seventy-seven percent of the officers reported that they take measures that they believe are necessary even if they expect their supervisors to disagree. Forty-three percent actually believed they should use their own standards of police work even when prohibited from doing so by department procedures.[236]

Given police officers' willingness to act independently, it is possible that, at present, no study of police response to domestic violence can be reliably designed. Since command support is crucial to implementation of police policies,[237] the fact that at least some of the experiment designers of the replication studies wished to disprove the original results even before they performed the replication studies,[238] may be a further reason to question the results of the experiments.

E. *Failure to Take the Victims' Response into Account*

The police replication experiments were framed almost entirely from the abusers' perspective in that designers assumed that the response of the victim to various policies was largely irrelevant to the outcome of the study. That is, they assumed that the various police responses either had no effect on the victim or, if they did cause some effect, it was the

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232. *North Carolina Experiment, supra* note 91, at 83.
233. *Id.*
234. *Id.*
235. *Id.* at 84.
236. *Id.*
237. *Id.* at 83.
238. Interview with Victoria Nourse, Counsel, U.S. Senate Judiciary Committee (March 1, 1993) (discussing her prior conversation with Lawrence W. Sherman).

abuser alone who determined whether the victim would be subsequently abused. This criticism is not meant to imply that a victim provokes her abuser or chooses to be battered, but to note that many of the victim's choices may affect whether she will be battered again. Thus, a victim who goes into a shelter, who goes into hiding, or who relocates may well limit the abuser's ability to continue the violence, as well as limit the experimenter's ability to document the occurrence of continued abuse.

That victims' behavior can profoundly affect domestic violence is evident from research into the effectiveness of batterer treatment programs. That study found that fifty-three percent of women agree to reconcile with their abusive partner upon learning that he has gone into a batterer treatment program, but only nineteen percent will do so if he does not enter a such program.[239] Although court-ordered treatment of batterers made virtually no difference in preventing their future acts of violence,[240] victims were far more likely to notify police and press new charges against their abusers if their treatments were unsuccessful.[241]

Despite the fact that outside circumstances can affect the victim as well as the actions of the perpetrator, the follow-up questioning of the victims in the police replication studies was designed to discover whether their abusers had again been violent. Experimenters generally considered those answers to be far less accurate because victim responses generally cannot be independently verified, unlike subsequent calls to the police for assistance.[242] Yet whether a victim will notify the police is at least as unpredictable as whether the victim later reports the abuse.[243]

Police clearly induced stress on victims of domestic violence in the replication studies by asking them if they wanted their abuser arrested. Based on the experience of many victims, a plausible assumption is that at least some of the abusers overheard this question and their victims' answers. When a victim assented, police presumably arrested the abuser, and experimenters automatically eliminated such cases from the study.[244] These cases should have been considered in the study and, at least, evaluated as a separate category. It is likely that these cases would show a higher deterrence level in the offender and certainly greater cooperation and satisfaction in the victim. Yet the only cases

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239. EDWARD W. GONDOLF & ELLEN R. FISHER, BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS 85 (1988).

240. ADELE HARRELL, EVALUATION OF COURT-ORDERED TREATMENT FOR DOMESTIC VIOLENCE OFFENDERS: FINAL REPORT 80, 92 (State Justice Institute, Urban Institute, Oct. 1991).

241. *Id.* at 94.

242. *North Carolina Experiment, supra* note 91, at 112-13.

243. Lerman, *supra* note 223, at 226.

244. *Misdemeanor Domestic Violence, supra* note 85, at 16.

retained in the study involved victims who were either ambivalent about or opposed to having their abuser arrested. Many of these victims must have felt completely betrayed when their wishes regarding the arrests of their abusers were ignored, as occurred in Charlotte and Milwaukee. Victims in Milwaukee would feel particularly violated by such actions because arrest was mandatory under a city-wide policy.[245]

Bowman points out that Sherman's justification of the "break" received by many of the abusers in the Milwaukee experiment fails to consider that the victims may have seen themselves as having been deprived of the mandatory arrest of their abusers, a deprivation that very possibly endangered the safety of both the victims and their children.[246] Of course, in none of the experiments were the children of abused couples interviewed for their reactions and to determine whether the victim had experienced further violence since the initial police response.

F. *Failure to Randomly Assign Separated Parties*

Given that couples who have separated or are about to separate have the highest levels of interpersonal violence,[247] it is disappointing that none of the studies tracked cohabiting, separating, separated, and divorced couples as distinct reporting categories for the different police responses. A study of all 551 of the women murdered by their intimate partners between 1974 and 1990 in the Province of Ontario, Canada, found that although separation greatly increased a woman's chance of being killed, none of the murdered women were divorced from their abusers.[248]

Although the Milwaukee police replication study tracked how long parties had been cohabiting, only the Charlotte study reported data regarding the parties' divorce or separation status. Yet the Charlotte study's advice/separation police response sample had so few separated or divorced couples[249] that that statistical fluke alone could have explained why more men who were arrested reassaulted their female partners than did those receiving advice/separate response. It is also possible that separated men might have been more violent and less likely to have their cases classified as misdemeanors, more likely to have left quickly before the police arrived (they presumably had another home

245. POLICING DOMESTIC VIOLENCE, *supra* note 143, at 144.

246. Cynthia G. Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201, 205 (1992).

247. PAGELOW, *supra* note 126, at 43; HARLOW, *supra* note 126, at 5.

248. MARIA CRAWFORD & ROSEMARY GARTNER, WOMAN KILLING: INTIMATE FEMICIDE IN ONTARIO, 1974-1990, 42 & 179 (Oshawa, Ontario: Women We Honour Action Committee 1992).

249. CHARLOTTE FINAL REPORT, *supra* note 90, at 35.

where they could go), or more adept at manipulating the police into not arresting them or not including them in the experiment. Alternately, abusers' increased levels of anger could have resulted in numerous violent episodes, making their chance assignment to the arrest response inflate the entire arrest response's propensity to reoffend. Finally, it is not impossible that men who had already separated or faced imminent separation from their mates were arrested for their misbehavior once the police were present, even though they might have been initially slated for another police response. This phenomenon could result in this subgroup being counted within the arrest response.

Regardless of causation, the fact that two police responses varied substantially in the number of men who were separated and included in the category could have explained the ultimate results and thus rendered at least the Charlotte experiment invalid.

G. *Domestic Violence is Not a Private Matter*

Another major flaw with the domestic violence police replication studies is the experimenters' assumption that domestic violence is a private matter. This view caused them to consider only the abuser, the victim, and the police in evaluating the different possible police responses. Examination of the police was largely limited to determining whether the police carried out the assigned response and the time commitment required by each response.[250]

Some of the questions asked of victims were misogynist in that they minimized the abuse or assumed it was mutual, and characterized the abuse as a private dispute rather than a brutal, unjustified attack. For example, in the Charlotte study, regarding an incident which had resulted in the police being called, interviewers were instructed to ask victims, "Were you and _____ having an argument, or fight, or just what was it all about?"[251] Characterizing domestic abuse as an argument or a fight is trivializing and is counterproductive to efforts to aid the victim in realizing that she is being criminally victimized. Yet the question continues, "Just tell me in your own words what was going on. INTERVIEWER THE POINT HERE IS THE APPARENT CAUSE OF THE ARGUMENT/FIGHT." This is followed by questions 62, 63, 65 and 66 which seek to find the two major causes and how often the parties fight over these issues:

> 62. So, would you say that the main cause was _____ (INTERVIEWER: TRY TO REMEMBER MAIN CAUSE) or something else?

250. *Misdemeanor Domestic Violence, supra* note 85, at 28.

251. CHARLOTTE FINAL REPORT, *supra* note 90, Interview Schedule Draft, at 7.

1. His use of money
2. His employment/ unemployment
3. His drinking/drugs
4. His treatment of kids
5. His extramarital or other women
6. His treatment of kin
7. His friends
8. His household tasks
9. His nagging
10. His work around house
11. His alimony/support payments
12. His other: (specify)
13. Her use of money
14. Her employment/ unemployment
15. Her drinking drugs
16. Her treatment of kids
17. Her extramarital or other men
18. Her treatment of kin
19. Her friends
20. Her household tasks
21. Her nagging
22. Her work around house
23. Her alimony/support payments
24. Her other: (specify)

63. If that was the main argument, was _____ also a big part of it (INTERVIEWER: TRY TO DETERMINE SECOND PLACE) or what was the other main thing you would say?
____ ENTER CODE FROM ABOVE, HERE (1-24) . . .

65. Was this particular fight/argument/problem something you've had other fights/arguments about?
1. Yes
2. No (Go to 68)

66. IF YES, ASK: About how many times in the last six months have you fought over this?
1. None
2. Once or twice
3. 3-5 times
4. 6-9 times
5. 10-15 times
6. 16 or more times

Such questions are highly objectionable because they incorrectly assume that batterers abuse their mates because of outside pressures or behavior which the victim might have been able to avoid or ameliorate.[252] The reality is that batterers beat their partners as a way of exercising power and control over them and no changes in the victim's behavior will stop the abuse.[253] The abuser's tendency to blame the situation or other people for his abuse or to accuse his partner of

252. ANN JONES & SUSAN SCHECHTER, WHEN LOVE GOES WRONG 60 (1992).
253. *Id.* at 81-82.

infidelity,[254] is part of his need to control, his denial, and his paranoia.[255] Therefore, these types of questions are not only irrelevant, but also highly counterproductive for the very reasons mentioned previously in the Analysis of the [Metro-Dade] Safe Streets Unit Experiment.[256] Such questions make a victim less likely to understand her danger, her need to stop blaming herself, and her need to leave her abuser if he has not accepted responsibility for his actions and made meaningful progress toward stopping his controlling behaviors.[257] Likewise, the questioning of the offender by the Safe Streets Unit would only have increased his rationalization and denial.

Such counterproductive questions actually compromise the results of the Charlotte and Metro-Dade studies. By asking questions that confuse victims into blaming themselves or into failing to realize the seriousness of this abuse, the designers make it more difficult for a woman to leave the relationship. Such questions may even have made it less likely that a victim would call for police protection or report the abuse if later contacted by the interviewers. Nor can it be said that the effects of these inappropriate questions would be the same on women regardless of which response the police used.

Domestic violence affects not only the parties involved in the dispute, but their children and the rest of society. Seventy percent of men who batter women deliberately beat their children[258] and a significant number sexually abuse their children, especially their daughters.[259] Men who abuse women are far more likely to kidnap their children.[260] Growing up in a home where their mother is battered subjects children to poor role models, which in turn allows the cycle of violence to be perpetuated.[261]

Half of all homeless women and children in this country are fleeing domestic violence.[262] Children's lives are severely disrupted by abuse,

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254. David Adams, *Identifying the Assaultive Husband in Court: You Be the Judge*, 33 BOSTON BAR J. 24 (July/Aug. 1989).

255. Vaselle-Augenstein & Ehrlich, *supra* note 225, at 147.

256. *See supra* text accompanying notes 174-77.

257. JONES & SCHECHTER, *supra* note 252, at 112-15.

258. Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse, in* FEMINIST PERSPECTIVES ON WIFE ABUSE 158, 162 (Kersti Yllo & Michele Bograd eds., 1988).

259. WALKER, *supra* note 183, at 51-54.

260. PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN 109 (1990); Geoffrey L. Grief & Rebecca L. Hegar, *Parents Whose Children Are Abducted by the Other Parent: Implications for Treatment*, 19 AM. J. OF FAM. THERAPY 215, 221 (1991).

261. Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Custody: Analysis of Legislation and Its Impact for Women and Children*, 12 GOLDEN GATE U. L. REV. 538, 555 (1982).

262. The Violence Against Women Act of 1990: Hearings on S.2754, Senate Committee on the Judiciary, Report 101-545, 101st Cong. 2d Sess. (1990); Joan

causing them to miss considerable school time, and too frequently to run away or relocate.[263]

The United States Surgeon General reports that battering is the single largest cause of injury to women, accounting for one-fifth of all hospital emergency room cases.[264] Every city, town, and state must bear part of the enormous cost. For example, each year the abuse of women costs New York City, a city of eight million, half a billion dollars. The city spends $77.5 million in emergency room costs at hospitals in New York City for injuries deliberately inflicted by men upon their partners. A minimum estimate of the cost of the 12,724 domestic violence arrests that occurred in 1989 and subsequent court and detention expenses amounted to $41 million. It costs the city at least $34-40 million dollars a year to shelter battered women and their children, and $71.5 million annually to pay for the 40% of children put in foster care because their families suffer from domestic violence. The largest cost of their abuse is borne by New York City employers who annually lose $250 million in lower work productivity, higher turnover, and greater absenteeism, averaging eighteen days per year per battered woman.[265]

Abusive husbands and male lovers harass the majority of employed battered women while they are at work, either in person or over the telephone, causing twenty percent of them to lose their jobs.[266]

Thus, it is clear that domestic violence affects everyone. Therefore, it is not only the abuser's response that should determine whether an arrest policy is considered a success.

It will not be known for many years whether mandatory arrest reduces the incidence of domestic violence in the next generation. If a mandatory arrest policy teaches the sons of battered women that such physical abuse is unacceptable behavior, then it will have been an enormous success even if it had little impact on their fathers. Similarly, if such a policy enables more daughters of abused mothers to grow up sure that no man has the right to abuse them it will again be effective, regardless of whether it had much effect on their fathers or brothers.

Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421 (1991).

263. MARIA ROY, CHILDREN IN THE CROSSFIRE: VIOLENCE IN THE HOME–HOW DOES IT AFFECT OUR CHILDREN 89-90 (1988).

264. Susan A. McManus & Nikki R. Van Hightower, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies*, 49 PUB. ADMIN. REV. 269 (May/June 1989).

265. The New York Senate Committee on Investigations, Taxation and Government Operations, DOMESTIC VIOLENCE: THE HIDDEN CRIME 2-3 (Feb. 24, 1992).

266. Susan Schechter & Lisa T. Gray, *A Framework for Understanding and Empowering Battered Women, in* ABUSE AND VICTIMIZATION ACROSS THE LIFE SPAN 240, 242 (Martha B. Straus ed., 1988).

Even if mandatory arrest has no direct effect on families in which women are being abused, if the policy sends a clear message to the rest of society it will have been effective. Levinson found that friends, neighbors, and relatives were far more successful in stopping wife abuse than was the criminal justice system.[267] Because American society has never taken a stand against domestic violence, it has had to rely on the police and courts to intervene in domestic violence cases. Yet if society understands that abuse of women is wrong, it will be in a much better position to curb future acts of domestic violence.

H. *Experimenters' Treatment of Female Perpetrators of Violence*

The high percentage of female perpetrators in some of the experiments is very distressing, particularly as the data regarding female perpetrators was tabulated into most of the results of the experiments.

Women abused by their male partners comprise 94% of all domestic violence victims.[268] Furthermore, according to data from batterer treatment programs that assesses referrals both for lethality and whether they are really the victims, the overwhelming number of women suspects referred by the courts into batterer treatment programs are actually victims, often acting in self-defense. EMERGE, the country's oldest batterer treatment program, reports that virtually every woman referred to its program was actually a victim who was wrongfully arrested.[269] A study at the University of Denver found that 96% of women arrested for domestic violence offenses were self-defending victims, with the remaining 4% of women slightly more likely to be mutual combatants than primary aggressors.[270]

The percent of women offenders in the police replication experiments varied from 2% in Minneapolis, 4% in Omaha, 9% in Milwaukee, and 11% in Colorado Springs, to 18% in Charlotte.[271] Only the Metro-Dade and Charlotte experiments excluded women perpetrators from their results. Nonetheless, it is extremely troublesome that the Milwaukee, Colorado Springs, and especially the Charlotte police reported many female abusers, suggesting an unwillingness to perceive the real dynamics and danger of domestic violence. The Charlotte study is particularly suspect because it reported that women were the offenders in 17.8% of cases where on-scene arrest was discretionary, but only in

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267. LEVINSON, *supra* note 1, at 31, 98-107.

268. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 8 (1987).

269. Joan Zorza, *The Gender Bias Committee's Domestic Violence Study: Important Recommendations and First Steps*, 33 BOSTON BAR J. 15 (July/Aug. 1989).

270. Tina M. Busey, *Woman Defendants and Reactive Survival Syndrome*, THE CATALYST 6-7 (Winter 1993) (Domestic Violence Resource Center Newsletter, Littleton, CO).

271. POLICING DOMESTIC VIOLENCE, *supra* note 143, at 344; *North Carolina Experiment*, *supra* note 91, at 97-98.

4.4% of cases where arrest was mandatory and only in 2.4% of cases where on-scene arrest was not feasible.[272]

Because so many women arrested as domestic violence perpetrators are actually victims, the experimenters should have either excluded all female suspects from their studies or, at least, tabulated the data regarding female suspects separately. Our experience is that the violence is particularly likely to escalate unchecked in cases where the abuser succeeds in having society blame the victim, and the woman is much less likely to receive further police protection once she is typed as an offender.

The Metro-Dade and Charlotte experiment results only included males battering female spouses or lovers (i.e., no gay or lesbian partners or females abusing male partners were included). The other four studies included instances of females abusing males, and possibly gays, lesbians, and other relationships in their results.

However, that 17.8% of Charlotte cases were excluded from the study because the perpetrator was a woman[273] is so out of proportion that one wonders if that city's police are so gender biased as to make their entire study suspect. Arresting the victim in a domestic dispute epitomizes the "blame the victim" syndrome. Inclusion of these cases in the experiment may well have distorted the results. The mindset of Charlotte police who concluded that 17.8% of perpetrators were women was sufficiently biased to raise questions as to whether they were able to conduct the experiment fairly. At a minimum, the police were inappropriately neglecting to detect real male perpetrators in many instances.

Regarding same-sex couples, it is likely that police will be confused as to which party is the real perpetrator and they are far more likely to make dual arrests in such a situation.[274] Accordingly, the relatively sparse data on same-sex couples should have been either excluded or tabulated in a separate category.

None of the experiments make clear how often dual arrests were made, or whether the police routinely analyzed each case to determine whether the suspect was acting in self-defense or was otherwise not the primary aggressor.

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272. *North Carolina Experiment, supra* note 91, at 98.

273. *Id.* at 97.

274. DAVID ISLAND & PATRICK LETELLIER, MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE 21 (1991); CLAIRE M. RENZETTI, VIOLENT BETRAYAL: PARTNER ABUSE IN LESBIAN RELATIONSHIPS 107-12 (1992).

I. *Absence of Habitual Offenders*

Another problem in the replication studies was the sparsity of repeat offenses noted in the studies. The 1985 National Family Violence Study found that 0.5% of women reported twelve or more severe assaults per year from their intimate partners, and that 2.5% of women were severely assaulted at least three times a year. Severe assaults included being kicked, punched, choked, or attacked with a weapon.[275] Women in battered women's shelters report an average of sixty assaults per year.[276] Yet none of the police replication studies reported that even one victim who was so frequently assaulted. Whether this phenomenon was due to a domestic victim's propensity to minimize the level of violence out of shame or as a survival tactic,[277] or because the experiments' designs excluded them from the studies or from recontacting the police. Whatever the reason, the absence of such cases raises serious, but probably unanswerable questions regarding the design and/or validity of each of the studies.

J. *Military Men's Violence*

The Colorado Springs experiment, the only one involving a significant military population, included twenty-four percent of suspects in the military.[278] Supposedly, men in the military, like other employed males, were believed to be the "good risks" for whom arrest generally worked to deter future violent episodes.

However, violence against women committed by those in the military is in considerably higher proportions than that committed by civilians. As noted in the analysis of the Colorado Springs experiment section,[279] studies of veterans have shown that the incidence of spousal abuse is much higher in the armed forces than in the nonmilitary population.[280] Furthermore, battered women's advocates report that military wives, and especially those of officers, are considerably fearful of reporting domestic violence or recurrences of such violence, believing that it would seriously effect their husband's career.[281] The military can impose a demotion as nonjudicial punishment of domestic abusers and thereby reduce their pay or chances for advancement or favorable assignment. It is also easy

275. Murray A. Straus, *Conceptualization and Measurement of Battering: Implications for Public Policy, in* WOMAN BATTERING: POLICY RESPONSES 30-31 (Michael Steinman ed., 1991).
276. *Id.* at 30.
277. WALKER, *supra* note 183, at 23.
278. Berk, *supra* note 138, at 175.
279. *See supra* text accompanying notes 149-53.
280. Gibbens, *supra* note 151, at 5-7.
281. *See* SHUPE, *supra* note 153, at 72.

for a superior officer to label a soldier as a troublemaker, making promotions and favorable duty assignments far less likely.

Soldiers, and hence their wives, are notoriously subject to frequent relocations and other disruptions.[282] Yet the military family's tendency to move abruptly makes it difficult for those compiling recidivism records to locate these families, a circumstance which would have resulted in an incorrect appearance of a reduced rate of recidivism. Indeed, the worst offenders might well be the most likely to move because of discharge or reassignment, or to have received a military court martial or nonjudicial punishment. There is no indication that any of the studies used military records to track perpetrators. Without access to these records, studies would classify such soldiers as successes, even if they were in fact continuing their violent behavior.

Although soldiers are subject to strong administrative direction, they are also less sensitive to violence and hold to more traditional sex roles than males in the civilian population.[283] Soldiers are more often violent and are more likely to use lethal force against their wives than are civilian men. Soldiers are also more likely to use weapons against their female partners than are civilians. Military men are more than four times as likely as civilians to choke their wives into unconsciousness or with sufficient violence to leave them with sore and bruised windpipes and neck muscles.[284] One-third of the military wives who were battered while pregnant developed complications in their pregnancies that threatened their own lives as well as those of their unborn children.[285] A recent study of the Presidio army base at San Francisco found that 53.3% of the engineers stationed there perpetrated severe physical domestic abuse, with 23% of them using weapons while doing so.[286]

For all of these reasons, one must continue to remain skeptical of the conclusion that Colorado Springs military personnel are really "good risks." At a minimum, we would have liked to have known what the base policies were about domestic violence and how strongly they were enforced. The study should have compared these military men with other men in the military examined by other experiments.

K. *Effect of Recession*

The domestic violence police replication studies were conducted during a period when the economy was in a real decline, the worst

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282. Carol Apt & David F. Hurlbert, *The Sexuality of Women in Physically Abusive Marriages: A Comparative Study*, 8 J. FAM. VIOLENCE 1, 57, 65 (1992).
283. *Id.*
284. SHUPE, *supra* note 153, at 76-77.
285. *Id.*
286. Freedman, *supra* note 153, at 16.

recession in three decades.[287] Stark notes that the most dramatic conclusions drawn by the experimenters were on minorities and the working poor, the groups most affected by the recession. Because violent crime, including assault, has long been correlated with the business cycle, Stark suggests that the most appropriate baseline for the replication experiments should not have been the prearrest levels of violence, but the rate of violence occurring at the same time in cities having similar demographics, where the police policy was not changed.[288] In cities where only some precincts were included in the experiment, it might have been possible to design the experiment using similar, but excluded precincts as the control, particularly if police were not reassigned between experiment and nonexperiment precincts. Although it would have been desirable to use one control group of battered women who did not call the police, this group would most likely have been unrepresentative. For example, such a group would have included women so isolated by their abusers that they had no telephones, women who felt more self-blame or less deserving of help, and women who lived sufficiently far from their neighbors that no one could hear their screams.

That the researchers failed to consider the worsening economy might have compromised their results. Even if declining economic conditions did not, as is likely, directly effect the level of abusers' violence, it might well have reduced police manpower and morale, or the abusers' access to their victims, thereby indirectly impacting the experiment.

L. *What Was Not Studied*

The significance of the experiments is further diminished when one realizes what was not studied. First and foremost, the experiments studied only misdemeanors. Second, the experiments did not study the effects of other aspects of the criminal justice system. In addition, the experiments assumed domestic violence was a private matter; did not consider the impact on children; and failed to put into a separate category or subcategory parties in the process of separation or divorce.

VII. CONCLUSION

There may be reasons to oppose mandatory arrest, but opposition should not be based on the experiments done to replicate the original Minneapolis police domestic violence experiment. The police replication experiments do not, as they are purported to, show that mandatory arrest fails to provide any deterrent effect or one that is only effective against white employed abusers. Mandatory arrest clearly deterred white

287. Stark, *supra* note 217, at 664.
288. *Id.*

and Hispanic abusers even when they were unemployed. Even experiments that indicated that arrest may cause some escalation in domestic violence by black men showed only a slight increase in such incidents.

More to the point, the experiments do not show what mandatory arrest would accomplish as part of a coordinated response to domestic violence. Had prosecution, conviction, and punishment of the offender occurred following arrest, the deterrence effect might have been greater, particularly on those least intimidated by the arrest alone.

In addition, arrest has many purposes, not all of which are directed at the offender. When it is followed by speedy prosecution, conviction, and punishment, the arrest of a domestic abuser conveys to other members of the family and to society as a whole that certain behavior is offensive and will not be tolerated. The benefits of this message may ultimately outweigh any increase in abuse by a few batterers if it translates into greater protection for most victims.

Despite the many problems with the police replication experiments there were several hopeful new developments. First, when police have probable cause to arrest, they should arrest all abusers who were not acting in self-defense, particularly those offenders identified as being most likely to be deterred: the white, employed batterers, the very group police have traditionally been reluctant to arrest.

Second, the length of time an arrested abuser is held should be no shorter than that of other offenders. Very possibly, to the extent which the law allows it, the time should be longer than that imposed in comparable offenses. And the victim should always be notified if reasonably possible before the abuser is released.

Third, when they have probable cause to arrest, police should issue an arrest warrant when they are unable to arrest an absent offender.

Fourth, arrest without more follow through by the criminal justice system may be too weak a sanction to deter many batterers, particularly the unemployed or those with prior arrest records.

Fifth, because the police replication studies showed that unemployed men are the least deterred by arrest, future studies should examine whether court-facilitated employment will lower recidivism rates for batterers. However, this should not be done at the expense of any services and employment opportunities for victims of domestic violence.

The real implication of the police replication studies are that a coordinated community response is what is needed to best eliminate domestic violence. Police, prosecutors, judges, probation officers, and those in corrections must all treat domestic violence as the serious crime that it is, giving the same strong message to the abuser without in any way blaming the victim.

Finally, any future experiments should be designed with input from those in the battered women's movement, both on the national and local

levels, in order to eliminate the flaws that comprised the results of the police replication studies and actually endangered some victims.

Much still remains to be learned about the prevention of domestic violence, the deterrence its perpetrators, and the protection of its victims.

APPENDIX

TABLE I
VICTIM-REPORTED OUTCOME OF FEAR OF BEING PHYSICALLY HURT, PUSHED, HIT OR MANHANDLED; OR OF BEING PHYSICALLY INJURED BY THE SUSPECT DURING THE SIX-MONTH FOLLOW-UP, NONARREST V. NONARREST RESPONSE

VICTIM FELT ENDANGERED			VICTIM PUSHED OR HIT		VICTIM PHYSICALLY INJURED	
Prevalence	Nonarrest	Arrest	Nonarrest	Arrest	Nonarrest	Arrest
Total	165	77	165	77	165	77
Yes (#)	80	44	69	29	45	16
Yes (%)	48.5	57.1	41.8	37.7	27.3	20.8
No (#)	85	33	96	48	120	61
No (%)	51.5	42.9	58.2	62.3	72.7	79.2

NOTE: Total number of cases was 221 for nonarrest and 109 for arrest. Because interview date was missing in fifty-six nonarrest cases and thirty-two arrest cases, the total number of reporting nonarrest cases was 165 and arrest cases was seventy-seven.[289]

289. *The Omaha Police Experiment, supra* note 35, at 201.

TABLE II
AT TWELVE MONTHS

VICTIM FELT ENDANGERED			VICTIM PUSHED OR HIT		VICTIM PHYSICALLY INJURED	
Prevalence	Non-Arrest	Arrest	Non-Arrest	Arrest	Non-Arrest	Arrest
Total	159	71	159	72	159	71
Yes (#)	94	46	81	38	56	25
Yes (%)	59.1	64.8	50.9	52.8	35.2	35.2
No (#)	65	25	78	33	103	46
No (%)	40.9	35.2	49.1	45.9	64.8	64.8

NOTE: Missing were sixty-two cases in the nonarrest group and thirty-eight cases in the arrest group from the first interview.[290]

290. *Recidivism*, *supra* note 42, at 126-27.

TABLE III
VICTIM-REPORTED OUTCOMES
DURING 6-MONTH FOLLOW-UP PERIOD
OFFENDER ABSENT

VICTIM FELT ENDANGERED			VICTIM PUSHED OR HIT		VICTIM PHYSICALLY INJURED	
Out-come	War-rant	No War-rant	War-rant	No War-rant	War-rant	No War-rant
Total	84	112	84	112	84	112
Yes (#)	41	65	29	53	18	41
Yes (%)	48.8	58	34.5	47.3	21.4	36.6
No (#)	43	47	55	59	66	71
No (%)	51.2	42	65.4	52.7	78.6	63.4

NOTE: Total number assigned to receive warrants was 111, with twenty-seven victims not interviewed; total assigned not to receive warrants was 136, with twenty-four victims not interviewed.[291]

291. *The Omaha Police Experiment, supra* note 35, at 52.

TABLE IV
PERCENTAGE CHANGE OF RATE
FOR ANY DOMESTIC VIOLENCE VICTIM
OVER COURSE OF EXPERIMENT[292]

RATE	% CHANGE IN HOSPITAL REPORTS	% CHANGE IN ARREST RECORDS
Full Arrest	+61%	+64%
Short Arrest	+90%	+115%
Warning	+45%	+82%

292. *Short-Custody Arrest, supra* note 68, at 840.

Kinship and Marriage in Massachusetts Public Employee Retirement Law: An Analysis of the Beneficiary Provisions, and Proposals for Change

Jennifer Wriggins*

I. INTRODUCTION

It is commonly observed that "the American family" is changing.[1] Many statutes enacted earlier in the twentieth century, as well as numerous employer-supplied benefits, were based on a picture of a family consisting of a working father and a stay-at-home mother, together raising their children.[2] This picture, however, was never a completely

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1. *Only One U.S. Family in Four is 'Traditional,'* N.Y. TIMES, January 30, 1991, at A19. According to the article, in 1990 only 26% of American households were made up of a married couple and one or more children under eighteen. *Id. See also* BARBARA R. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 4-6, 20-21, 51-54 (1986); *Recognizing Non-Traditional Families*, SPECIAL REP. SERIES ON WORK & FAMILY (BNA) No. 38 (Feb. 1991) [hereinafter BNA REPORT No. 38]; Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164-65 (1992); Jerhold K. Footlick, *What Happened to the Family?*, NEWSWEEK, Special Issue, 1989, at 14.

2. *See, e.g.*, MASS. GEN. L. ch. 32, § 89C (1961) (Annuities to Certain Widows of Employees Killed, or Who Died from Injuries Received, In Line of Duty). Many such statutes were struck down as unconstitutional in the 1970s as discriminatory on the basis of sex. For example, a statute providing that spouses of male members of the armed services were "dependents" for purposes of receiving military benefits, but spouses of female members were not "dependents" unless actually dependent on their wives for more than half their support, was held unconstitutional in Frontiero

accurate representation of reality, particularly for women who were not white.[3] In recent years, recognition has grown that the image of the "traditional" American family does not match United States demographics[4] and, consequently, that some of the laws based on this image operate unfairly when applied to those who live in "nontraditional" families.[5] Over the last decade, the concept of extending certain employment benefits to "domestic partners"[6] of employees in order to relieve some of these inequities has gained considerable ground in both the private and public sectors.[7] In spite of these advances, however, domestic partnership ordinances and programs have thus far failed to deal with inequities in existing retirement programs.

A paradigmatic example of this unfair operation of laws, which has received scant public attention, is found in the beneficiary provisions of the Massachusetts Contributory Retirement System for Public Employees (retirement statute).[8] The retirement statute is a critical arena in which to examine these issues because it governs the retirement of over

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v. Richardson, 411 U.S. 677 (1973). A Social Security Act provision that awarded survivor's benefits to widows, but not to widowers responsible for dependent children, was struck down in Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

3. BLACK WOMEN IN WHITE AMERICA 227-84 (Gerda Lerner ed., 1972); JULIE A. MATTHAEI, AN ECONOMIC HISTORY OF WOMEN IN AMERICA 94-97, 133-36 (1982).

4. BERGMANN, *supra* note 1, at 4-6, 20-21; THE AMERICAN WOMAN 1990-1991: A STATUS REPORT 372-74, tbls. 10-12; 376 tbl. 14; 377 fig. 5; 378 tbl. 16; 380 fig. 6; 382 fig. 7 (Sara E. Rix ed. 1990); MATTHAEI, *supra* note 3, at 279-93; Footlick, *supra* note 1, at 16-17.

5. *See, e.g.*, BNA Report No. 38, *supra* note 1; Cornish, *supra* note 1, at 1165-86; Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace*, 51 OHIO ST. L.J. 1067, 1068-69 (1990); David Link, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOY. L.A. L. REV. 1055, 1057-58, 1079-80, 1099, 1114-18 (1990); John Wofford & Charles Colbert, *Sexual Orientation in the Workplace: The Strategic Challenge*, *in* COMPENSATION AND BENEFITS MANAGEMENT, Summer 1993, at 15; Lisa Zimmer, Note, *Family, Marriage, and the Same-Sex Couple*, 12 CARDOZO L. REV. 681, 681-84 (1990). *See* Massachusetts Governor Weld's Exec. Order No. 340, discussed *infra* at text accompanying notes 134, 145-46.

6. While the phrase "domestic partner" has no single meaning, it is generally intended to apply to those in an emotionally committed, co-habitating, intimate, nonmarital relationship. *See infra* text accompanying notes 134-45.

7. *See, e.g.*, Cornish, *supra* note 1, at 1188-92; *see* Massachusetts Governor William F. Weld Executive Order No. 340 (1992); Boston Mayor Raymond L. Flynn Executive Order, *Extension of Certain Personnel Benefits* (Feb. 12, 1993); CAMBRIDGE, MASS. MUN. CODE ch. 2, § 119 (1992); BROOKLINE, MASS. DOMESTIC PARTNERS BY-LAW (June 2, 1993); *Labor Letter: A Special News Report on People and Their Jobs in Offices, Fields and Factories*, WALL ST. J., Jan. 25, 1994, at A1; David J. Jefferson, *Gay Employees Win Benefits for Partners At More Corporations*, WALL ST. J., Mar. 18, 1994, at C1, C5; *see infra* text accompanying notes 134-41.

8. MASS. GEN. L. ch. 32, §§ 9, 12(2) (1992). *See* text accompanying notes 21-132. This article does not deal with private employers' retirement benefits, nor does it discuss public retirement systems nationwide. Public employment retirement systems in the other New England states are discussed *infra* at notes 14, 76, and 117.

400,000 individuals in the Commonwealth, the largest number of individuals governed by any single retirement program in Massachusetts.[9] Retirement programs are an extremely important part of an employee's compensation package, particularly in the context of public employment.[10] Providing for employees during their retirement, and in some fashion for their dependents, is one of the common goals and characteristics of retirement plans.[11] Employee benefits, including retirement benefits, as a whole average 30.4 percent of the total compensation of public sector employees.[12] Retirement savings make up approximately 7.6 percent of compensation for public sector employees.[13] Unlike a private employer's retirement plan, however, Massachusetts's retirement statute is a manifestation of the legislative will and reflects public policy. Thus, any inequities found are more troubling than those that might be found in private retirement plans. Such inequities are also subject to greater public debate, and perhaps to change, than those of a private retirement system.[14]

Part II of this article outlines the operation of the Massachusetts retirement statute, codified at Chapter 32 of the Massachusetts General Laws. The statute's beneficiary provisions, discussed in Part III of this article, contain a rigid and limited list of relatives who may receive certain valuable benefits after an employee's death.[15] These statutory provisions significantly restrict the opportunity of public employees with

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9. Retirement Boards of the Commonwealth, (Retired State, County, and Municipal Employee's Association of Massachusetts, June 1992). *See also Public Employee Retirement Administration*, REPORT FOR THE STATE EMPLOYEES' CONTRIBUTORY RETIREMENT SYSTEM 13 (1992) [hereinafter PERA REPORT].

10. *See infra* notes 12-13.

11. JEFFREY D. MAMORSKY, ed., EMPLOYEE BENEFITS HANDBOOK 1-2, 1-6, 10-25, 10-26, 10-27, 33-5 (2d ed. 1987) [hereinafter EMPLOYEE BENEFITS HANDBOOK].

12. EMPLOYMENT COST INDEXES AND LEVELS (BUREAU OF LABOR STATISTICS Sept. 1993), at 101, tbl. 26 [hereinafter EMPLOYMENT COST INDEXES AND LEVELS].

13. *Id.* at 102, tbl. 27. *See id.* at 10-17, 89, 93-94. For private employment, employment benefits constituted 28.7% of total compensation as of March 1993. *Id.* at 14, tbl. 11. For private employment, retirement savings made up only 2.9% of total compensation as of March 1993. *Id.* at 93, tbl. 18.

14. Two New England states, Maine and Connecticut, have revised their public employee retirement statutes in ways which make them operate more equitably towards those in "nontraditional" families. *See* ME. REV. STAT. ANN. tit. 5, § 17953 (West 1989) (amend. 1987); CONN. GEN. STAT. ANN. § 5-165(a)(2),(3) (West 1988); CONN. GEN. STAT. ANN. § 5-165a(c) (West 1988) (amend. 1983, P.A. 83-533, § 12). The public retirement statutes of the other New England states generally contain fewer of the types of limitations and inequities discussed in this article. *See* R.I. GEN. LAWS §§ 36-10-18, 36-10-19.1(b), 36-10-21, 36-10-23, 36-10-24 (1956); *but see* R.I. GEN. L. § 36-10-20 (1956); *see* N.H. REV. STAT. ANN. §§ 100-A:9, 100-A:11, 100-A:12 (amended 1991 & 1993), 100-A:13 (amended 1992), 100-A:13(a) (1990). *See* VT. STAT. ANN. tit. 3, §§ 464, 465, 468 (1985). *But see* N.H. REV. STAT. ANN. 100-A:8 (1990). *See infra* notes 76 & 117.

15. *See infra* text accompanying notes 38-112.

relationships that fall beyond the law's traditionally recognized ties of blood and marriage to provide for those individuals for whom they are responsible after their deaths.[16]

Part IV of this article examines several other provisions of the retirement statute, including those addressing accidental death benefits, in which the bright-line status of marriage is not the sole determinant on which entitlement to certain benefits turns.[17] In various circumstances, the marital relationship's duration, nature, and status at the time of the employee's death are considered in awarding certain benefits. Eligibility for these benefits turns on both strict rules and case-by-case determinations as to the fairness and appropriateness of providing certain benefits to employees and their families.[18] Given this legislative concern with, and the precedent of examining, the duration, substance, and nature of individual employees' marriage relationships, it is inconsistent and unnecessary to deny benefits to survivors of employees who are not in legally recognized relationships, regardless of the duration, substance, and nature of those relationships.[19]

Part V of the article examines several legislative options to further the goal of basic fairness to employees while protecting other interests of the system, and in conclusion recommends several specific changes.[20]

II. THE FRAMEWORK OF THE MASSACHUSETTS PUBLIC EMPLOYEE CONTRIBUTORY RETIREMENT SYSTEM

A. *The Basic Structure*

The retirement system is part of the benefits package offered to the vast majority of Massachusetts's full-time public employees.[21] Established in 1946, participation in the system is mandatory for employees

16. *See infra* text accompanying notes 60-112.

17. *See infra* text accompanying notes 113-32.

18. *See infra* text accompanying notes 113-32. The tension between bright-line rules and case-by-case determinations is of course not unique to the retirement statute, but recurs throughout law. *See, e.g.*, KENNETH C. DAVIS, ADMINISTRATIVE LAW TEXT 19, 21-23 (3d ed. 1972); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15-17 (1987); Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 940 (1923).

19. *See infra* text accompanying notes 60-112, 132-33. For other discussion of the retirement statute, see, e.g., Maria C. Walsh, *A Judicial Guide to Labor and Employment Law* 314-36 (1990) [hereinafter *Judicial Guide*]; Maureen Duval & Paul Todisco, Pension Reserves Investment Management Board's Overview of the Massachusetts Public Employee Contributory Retirement Law (May 15, 1992) (on file with author) [hereinafter Overview].

20. *See infra* text accompanying notes 133-74.

21. *Judicial Guide*, *supra* note 19, at 314.

who are eligible to participate.[22] Depending on when the employee entered into public employment, thus becoming a "member" of the system,[23] between five and eight percent of the employee's gross paycheck is deducted from each member's paycheck as a mechanism for partially funding the retirement system.[24] Retirement is generally achieved after twenty years of creditable service.[25]

An individual's retirement allowance is based on a formula involving the employee's age at retirement, years of service, the type of job the employee performed, and several other factors.[26] The retirement allowance consists of two parts. The annuity portion, based on the member's own contributions from payroll deductions comprises roughly ten

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22. MASS. GEN. L. ch. 32, § 22(1)(b) (1992); Overview, *supra* note 19, at 1.

23. A "Member" in the context of the retirement statute is defined as:

> any employee included in the state employees' retirement system, in the teachers' retirement system or in any county, city, town, the Massachusetts Turnpike Authority, the Massachusetts Housing Finance Agency, or the Massachusetts Port Authority contributory retirement system, the Massachusetts Bay Transportation Authority police retirement system, the Blue Hills Regional Vocational school retirement system, the Minuteman Regional Vocational Technical School District Employees' retirement system, and the Greater Lawrence Sanitary District Employees' retirement system, established under the provisions of sections one to twenty-eight, inclusive, or under corresponding provisions or earlier laws, and if the context so requires, any member of any contributory retirement system established under the provisions of any special law.

MASS. GEN. L. ch. 32, § 1 (1992). There are in fact 106 contributory retirement systems in the Commonwealth. PERA REPORT, *supra* note 9, at 19. The current retirement law gathers together many pre-existing statutes regulating public employee retirement systems. Bianchi v. Retirement Board of Somerville, 359 Mass. 642, 647, 270 N.E.2d 792, 795 (1971). For convenience, references in this article to public employees generally include any public employees covered by the retirement statute, Massachusetts General Law Chapter 32. The retirement statute defines "Board" as "the appropriate retirement board established under the provisions of section twenty having jurisdiction of any contributory retirement system established under the provisions of sections one to twenty-eight inclusive . . . ." MASS. GEN. L. ch. 32, § 1 (1992).

24. MASS. GEN. L. ch. 32, § 22(1)(b) (1992); Overview, *supra* note 19, at 3.

25. "Creditable service" is "all membership service, prior service and other service for which credit is allowable to any member under the provisions of sections one to twenty-eight inclusive." MASS. GEN. L. ch. 32, § 1 (1992). Details as to the application of the term "creditable service" are found in MASS. GEN. L. ch. 32, § 4 (1992). Exceptions to this twenty year standard apply to members of the retirement system who began their state employment before January 1, 1978. MASS. GEN. L. ch. 32, § 5 (1992). These members may retire at any time after age fifty-five regardless of the number of years served. *See* MASS. GEN. L. ch. 32, §§ 1, 4 (1992); *Judicial Guide*, *supra* note 19, at 314. Members employed January 1, 1987 or thereafter, after reaching age fifty-five, can retire after ten years of creditable service. *See* MASS. GEN. L. ch. 32, § 5 (1992).

26. *See* MASS. GEN. L. ch. 32, § 5 (1992).

percent of the allowance.[27] The second part, or pension portion, comprises the remaining ninety percent, or so, provided by the governmental employer.[28] The amount of retirement allowance also depends on the type of allowance chosen by the employee.[29]

Several provisions of the statute permit a member to designate a beneficiary to receive certain payments after the member's death. As discussed in more detail below,[30] the statute gives members considerable, but not unlimited, control over the disposition both of their own contributions from payroll deductions and of interest on those contributions.[31] In contrast, members' control over the choice of beneficiary for their retirement allowance, which includes the much more valuable pension portion, is strictly limited.[32] The retirement statute also includes various other provisions, discussed below, pertaining to benefits that certain relatives may receive after a member's death.[33]

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27. *Judicial Guide*, *supra* note 19, at 314. "Annuity" is defined as "payments dependent upon the continuance of life of any member and derived from his accumulated regular deductions or from his accumulated additional deductions, if any, or from both, as the case may be." MASS. GEN. L. ch. 32, § 1 (1992). "Additional deductions" are amounts that a member can specify be deducted from his paycheck. *Id.* "Pension" is defined as "payments dependent upon the continuance of life of any member or beneficiary and derived from contributions made by the appropriate governmental unit." *Id.* "Retirement allowance" is defined as "the sum of the amount of the annuity and the amount of the pension provided for in sections one to twenty-eight inclusive." *Id.*

28. *Judicial Guide*, *supra* note 19, at 314.

29. Section 12(2) contains three options for types of retirement allowances from which an employee can select one. MASS. GEN. L. ch. 32, § 12(2) (1992). *See infra* text and accompanying notes 50-65.

30. *See infra* text accompanying notes 42, 46-49.

31. MASS. GEN. L. ch. 32, § 11(2)(c) (1992). *See infra* text accompanying notes 40-41, 43-45, and chart accompanying notes 66-75.

32. MASS. GEN. L. ch. 32, § 12(2) Options (c), (d) (1992). *See infra* chart accompanying notes 66-75. An additional issue is that of health insurance for employees of the Commonwealth and their dependents. Massachusetts General Laws Chapter 32A, § 5 provides that state employees are automatically entitled to receive health insurance. Massachusetts General Laws Chapter 32A, § 11 states that the surviving spouse or surviving dependent of an employee or retired employee of the Commonwealth may continue general health coverage. A "dependent" is defined as "an employee's spouse, his unmarried children under nineteen years of age, and any child nineteen years of age or over who is mentally or physically incapable of earning his own living . . . ." MASS. GEN. L. ch. 32A, § 2(d) (1992). This issue, although it has been much discussed in the context of domestic partnerships, is beyond the scope of this article. *See supra* notes 5, 7, and *infra* notes 134-41.

33. MASS. GEN. L. ch. 32, §§ 9(1), 12(2) Option (d), 12B (1992). *See* text accompanying notes 113-32.

B. *Funding of the Retirement System*

Although deductions from employees' wages are used partially to fund the retirement system, the system was not initially intended to be, nor is it, funded entirely from workers' contributions.[34] The remainder of the system's obligations were left to be funded on a "pay-as-you-go" basis, meaning that appropriations must be made annually for payment of current benefits to retirees.[35] Due to the large amount of liabilities for members' past service (unfunded liabilities), and the uncertainty of tax revenues from which to fund anticipated liabilities, the General Court organized an investigation into the operation of the law in the early 1980s.[36] This investigation eventually resulted in the passage of several pieces of legislation aimed at streamlining the system and creating several reserve funds with the goal of eventually eliminating unfunded liabilities.[37]

III. CHOICE OF BENEFICIARY PROVISIONS

A. *The Statutory Framework*

The distinction between a member's own contributions (the annuity), and the pension itself, which consists of contributions derived from the appropriate governmental unit, is critical to an understanding of the retirement system.[38] A "retirement allowance" consists of the sum total of the member's annuity and pension.[39] It is also useful to bear in mind the distinction between a member dying before reaching retirement, and a member dying after reaching retirement.

1. Dying Before Retirement

If a member dies before retirement, one of two things can occur regarding his or her benefits, assuming that no exceptions apply. First, if the member has chosen a beneficiary from a limited list of relatives,[40] a one-time immediate payment of two-thirds of the total retirement

34. *See* Overview, *supra* note 19, at 3.
35. *Id.*
36. *Id.*
37. *Id.*; MASS. GEN. L. ch. 32, §§ 22, 23 (1992); *see also* PERA REPORT, *supra* note 9, at 5.
38. MASS. GEN. L. ch. 32, § 1 (1992).
39. *Id.*
40. If a member dies before retirement, without having chosen a beneficiary for the Member Survivor Allowance, the member's spouse may elect to receive the allowance in some circumstances. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992). This alternative way of obtaining the Member Survivor allowance is discussed in more detail at text accompanying notes 124-32.

allowance to which he or she would have been entitled had retirement taken place on the date of death will be paid to the chosen relative.[41] Alternatively, if the employee has chosen a beneficiary not on the limited list of relatives, only his or her contributions, together with accrued interest, can be paid to the non-relative beneficiary.[42] The beneficiary under the first scenario, i.e., chosen from the statute's limited list, will generally receive a much greater payout than the beneficiary under the second option.

Each of these two outcomes will be discussed in more detail. Under the first scenario, a member may nominate a beneficiary within a narrow list of relatives as a "Member Survivor." If the member dies before reaching retirement, the "Member Survivor" will get a payout equal to two-thirds of the total amount of the "Option (c)" retirement allowance to which the member would have been entitled had retirement taken place on the date of death.[43] The Option (c) retirement allowance is one of several retirement allowance options from which members may choose upon their retirement.[44] The only persons that a member may nominate to receive this Member Survivor Allowance are the member's "spouse[,] former spouse who has not remarried, child, father, mother, sister or brother . . . ."[45]

Regarding the second scenario, the payment of a member's contributions to a beneficiary, any member may nominate on a prescribed

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41. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992).

42. MASS. GEN. L. ch. 32, § 11(2)(b), (c) (1992).

43. MASS. GEN. L. ch. 32, § 12(2), Option (d) (1992). Note that the Member Survivor Allowance only applies if the employee dies before retirement. *See infra* chart accompanying notes 66-75.

44. *See infra* text accompanying notes 56-65.

45. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992). According to Option (c), if a spouse receiving an allowance as a beneficiary dies, leaving children of the beneficiary and the deceased employee who are under eighteen years of age, the children's guardian will receive the spouse's share. *Id.* The option further provides that if a member has not designated an eligible beneficiary other than his or her spouse under Massachusetts General Laws Chapter 32, § 12(2) Option (c), with some conditions the spouse may elect to receive the Member Survivor Allowance, § 12(2) Option (d). If the spouse elects to receive the allowance, the spouse will receive an additional allowance for each minor, incapacitated, or under twenty-two year old student child. *See* MASS. GEN. L. ch. 32, § 12B (1992). If the spouse does not elect to receive the allowance, and prior to death the member had designated a beneficiary under the more liberal provisions of § 11(2)(c), then the accumulated total deductions of the member shall be given to the surviving beneficiary chosen under § 11(2)(c). MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992). If there is no other surviving beneficiary, the spouse shall receive the member's accumulated total deductions. *Id.* On a member's death, the board shall notify the spouse and children of the member what information is necessary to determine their eligibility for benefits. MASS. GEN. L. ch. 32, § 12(c) Option (d) (1992). Remarriage of the spouse reduces the Member Survivor Allowance. *Id.*

form "one or more beneficiaries to receive" the return of the employee's contributions if he or she dies before retirement, according to the retirement statute's section 11(2).[46] The statute contains several exceptions to an employee's ability to nominate any person to receive his or her contributions. For example, if the deceased employee has nominated a beneficiary for part of the retirement allowance under the more limited provisions of section 12(2) Option (d) (Member Survivor Allowance),[47] payment of the member's contributions to a beneficiary under section 11(2) shall not be made.[48] Thus, a member cannot "split" retirement benefits by giving contributions to a non-relative and part of the pension to a relative. Another exception occurs when an employee is survived by a dependent child and payment is not made under the broad provisions of section 11(2).[49] Apart from these exceptions, an adult member may nominate whoever he or she wishes to receive his or her contributions upon death.

2. Dying After Retirement

A member who survives until the age of retirement and becomes eligible for retirement can retire and choose from three different options with respect to retirement benefits.[50] Each option is tailored to advance different goals of different employees, and together they present a rather broad range of options for employees to choose from, depending on their family situations and wishes. For an individual who seeks to have the maximum amount of income during his or her life and has no person to whom he or she seeks to leave any benefits, Option (a), the "Life Annuity," is the obvious choice. It is a "full retirement

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46. MASS. GEN. L. ch. 32, § 11(2)(c) (1992). This subsection also contains the proviso that "any such beneficiaries nominated by a minor shall be of his kindred." *Id.* § 11(2)(c). *See infra* chart accompanying notes 66-75.

47. *Id.* § 12(2) Option (d). The list of possible beneficiaries for MASS. GEN. L. ch. 32, § 12(2) Options (c) and (d) is actually contained in Option (c). *See infra* text accompanying notes 124-32.

48. MASS. GEN. L. ch. 32, § 11(2)(c) (1992). In such an instance, return of contributions and interest would be made under the provisions of § 12(2).

49. *Id.* Specifically, if the deceased employee is a male and is survived by a person eligible to receive the pension allowance as set forth in § 12B (which provides for an additional allowance for spouses and children of surviving members), or is a female and is survived by a child eligible according to § 12B, the return of contributions to the designated beneficiary shall not be made. MASS. GEN. L. ch. 32, § 11(2)(c) (1992). If "the widow" or guardian of the minor child chooses not to elect to receive the benefits to which they would otherwise be entitled, the benefits will be paid in accordance with the employee's choice. MASS. GEN. L. ch. 32, § 11(2)(c) (1992).

50. MASS. GEN. L. ch. 32, § 12(1) (1992). If a member lives to retirement and dies without having chosen an option, the retirement allowance is paid as in § 12(2) Option (b) (1992). MASS. GEN. L. ch. 32, § 12(1) (1992). *See infra* notes 52-65 and accompanying text. *See also infra* chart accompanying notes 66-75.

allowance," including a pension, which does not provide payment to any beneficiaries.[51] All payments are made during the member's life and terminate upon death.

Option (b), the "Cash Refund Annuity," involves a member receiving a cash annuity consisting generally of employee contributions and a pension.[52] But if the employee dies before the annuity portion disbursed equals the amount of contributions made, the beneficiary as designated in the permissive provisions of section 11(2)[53] receives the balance of the member's contributions.[54] If the employee dies after having received annuity payments which are *greater* than the amount of employee contributions, the beneficiary receives nothing.[55] The beneficiary does not under any circumstances receive the pension.

The final choice, Option (c), is the "Joint and Last Survivor Allowance." This option is designed for persons who want to provide for a beneficiary as well as receive a retirement allowance. Under Option (c), a member gets a reduced retirement allowance during his or her lifetime.[56] After the member's death, the eligible beneficiary receives two-thirds of the member's retirement allowance for the beneficiary's lifetime.[57]

This "Joint and Last Survivor Allowance" is a very valuable benefit, but unlike the treatment of employee contributions made to the system, the employee is only allowed to designate a beneficiary from certain limited categories of people.[58] Under this provision, as with the Member Survivor Allowance discussed above,[59] "[n]o person shall be eligible for nomination as beneficiary . . . unless such person is the spouse[,] former spouse who has not remarried, child, father, mother, sister or

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51. MASS. GEN. L. ch. 32, § 12(2) Option (a) (1992). The life annuity is a full retirement allowance payable to such member which shall consist of a regular life annuity, a pension, and an additional life annuity. *Id.*

52. MASS GEN. L. ch. 32, § 12(2) Option (b) (1992).

53. *See supra* notes 42, 46-49 and accompanying text.

54. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).

55. *Id.*

56. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992); PERA REPORT, *supra* note 9, at 23.

57. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992). Once the member reaches retirement, the 12(c) beneficiary choice becomes irrevocable: if the beneficiary dies on or after the date the retirement allowance becomes effective, but before the death of the member, the member shall be paid a full retirement benefit under Option (a) and may not designate anyone else to receive the benefit. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992). If, however, the beneficiary dies before the date the retirement allowance becomes effective, the member may make a new election under Option (a), (b), or (c). *Id.*

58. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

59. *See supra* text accompanying notes 40-41, 43-45.

brother of such member."[60] No person can be a member's Joint and Last Survivor other than one who falls within the categories of the spouse or immediate family. The Joint and Last Survivor Allowance is the only means by which an employee may provide an annual allowance for a named beneficiary. If an employee does not have a spouse, a former spouse who has not remarried, or a relative on the authorized list to whom he or she wants to bequeath these benefits, the employee must take either the Life Annuity option,[61] using the entire retirement benefit, or the Cash Refund Annuity,[62] which allows an employee to give a portion of his or her contributions to a designee outside the retirement allowance beneficiary provisions of Option (c) if any contributions remain at the time of death.[63] All of the three options included in section 12(2) are actuarially equivalent.[64] This means that each is designed to cost the public employer the same amount.[65]

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60. MASS. GEN. L. ch 32, § 12(2) Option (c) (1992). If a spouse receiving an allowance as a beneficiary dies leaving children of the deceased employee and the beneficiary who are under eighteen years of age, the children's guardian will receive the member's share. *Id.* This list is hereinafter referred to as the "retirement allowance beneficiary" provisions.

61. MASS. GEN. L. ch. 32, § 12(2) Option (a) (1992).

62. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).

63. As allowed by MASS. GEN. L. ch. 32, § 11(2) (1992).

64. MASS. GEN. L. ch. 32, § 12 (2) Option (c) (1992).

65. "Actuarial equivalent" is defined by the retirement statute as "any benefit of equal value when computed upon the basis of the Combined Annuity Table of Mortality set back one year and interest at the rate of three per cent [sic] per annum." MASS. GEN. L. ch. 32, § 1 (1992).

An additional definition of "actuarial equivalent" is, "[i]f the present value of two series of payments is equal, taking into account a given interest rate and mortality according to a given table, the two series are said to be actuarially equivalent. For example, under a given set of actuarial assumptions, a lifetime monthly benefit of $67.60 beginning at age 60 can be said to be the actuarial equivalent of $100 a month beginning at age 65. The actual benefit amounts are different but the present value of the two benefits, considering mortality and interest, is the same." EMPLOYEE BENEFIT PLANS: A GLOSSARY OF TERMS 3 (June M. Lehman, ed., 6th ed. 1987).

TABLE I

1. Death Occurs Before Retirement	
Type of Funds:	Beneficiary Options:
A. Member's Own Contributions plus interest[66]	Employee's Choice[67]
B. Two-Thirds of total retirement allowance to which member would have been entitled if retirement had taken place on date of death (Member-Survivor Allowance)[68]	Spouse, former spouse who has not remarried, siblings, children, parents[69]
2. Death Occurs After Retirement	
Options:	
(a) Life Annuity. Full pension plus annuity, received by member during lifetime[70]	None[71]
(b) Cash Refund Annuity. Cash annuity including annuity plus pension for member's lifetime; beneficiary receives balance of employee's contributions if employee dies before receiving annuity payments greater than her contributions[72]	Employee's choice[73]
(c) Joint and Last Survivor. Reduced allowance during member's lifetime; beneficiary receives two-thirds of the member's retirement allowance during her lifetime[74]	Spouse, former spouse who has not remarried, siblings, children, parents[75]

66. MASS. GEN. L. ch. 32, § 11 (2)(a) (1992).
67. MASS. GEN. L. ch. 32, § 11 (2)(c) (1992).
68. MASS. GEN. L. ch. 32, § 12 (2) Option (d) (1992).
69. MASS. GEN. L. ch. 32, § 12(2) Options (c), (d) (1992).
70. MASS. GEN. L. ch. 32, § 12(2) Option (a) (1992).
71. MASS. GEN. L. ch. 32, § 12(2) Option (a) (1992).
72. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).
73. MASS. GEN. L. ch. 32, §§ 12(2) Option (b), 11(2) (1992).
74. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).
75. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

B. *Implications of the Limitations on Choice of Beneficiary*

The limitations on beneficiaries of the Joint and Last Survivor Allowance and the Member Survivor Allowance in certain respects deprive some deserving members of the right to control their benefits as opposed to other members.[76] Employees are only allowed to retire after providing loyal service to the Commonwealth for many years.[77] The retirement allowance, as well as the opportunity to name those closest to one as beneficiaries, are intended to constitute part of the reward for such loyal service.

For example, if an unmarried, long-divorced, or never-married member has no living children, parents, or siblings, but does have an extremely close friend for whom he or she wishes to provide, under the present system the member is not permitted to name the friend as beneficiary of either the Joint and Last Survivor Allowance[78] or the Member Survivor Allowance.[79] The member may provide for a return of contributions to the friend if the employee dies before retirement.[80] If the employee lives to retirement, he or she must choose between the Life Annuity Option[81] and the Cash Refund Annuity.[82] The Cash Refund Annuity allows for the return of a portion of the employee's contributions to the friend/beneficiary, depending on how long the member lives. If a member has a close friend and a living brother, however, the member is unable both to bequeath the contributions to the friend *and* name the brother as beneficiary of the Joint and Last Survivor Allowance. If the brother is named as the Joint and Last Survivor[83] or Member Survivor[84] beneficiary, the close friend cannot

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76. The public retirement statute of the other New England states contain fewer limitations on who an employee may choose to be a beneficiary of a retirement allowance than Massachusetts. In fact, Vermont, New Hampshire, Connecticut, and Maine have no limitations on whom an employee may designate for receipt of an allowance. VT. STAT. ANN. tit. 3, § 468 Options 2, 3, 4 (1985); CONN. GEN. STAT. ANN. § 5-165 (a)(2), (3) (West 1988); N.H. REV. STAT. ANN. § 100-A:13 Options 2, 3 (1990); ME. REV. STAT. ANN. tit. 5, § 17953(2) (West 1989). Rhode Island only requires that a recipient of a retirement allowance have an insurable interest in the employee's life. R.I. GEN. LAWS § 36-10-18 (a), (b) (1990).

77. *See* MASS. GEN. L. ch. 32, § 5 (1992). Twenty years of creditable service is generally required before retirement is achieved. *Judicial Guide, supra* note 19, at 314 (citing MASS. GEN. L. ch. 32, § 5 (1992)). *See supra* text accompanying note 25.

78. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

79. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992).

80. MASS. GEN. L. ch. 32, § 11(2) (1992).

81. MASS. GEN. L. ch. 32, § 12(2) Option (a) (1992).

82. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).

83. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

84. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992).

be named to receive the return of employee contributions under section 11(2).[85]

Another example is that of two unmarried individuals in a heterosexual relationship who consider themselves to be spouses, live together, share their incomes, and name each other as beneficiaries in their wills. In such a scenario, the female member could not name her "spouse" as beneficiary of the Joint and Last Survivor Allowance or the Member Survivor Allowance. If she dies before retirement, the only way her partner can receive any of her benefits or contributions only is if she had named him under section 11(2) as beneficiary of her contributions. If she dies after retirement, the only way he can receive any of her benefits or contributions is if she had chosen the Cash Refund Annuity and dies prior to receiving an amount equal to the contributions she had made to the system. If the member dies before retirement, the "spouse" could not possibly elect to receive the Member Survivor Allowance, because non-spouses are not permitted to make such elections.[86]

If the heterosexual couple married, the member would instantly be able to name her husband as Joint and Last Survivor and Member Survivor beneficiary.[87] If she dies before retirement and had neglected to name her husband or any other person as beneficiary, her husband could elect to receive the Member Survivor Allowance, assuming that the couple had been married a year and was living together at the time of her death.[88]

An additional example is of two individuals in a homosexual relationship, who consider themselves to be spouses, live together, share support of each other, name each other as beneficiaries in their wills, and whose relationship shares many of the characteristics of a traditional marriage. A member of the retirement system in such a situation would have no way of providing for his or her partner with the Member Survivor Allowance or the Joint and Last Survivor Allowance, even if the partner was completely dependent on the member for financial support.[89]

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85. MASS. GEN. L. ch. 32, § 11(2)(c) (1992).

86. MASS. GEN. L. ch. 32, § 12(2)(d) (1992).

87. MASS. GEN. L. ch. 32, § 12(2)(c) (1992).

88. MASS. GEN. L. ch. 32, § 12(2)(d) (1992). Also, the employee must have been a member for at least two years. *Id.* *See infra* text accompanying notes 124-32.

89. It is illegal in Massachusetts for an employer, "because of the . . . sexual orientation . . . of any individual . . . to discriminate against such individual in compensation or in terms, conditions, or privileges of employment, unless based upon a bona fide occupational qualification." MASS. GEN. L. ch. 151B, § 4(1) (1992). Chapter 151B, section (4)(1) of the Massachusetts General Laws does not outlaw discrimination on the basis of marital status. It may be argued that the limitations in the retirement allowance beneficiary provisions effectively offer lower compensation and less favorable terms, conditions, and privileges of employment to gay and lesbian employees than to heterosexual employees. A heterosexual employee can marry her partner and thus may name his or her spouse (or former spouse) as a

retirement allowance beneficiary. By contrast, a gay or lesbian employee cannot marry his or her partner and is thus unable to provide the same benefits to the partner (or former partner).

Participation in the system is mandatory for employees. An employee cannot set up an individual retirement account (for which he or she could choose any beneficiary) during any year when he or she is a member. I.R.C. § 219(g) (1988). Thus, an employee's mandatory participation in the system affects retirement planning in a significant manner.

The success of a discrimination claim is uncertain but possible. First, an amendment to several sections of Chapter 151B states: "[N]othing in this act shall be construed so as to legitimize or validate a 'homosexual marriage,' so-called, or to provide health insurance or related employee benefits to a 'homosexual spouse,' so-called." 1989 Mass. Acts. ch. 516, § 19. This language has not been construed in any reported decisions.

One issue in a discrimination case is likely to be whether a retirement allowance is an "employee benefit" which is "related" to "health insurance." Chapter 151B by its terms is to be construed liberally to accomplish its purposes, which include opposing discrimination on the basis of sexual orientation in employment. MASS. GEN. L. ch. 151B, § 9 (1992). The retirement statute operates largely independently of any provisions relating to state employees' health insurance. *See supra* note 32. Moreover, many employers provide health insurance benefits that do not provide retirement benefits. (For private employers, health insurance costs comprise 7.2% of total compensation, while retirement costs comprise 2.9% of total compensation). *See* EMPLOYMENT COST INDEXES AND LEVELS, *supra* note 12, at 11. Retirement benefits clearly serve different purposes from health insurance benefits, as retirement benefits are aimed at providing income to retired employees and their dependents, while health insurance benefits are aimed at protecting employees from unexpected financial loss caused by injury or illness to their families or themselves. Employee Benefits Handbook, *supra* note 11, at 1-2, 1-6, 33-5. Thus, a retirement allowance may be considered a benefit which is not related to health insurance.

Even apart from the amendment discussed above, are the retirement allowance beneficiary provisions discriminatory in violation of Chapter 151B? The logic of Massachusetts Governor Weld's Executive Order 340 (discussed *infra* at text accompanying note 134) compels an affirmative answer. The Executive Order acknowledges the Commonwealth's obligations under Chapter 151B "to protect its citizens from discrimination on the basis of sexual orientation," and directs the personnel department to promulgate such regulations "as are necessary to eliminate discrimination on the basis of sexual orientation in the benefits provided to employees under its jurisdiction." Executive Order 340, *infra* note 134. The Order goes on to provide a narrow list of benefits which are being extended, such as bereavement leave for an employee whose domestic partner or domestic partner's family member has died. If it is discriminatory to not allow an employee to take bereavement leave when his or her domestic partner dies, it is also discriminatory to not allow an employee to provide a retirement allowance to his or her domestic partner when the employee dies.

Some legal support may be found for arguing that the retirement allowance beneficiary scheme is discriminatory, although such arguments have not gained broad approval. The Vermont Labor Relations Board in June 1993 ruled against the University of Vermont that the university violated its non-discrimination policies prohibiting discrimination on the basis of sexual orientation, by denying medical benefits to domestic partners of employees while extending benefits to spouses of employees. Grievance of: B.M., S.S., C.M., and J.R., No. 92-30, at 214 (Vermont

The beneficiary provisions applicable to the Joint and Last Survivor Allowance and the Member Survivor Allowance were amended in 1991 to permit a member to designate a "former spouse who has not remarried" as a beneficiary.[90] This addition apparently was made in order to make it more practical to divide pensions in the context of domestic relations orders in divorce actions.[91] This addition is significant because it expands the retirement allowance beneficiary provisions to include persons not related to members by blood or by marriage. It does not limit beneficiary choices to those aimed at supporting "traditional" families, i.e., a "former spouse" by definition is generally not part of the family unit (or he or she would not be a former spouse). It is also at odds with the provisions concerning the spouse of a member electing to receive the Member Survivor Allowance, which state that the allowance may be denied if the parties were not living together at the time of the member's death.[92]

It may be argued that the limited beneficiary choices of the Joint and Last Survivor Allowance and the Member Survivor Allowance are appropriate because limiting the choices to relatives by blood and marriage (except for former spouses) allows the benefits to be targeted at dependents of employee-members. Indeed, it is an overriding goal of the retirement system to provide for the dependents of employee-mem-

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Labor Relations Bd. 1993). The Vermont Labor Relations Board applied a disparate impact analysis based on Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), stating that "[o]nce the employee demonstrates that the employer['s] practice causes a disparate impact on a protected class, the practice is prohibited unless the employer can demonstrate that the practice is related to job performance and [is] consistent with business necessity." *Id.* at 216. The Board found that excluding unmarried domestic partners of employees from health benefits had a "markedly disproportionate impact on gay and lesbian employees compared to heterosexual employees." *Id.* at 218. Finding no business necessity, the Board ordered the University to provide domestic partner benefits. *Id.* at 220-21. A similar disparate impact analysis was used in Anglin v. City of Minneapolis, Minneapolis Library Bd., No. 88180 EM-12 (City of Minneapolis Comm'n on Civil Rights 1992), to find that the city's failure to provide health benefits to same-sex partners of employees violated the city's ordinance forbidding discrimination on the basis of affectional preference. *Id.* at 13. *But see* Phillips v. Wisconsin Personnel Comm'n, 482 N.W.2d 121 (Wis. 1991) (state's failure to provide health insurance benefits to partner of lesbian employee held not discriminatory on basis of sexual orientation or gender and not equal protection violation). Disparate impact analysis may be a promising approach to pursue in legal challenges to the retirement allowance beneficiary provisions.

90. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

91. *See* Memorandum from John J. McGlynn, Commissioner of Division of Employee Retirement Administration, to All Retirement Boards (Apr. 24, 1991) (on file with author).

92. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992). *See infra* text accompanying notes 124-32.

bers.[93] Upon close examination, however, it becomes clear that the retirement allowance beneficiary list is not about providing for dependents. A member could leave his or her pension to an adult millionaire sister, for example. Using a blood relationship as a surrogate for dependency determinations is not even rational.[94]

Moreover, although members may have actual dependents who do not fall within the allowed class, there is no latitude for case-by-case determinations in this context. Indeed, the statutory list seems to be based on a concept of family that statistics show is becoming less and less common.[95] Often, in today's two-earner households, relationships between adults are of interdependence, and not of one-way dependence.[96] If the goal of the retirement system is to promote caring for actual dependents, perhaps the retirement allowance beneficiary list should be changed by allowing the Board the discretion to determine whether a person with whom a member has a relationship is truly financially dependent.[97]

The retirement allowance beneficiary restrictions may be defended as a bright-line means of reflecting the emotional attachments of the majority of members, and allows those members to provide for those to whom they are emotionally attached. Yet, the list may not accurately reflect the relationships of many members at all. Some people are estranged from their legally-recognized families and it would be highly unlikely that they would wish to provide a benefit to those families. If the goal is to allow members to designate as a beneficiary a person to whom they are emotionally attached, regardless of dependence, the list should be revised to permit the designation of persons beyond those currently listed.

It may also be argued that the Joint and Last Survivor Allowance,[98] which allows a member to provide to a beneficiary an allowance during the beneficiary's lifetime, is more expensive for the Commonwealth and should therefore be more limited than other options. This analysis is inaccurate, however, because the three options contained in section 12(2)[99] are actuarially equivalent,[100] or designed to cost the public employer the same amount.[101] For example, the amount received by

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93. *See supra* note 11 and accompanying text, and *infra* text accompanying note 117.

94. *See infra* note 112.

95. *See supra* notes 1 and 4.

96. BERGMANN, *supra* note 1, at 26-38.

97. *See infra* note 122.

98. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

99. The Life Annuity Option, the Cash Refund Annuity Option, and the Joint and Last Survivor Allowance Option.

100. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

101. *See supra* note 65.

the employee and her beneficiary under the Joint and Last Survivor Allowance is adjusted according to the age of the employee and the age of the beneficiary to be actuarially equivalent to the Life Annuity option.[102] Thus, there appears to be no fiscal justification for the beneficiary limitations on the Joint and Last Survivor Allowance.

Next, it may be argued that the Commonwealth has an interest in promoting "traditional" nuclear families because such units are deemed the best setting in which to raise children.[103] Even assuming this conclusion is correct,[104] the retirement allowance beneficiary list does not promote such families, since it includes adult siblings, ex-spouses, and parents who may not be involved in any way with the member's household unit or with child-rearing.

The retirement statute arguably treats members who have responsibilities and personal lives that do not fit within the statute and who wish to designate beneficiaries to reflect their responsibilities and lives, in a similar fashion to those who have been convicted of a "criminal offense involving violation of the laws applicable to [their] office or position."[105] Employees convicted of such offenses can designate that return of contributions be made to a beneficiary of their choice, but forfeit any interest otherwise received.[106] Such employees also forfeit their retirement allowance.[107] Loyal employees, who have not been convicted of any offense, and who wish to provide benefits to someone outside the rigid beneficiary list can only designate return of their own

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102. Thus, while a member may designate a very young beneficiary to receive the Joint and Last Survivor Allowance, the annual amount received by the beneficiary will be less than that which would be received by an older beneficiary. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992).

103. The Massachusetts Supreme Judicial Court recently held in the context of adoption, that the "best interests of the child" is the governing principle and that adoption by a lesbian co-parent of her partner's child is appropriate if in the best interests of the child. Adoption of Susan, 416 Mass. 1003, 1003, 619 N.E.2d 323, 324 (1993); Adoption of Tammy, 416 Mass. 205, 210-17, 619 N.E.2d 315, 318-21 (1993).

104. Interestingly, the City of Boston's Executive Order entitled "Extension of Certain Personnel Benefits," February 12, 1993, indicates that the City has an interest in promoting bonds within all types of families. It states: "The City recognizes that the welfare of all residents is enhanced by efforts to reinforce the bonds of families, both traditional and non-traditional, and encourages individuals to provide emotional, economic, and social support within households[.]" *See infra* text accompanying notes 135-36.

105. MASS. GEN. L. ch. 32, §§ 12(2)(c), (d), 15(4) (1992).

106. MASS. GEN. L. ch. 32, § 15 (4) (1992).

107. *Id.* The statute does not define offenses pertaining to an employee's office. A prominent current case pertaining to this issue is MacLean v. State Bd. of Retirement, No. 93-33cv1203 (D. Mass. filed Oct. 12, 1993), in which former Massachusetts state representative William Q. MacLean is challenging the Retirement Board's decision terminating his retirement allowance because of his conviction on conflict of interest charges.

contributions, plus interest, to a beneficiary.[108] They cannot provide any of their retirement allowance to a person not listed in the statute. The primary difference is that the loyal employee is permitted to direct his or her other contributions plus interest to the recipient of his or her choosing, while the convicted employee is allowed to designate the recipient of his or her contributions only (without interest).

Further, it is incongruous that a member may designate a former spouse to receive the Joint and Last Survivor's Allowance, while a gay or lesbian member in an intact, flourishing, long-term relationship cannot designate his or her partner to receive the allowance. This outcome contravenes principles of individual consideration of circumstances found elsewhere in the statute.[109]

The limitations on choice of beneficiary also force those with responsibilities and personal lives that do not conform to the statute's structure to deny those connections, e.g., to take the full annuity allowance,[110] or to provide minimal or no support to their loved one.[111] The employee in a lifelong, but legally unrecognized, relationship is denied the opportunity to take a lesser allowance during his or her lifetime in order to provide the Joint and Last Survivor Allowance to a partner.[112] In sum, the retirement allowance beneficiary provisions make very little, if any sense. They do not save the Commonwealth money. They do not further any coherent goal. Their restric-

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108. MASS. GEN. L. ch. 32, § 11(2) (1992). Note that this only applies if any employee dies before retirement; if he dies after retirement, the designated survivor only receives the remainder of the member's contributions, if any. MASS. GEN. L. ch. 32, § 12(2) Option (b) (1992).

109. *See infra* text accompanying notes 116-32.

110. MASS. GEN. L. ch. 32, § 12(2) Option (a) (Life Annuity) (1992). *See supra* text accompanying note 51.

111. MASS. GEN. L. ch. 32, § 12(2) Option (b) (Cash Refund Annuity) (1992). *See supra* text accompanying notes 52-55, 62-63.

112. MASS. GEN. L. ch. 32, § 12(2) Option (c) (1992). The retirement allowance beneficiary provisions, as discussed above, limit gay and lesbian employees' rights to provide for their partners or former partners while allowing married and divorced heterosexual employees to provide for their spouses or former spouses. Challenges under the Equal Protection Clause of the United States Constitution and under Part I, article 10 of the Massachusetts Constitution are worth considering. Most courts have applied rational basis scrutiny to equal protection claims of lesbians and gay men. Patricia A. Cain, *Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1551, 1620 n.368 (1993). As the discussion *supra* at text accompanying notes 60-112 has shown, the provisions are not reasonably tailored to any legitimate goal. They are not aimed at supporting members' family units (former spouses can be designated, *see supra* text accompanying notes 90-92), they are not aimed at supporting dependents of members (non-dependent parents and siblings can be designated, *see supra* text accompanying notes 93-95), other persons who may be actual dependents cannot be designated (*see supra* text accompanying notes 95-97), and its limitations do not save the state any funds (*see supra* text accompanying notes 98-102).

tions prevent employees from providing for actual dependents and loved ones after their own deaths.

IV. STATUTORY DEFINITIONS OF DESERVING SPOUSES

In several portions of the retirement statute, discussed in this part, the marital status of a retirement system member is a critical factor in determining whether a surviving spouse is entitled to benefits, but it is not the *sole* determinant. Several sections provide that the surviving spouse of a deceased member may not be able to receive benefits if the spouse did not live with the member at the time of the member's death, remarries, or if the Board finds that the spouse engaged in certain reprehensible conduct.[113] The duration, nature, and state of the relationship at the time of the member's death is in some circumstances taken into account.[114] Given that the statute considers the substance of the marital relationship in determining whether a surviving spouse receives certain benefits, it is inconsistent to deny all benefits to the surviving partners of gay, lesbian, or unmarried heterosexual members without considering the duration, nature, and state of their relationships.[115]

A. *Accidental Death Benefit*

The retirement statute provides for an accidental death benefit, which is neither a pension nor annuity benefit, for any member who dies as the result of a personal injury sustained or a hazard undergone while in the performance of official duties.[116] This payment is made automatically according to the recipient scheme set forth in the statute; members do not designate beneficiaries in this context. The theme of providing for employees' dependents is most emphasized in the provisions pertaining to accidental death benefits.[117]

The statute directs death benefits to be paid to a surviving spouse for as long as the spouse survives and does not remarry. To be eligible

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113. MASS. GEN. L. ch. 32, §§ 9 (2)(a), (b), 12(2) Option (d) (1992). *See infra* text accompanying notes 116-132.

114. *See infra* text accompanying notes 116-32.

115. *See supra* text accompanying notes 60-112, and *infra* text accompanying notes 116-32.

116. MASS. GEN. L. ch. 32, § 9(1), (2)(a) (1992).

117. *See supra* text accompanying note 11, and *supra* text accompanying note 93. This is true in other New England states' retirement laws, where accidental death benefits generally go automatically to a surviving spouse, children, and other relatives. *See, e.g.*, R.I. GEN. LAWS § 36-10-20 (1990); N.H. REV. STAT. ANN. § 100-A:8 (1990); ME. REV. STAT. ANN. tit. 5, § 18003 (West 1989). Vermont's public retirement statutes provision on accidental death benefits states it shall be paid to the "dependent beneficiary" or "dependent spouse" of the member, but it does not define the term "dependent." VT. STAT. ANN. tit. 3, § 465 (a), (b) (1985).

under this provision, however, the couple must have been living together[118] at the time of the member's death for the surviving spouse to receive the allowance.[119] Alternatively, the spouse may receive the benefit if the Board finds that the couple had been living apart at the time of the member's death because of the member's desertion of such spouse.[120] Given these beneficiary provisions, it is puzzling that the statute forces a benefit to be paid to a surviving spouse who the member abandoned, since the member would presumably not want the survivor to receive any benefits.[121] The benefit also terminates upon remarriage and is thus based on the assumption that marriage involves support and that a remarried spouse no longer needs or deserves such support.[122] If the couple was living apart at the time of the member's death because the spouse had abandoned the member, presumably the spouse would

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118. For discussion of what constitutes "living together" for purposes of Massachusetts General Law Chapter 32, § 12(2)(d), see Donnelly v. Contributory Retirement Appeals Bd., 15 Mass. App. Ct. 19, 443 N.E.2d 416 (1982), discussed *infra* note 126.

119. MASS. GEN. L. ch. 32, § 9(2)(a), (b) (1992).

120. MASS. GEN. L. ch. 32, § 9(2)(a) (1992).

121. This illustrates the dominance of the concept of dependence in this section of the statute. For, even if the member had deserted the spouse because the spouse was engaging in moral turpitude, or for some other "justifiable cause," the accidental death benefits are paid to the spouse. *See* MASS. GEN. L. ch. 32, § 12(2) Option (d), and *infra* text accompanying notes 112-13 (1992). The statute assumes the spouse is dependent on the member and therefore worthy of support.

122. Underscoring the equation of marriage with support is the provision pertaining to disposition of the benefits if there is no eligible surviving spouse. In such instances, the benefit is paid to a guardian for the benefit of any children who are under eighteen years of age and unmarried or who were over eighteen and incapacitated from earning on the date of the member's death. MASS. GEN. L. ch. 32, § 9(2)(b) (1992). It should be noted that permission of the probate court and the parent or guardian of a minor wishing to marry is necessary before a minor is permitted to marry. MASS. GEN. L. ch. 207 §§ 25, 33 (1992). Section 9(b) means that if a surviving child under eighteen marries, the benefit terminates. Once a child is over eighteen, the benefit terminates whether the individual is married or not.

The benefit provisions continue for a variety of situations. If there is no eligible surviving spouse or child, it shall be paid to the:

> surviving totally dependent father or mother of such member...then to any totally dependent unmarried or widowed sister of such member with whom he was living at the time of his death, so long as such beneficiary or beneficiaries survive, do not marry or remarry, and are unable to support themselves.

MASS. GEN. L. ch. 32, § 9(c) (1992).

The board is to decide all questions relating to dependency. MASS. GEN. L. ch. 32, § 9(3)(a) (1992). While the provision does not even contemplate the possibility that a brother could be totally dependent, the statute has been construed to allow benefits to a totally dependent brother. Flanagan v. Dedham Retirement Board, Division of Administrative Law Appeals, No. 8995 (Mar. 13, 1986) (on file with author).

not receive the benefit.[123] The accidental death benefits provisions are an example of marriage used as a necessary but not sufficient condition for payment of benefits to the surviving spouse of an employee, as various conditions must be satisfied before payment is made.

B. *Member Survivor Allowance*

The "Member Survivor Allowance," previously discussed,[124] allows the surviving spouse of a member who dies before retirement to elect to receive a survivor's share amounting to two-thirds of the member's retirement allowance if the member had not designated a beneficiary other than the spouse.[125] To receive this allowance, however, the spouse must have been married to the member for more than a year and the couple must have been living together at the time of death.[126] If they were living apart, the Board must find that they were living apart for "justifiable cause other than desertion or moral turpitude on the part of the [surviving] spouse" in order to award these benefits.[127]

This provision also illustrates the use of marriage as an important, but not exclusive, factor in the allocation of benefits. The one-year rule

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123. MASS. GEN. L. ch. 32, § 9(2)(a) (1992).

124. *See supra* text accompanying notes 40-41, 43-45; *supra* chart accompanying notes 66-75.

125. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992). Section 12(B) also provides for an allowance where a member who has two years creditable service under the circumstances in which a surviving spouse can elect to receive a survivors' allowance, see *supra* note 40 and *infra* text accompanying notes 126-32, and an additional allowance is paid to the surviving spouse for the benefit of the children. MASS. GEN. L. ch. 32, § 12B (1992). The couple must have been living together at the time of death, and if living apart the cause must not be moral turpitude of the surviving spouse. *Id.*

126. MASS. GEN. L. ch. 32, § 12(2) Option (d), 12B (1992). *See* Donnelly v. Contributory Retirement Appeals Bd., 15 Mass. App. Ct. 19, 443 N.E.2d 416 (1982). In *Donnelly*, the Appeals Court held that a husband and wife were "living together" at the time of the member-wife's death, so that the husband was entitled to claim the allowance, overturning the Board's determination that they had not been "living together" under the statute, and overriding the wife's choice of her children as named beneficiaries of her contributions. *Id.* at 24, 443 N.E.2d at 419. At the time of the member-wife's death by suicide, the husband was out of town on a short trip, and the wife had begun moving out of the house but was prevented from doing so completely by a storm. *Id.* at 21, 443 N.E.2d at 417. Where the parties had not established separate residences, the court held that they were living together at the time of the wife's death. *Id.* at 21-24, 443 N.E.2d at 417-19. The consequence was that the children were denied the return of their mother's contribution and the husband received the Member Survivor Allowance. *Id.* at 19, 443 N.E.2d at 419.

127. MASS. GEN. L. ch. 32, § 12(2)(d) (1992). *See infra* notes 128-31. The emphasis on desertion is interesting in view of the concomitant emphasis elsewhere in the statute on dependence. *See* MASS. GEN. L. ch. 32, § 9(a) (Accidental Death Benefits) (1992). *See supra* text accompanying notes 116-23. Moral turpitude, however, seems not to be related to dependence. *See infra* text accompanying notes 128-30.

forbidding the spouse from electing to receive benefits if the parties were married less than a year ensures that a couple will not marry at the last minute before a member dies so that benefits can be passed on to a "sham" spouse.

Moreover, if the parties had been married for twenty years but were living apart at the time of death, the surviving spouse will not necessarily receive the allowance. In such circumstances, the survivor does not automatically receive the allowance, but can only receive it if the Board finds that, although they were living apart, the survivor did not desert the member or engage in moral turpitude,[128] and the separation was justifiable.[129] This seems to have the purpose of insuring that a non-deserving spouse, e.g., a spouse who had deserted the innocent member, should not receive the benefit. Similarly, where a separation was precipitated by the survivor's moral turpitude, the survivor should not be able to elect to receive the benefit.[130] Only if a separation is for "justifiable cause," as determined by the Board,[131] can a surviving spouse married to a deceased member for more than one year elect to receive the benefit. The statute thus "weeds out" the undeserving surviving spouse, rather than making the bright-line legal issue of marriage the only factor relevant in being able to elect to receive the share.[132]

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128. There is no clear definition of "moral turpitude" under Massachusetts law. In Essex County Retirement Bd. v. Contributory Retirement Appeals Bd., 342 Mass. 322, 324, 173 N.E.2d 627, 629 (1961), the court assumed that bribery and larceny constituted moral turpitude. The term has interesting connotations: In Nemetz v. INS, 485 F. Supp. 470 (E.D.Va. 1980), a district court found that an immigrant's involvement in a long-term homosexual relationship constituted moral turpitude and demonstrated the immigrant's bad moral character so as to mandate his exclusion. This finding was reversed on appeal. Nemetz v. INS, 647 F.2d 432 (4th Cir. 1981). The phrase recurs in the context of whether a surviving spouse can elect to receive a survivor's allowance; if the spouses are living apart because of moral turpitude on the part of the survivor, the survivor cannot receive the allowance. MASS. GEN. L. ch. 32, §§ 12(2) Option (d), 12B (1992).

129. MASS. GEN. L. ch. 32, § 12 Option (d) (1992).

130. The "moral turpitude" phrase is repeated in MASS. GEN. L. ch. 32, § 10. *See supra* note 128 and accompanying text.

131. According to the *Donnelly* Court, "justifiable cause" is a "term of art" in domestic relations law. Donnelly v. Contributory Retirement Appeals Bd., 15 Mass. App. Ct. 19, 22, 443 N.E.2d 416, 418 (1982).

132. This "weeding out" is similar to, although broader than, the spouse's forced share in the context of wills, where a court may make a determination, prior to the death of the decedent, that will prohibit a spouse from claiming a forced share. *See* MASS. GEN. L. ch. 191, § 15 (1992) & MASS. GEN. L. ch. 209, § 36 (1992) (providing that a probate court may enter a judgment that a person has been deserted by his or her spouse or is living apart from such person's spouse for justifiable cause, and in such an instance the surviving spouse may not claim a forced share).

V. PROPOSALS FOR CHANGE

A. *Introduction*

This article has described the rigid statutory limitations on retirement allowance beneficiaries and discussed several scenarios in which such limitations may deny deserving members the opportunity to designate as beneficiaries those to whom they are responsible and emotionally attached. This article has also contrasted the rigid rules pertaining to designating beneficiaries with other provisions of the retirement statute. These other provisions, such as accidental death benefits, embody the ideas that rigid categories such as marital status should not be the sole criterion on which to base entitlement to retirement benefits and that other factors, such as emotional and financial dependence and the nature of the subject relationship, should be important in certain contexts. Similarly, entitlement to a portion of an employee's retirement allowance should not turn solely on marital status, which can deny loyal employees opportunities they have earned. Rather, the statute should be revised to more fairly and accurately reflect the realities of the diverse families of public employees.

This article will now propose several simple changes in the statute which would make it more consistent and fair to all employees. The changes proposed will not significantly increase costs or administrative burdens on the Commonwealth.

B. *Specific Proposals*

1. Allowing a Member to Designate His or Her Domestic Partner as a Recipient of the Joint and Last Survivor and Member Survivor Allowance

The beneficiary provisions for the Joint and Last Survivor and Member Survivor Allowances beneficiary list should be amended to reflect the values of both supporting dependents of members and enabling members to provide support for those to whom they are emotionally attached.[133] To accomplish this goal, each member should

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133. One possibility for change would be to eliminate the limitations of sections 12 Option (c) and 12 Option (d) on designation of beneficiaries for survivor allowances. This would allow a member to designate anyone as a beneficiary. As discussed in notes 14 and 76 above, the other New England states do not contain comparable limitations on beneficiaries, and employees can designate whomever they wish to receive retirement benefits after their deaths. Since the various options are actuarially equivalent, it can be argued that it should not matter at all who can be beneficiaries. The administrative simplicity of eliminating limitations on who can receive the Option (c) allowance is very appealing. However, such an amendment

have the option of designating a "domestic partner" to receive his or her survivor's benefits.

Both public and private employers are increasingly providing some of the same employment benefits to "domestic partners" of employees that they provide to legal spouses. Massachusetts Governor William Weld, in a 1992 Executive Order, extended the benefits of bereavement and sick leave for state employees in a "relationship of mutual support" with another person so that an employee whose domestic partner had died could take off time from work.[134] In 1993, former City of Boston

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would not reduce the inequities regarding the Member Survivor Allowance or Accidental Death Allowance, and a domestic partner requirement could do so.

134. Exec. Order No. 340, *reprinted in* Report to Governor, Governor Weld's Executive Order 340, entitled "Providing for Non-Discriminatory Benefit Policies for Employees of the Commonwealth," provides as follows:

> Whereas, Chapter 151B of the Massachusetts General Law established the obligation of the Commonwealth to protect its citizens from discrimination on the basis of sexual orientation; and Whereas, the Commonwealth recognizes its responsibility to take measures to ensure that its official employment policies are in harmony with the established obligations of Chapter 151B; Now, Therefore, I . . . do hereby order as follows:
>
> 1. For purposes of this executive order, "relationship of mutual support" means a relationship between two individuals, each unmarried and competent to contract, characterized by mutual caring and emotional support; an agreement to share basic living expenses; a sharing of living quarters and an intent to do so indefinitely; a mutual assumption of responsibility for each other's welfare; and a mutual expectation that the relationship is exclusive and will endure over time.
>
> 2. The Department of Personnel Administration shall, no later than November 1, 1992, promulgate such regulations and policies as are necessary to eliminate discrimination on the basis of sexual orientation in the benefits provided to employees under its jurisdiction. Benefits shall include the following:
>
> a. An employee of the Commonwealth shall be entitled to a maximum of four calendar days of paid "bereavement" leave, upon the death of a family member or of a person with whom the employee has a relationship of mutual support.
>
> b. An employee of the Commonwealth shall be allowed to use up to 10 days of accrued sick leave in the event of the serious illness of a family member or of a person with whom the employee has a relationship of mutual support.
>
> 3. An employee of the Commonwealth claiming leave benefits on account of the illness or death of a person with whom the employee has a relationship of mutual support must, as a condition of receiving such leave benefits, certify to the Department of Personnel Administration the existence of his or her relationship of mutual support.

Id.

Mayor Raymond Flynn extended certain personnel benefits to "domestic partners and other household members" of city of Boston employees.[135] The cities of Cambridge and Brookline have each passed domestic partnership ordinances within the last year.[136] Also within the last year, Clark University, Harvard University, the Massachusetts Institute of Technology, and Wellesley College have all put in place domestic partnership policies that provide a range of benefits to domestic partners of employees.[137]

Numerous entities, including a federal agency (the Department of Housing and Urban Development),[138] various municipalities,[139] one state (Illinois),[140] and many private companies, including Levi-Strauss[141] and Lotus Development,[142] have instituted some types of

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135. Boston Mayor Raymond L. Flynn, Executive Order, *Extension of Certain Personnel Benefits* (Feb. 12, 1993). The executive order did not define "domestic partners", but included "domestic partners" in the definition of "household members." *Id.* ¶ 1. "Household members" was defined simply as persons who currently reside in the household of a city employee and have shared their principal domicile for not less than the past year with a City employee. *Id.* The order extended sick, bereavement and family leave to household members of city employees and directed certain city agencies to explore appropriate family and medical leave policies to address all provisions of the executive order.

136. Christopher Mutler, *Brookline Adopts Domestic Partners Proposal*, BAY WINDOWS, June 10, 1993, at 1; CAMBRIDGE, MASS., MUN. CODE ch. 2, § 119 (1992); Town of Brookline, Final Vote to Amend the Town ByLaws (June 2, 1993) (on file with author).

137. Clark University, Proposed Policy for Extension of Benefits to Domestic Partners not Legally Allowed to Marry under Massachusetts Law (Apr. 1993) (on file with author); Memorandum from Joan F. Rice, Director of Personnel, Massachusetts Institute of Technology, to Members of the MIT Community (Apr. 28, 1993) (on file with author); Memorandum from Molly Ambrose Ostwald, Director of Personnel, Wellesley College, to Members of the Wellesley College Faculty and Staff (June 7, 1993) (on file with author). *See* Jordanna Hart, *Benefits at Harvard to cover gay partners*, BOSTON GLOBE, May 21, 1993, at 17.

138. *Legislative & Political Updates*, LESBIAN/GAY LAW NOTES, Apr. 1993, at 26 (U.S. Department of Housing and Urban Development puts into effect a domestic partner family leave program).

139. *See, e.g., Legislative Updates*, LESBIAN/GAY LAW NOTES, Nov. 1992, at 79 (Sacramento adopts domestic partner registration ordinance); LESBIAN/GAY LAW NOTES, June 1993, at 63 (Minneapolis). *See infra* note 143.

140. *Legislative Updates*, LESBIAN/GAY LAW NOTES, Nov. 1991, at 49 ("Illinois Senate has passed a bill allowing hospital patients to designate whom they won't allow to visit them, a sort of mini-domestic partner bill.").

141. *Levi Strauss, Princeton, Join Domestic Partnership Ranks*, LESBIAN/GAY LAW NOTES, Apr. 1992, at 29.

142. *Domestic Partnership Cause Advances*, LESBIAN/GAY LAW NOTES, Oct. 1991, at 67 (Lotus will offer health and other benefit coverage to domestic partners of gay employees).

domestic partnership benefit policies.[143] While it does not appear that domestic partnership principles have yet been applied to any retirement systems, it is unclear whether such a proposal has been made.[144] Massachusetts thus has an opportunity to be a national leader in this area.

Governor Weld's Executive Order 340 defines a "relationship of mutual support" in a manner that could be applied in other contexts with slight modifications. The order defines a "relationship of mutual support" as, "[a] a relationship between two individuals, [b] each unmarried and competent to contract; [c] characterized by mutual caring and emotional support; [d] an agreement to share basic living expenses; [e] a sharing of living quarters and an intent to do so indefinitely; [f] a mutual assumption of responsibility for each other's welfare; and [g] a mutual expectation that the relationship is exclusive and will endure over time."[145] The existing policy is administered by the Department of Personnel Administration, which has prepared a form entitled "Certification of Relationship of Mutual Support" which repeats the above definition and leaves blanks for the employee to verify that he or she is "committed to a relationship of mutual support under the terms of Executive Order 340."[146]

The retirement statute should be amended to provide for members to designate a "domestic partner" or "person with whom said member is in a relationship of mutual support" to receive benefits under the

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143. *See* Craig A. Bowman & Blake Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partner Ordinances*, 92 COLUM. L. REV. 1164 (1992); Elbin, *supra* note 5, at 1068. In Berkeley, California, believed to be the first city to extend health plan benefits to domestic partners, unmarried couples must file an Affidavit of Domestic Partnership stating that they have lived together for at least six months and "share common necessities of life." *Id.* at 1072. In Santa Cruz, California, which also extends health benefits to domestic partners, the policy states that if the employer or company suffers any loss because of a false statement in an Affidavit of Domestic Partnership, the employer or company may sue for their losses, including attorneys fees. *Id.* at 1073. The Santa Cruz policy also provides that the persons must be at least eighteen and not related close by blood than would prevent them from marrying in California. *Id.* Some private employers' domestic partnership policies, e.g., that of Lotus Development, have applied only to gay and lesbian employees, based on the reasoning that heterosexual employees can get married and take advantage of spousal benefits while gay or lesbian employees cannot. All governmental domestic partnership policies of which this writer is aware, apply to all employees regardless of sexual orientation.

144. In researching this article, the author has found no published articles pertaining to this issue.

145. Exec. Order No. 340, *supra* note 134, ¶ 1.

146. Memorandum from Robert C. Dumont, Personnel Administrator to Cabinet Secretaries and Agency Heads, Oct. 30, 1992 (on file with author). The form is identified as confidential. It does not name the person with whom the employee is in a Relationship of Mutual Support. *See id.*

Member Survivor Allowance if the employee dies before retirement,[147] and the Joint and Last Survivor Allowance if the employee dies after retirement.[148] The operable requirements could contain the elements in Governor Weld's definition: (1) the member must be unmarried and in a relationship with an individual who is unmarried; (2) the member and the person with whom he is in a relationship must be competent to contract; (3) the relationship must be characterized by mutual caring and emotional support; (4) the persons in the relationship must have agreed to share basic living expenses; (5) the persons in the relationship must be living together and intend to do so indefinitely; (6) they must mutually assume responsibility for each other's welfare; and (7) they must mutually expect that the relationship is exclusive and will endure over time.[149]

Members seeking to designate a beneficiary under the amended provision could be required to execute an affidavit attesting to the above elements of the relationship.[150] The affidavit would be kept confidential[151] and should name the domestic partner, as it is after all a designation of beneficiary form. If the designation is later challenged, the Board will determine the validity of the designation. As this article has shown, the retirement statute already provides for numerous situations in which the Board may have to make factual determinations,[152] so a new responsibility should not be a significant burden on the Board.

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147. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992).

148. *Id.*

149. *See* Exec. Order No. 340, *supra* note 134.

150. It should be noted that this involves a significantly greater degree of intrusion into the relationship of the individuals involved than is currently the case under the Joint and Last Survivor Allowance of § 12(2) Option (c). For example, if a person designates his spouse to receive survivor benefits under Option (c), the spouse automatically can receive the benefits regardless of whether the parties even live together or whether the parties' relationship is characterized by mutual support and caring, or whether the relationship is exclusive. *See* Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1664-66 (1993). In addition, the affidavit would give local retirement boards significant private information about members. This is an argument for simply eliminating all limitations on choice of beneficiaries for section 12(2) Option (c). *See supra* note 133.

151. Any such affidavit would contain personal data and should be protected from disclosure under the public records law. MASS. GEN. L. ch. 4, § 2 (cl. 26(c)) (1992). However, complete protection of the material would be difficult to ensure.

152. *See, e.g.*, MASS. GEN. L. ch. 32, § 12(2)(d) (1992). Under this provision, for example, if a member has not designated a spouse as a beneficiary, the spouse and member were not living together at the time of the member's death, and the spouse elects to obtain survivor benefits, the Board decides if the separation was justifiable or not. Under Massachusetts General Laws Chapter 32, § 9(3)(a) (1992), the Board would decide whether a widowed sister who lived with a member who died from an accident at work, is totally dependent upon him. *See id.* § 12(2)(d). *See supra* note 122.

While Governor Weld's Executive Order does not deal with situations in which a domestic partnership has ended, other policies have dealt with that issue. The University of Chicago, which provides health coverage and other benefits for domestic partners,[153] uses a form entitled "Statement of Termination of Domestic Partnership" which treats such a termination as equivalent to a divorce, terminating items such as library privileges but allowing the ex-domestic partner to continue health insurance benefits for thirty-six months after termination.[154] In the retirement context, a similar form could be drafted that would terminate the designation of the beneficiary.[155]

These provisions would establish a clear standard for determining whether a person with whom a member lived and had a relationship was the member's "domestic partner." The Board would not be required to become involved in individual determinations except in extraordinary circumstances.

It should be emphasized that this statutory change should not cost the Commonwealth any additional funds because all of the options

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153. The University of Chicago, Personnel Policy Guidelines, § U401.01 (Jan. 11, 1993) (on file with author).

The University of Chicago defines "domestic partnership" as:

> two individuals of the same gender who live together in a long-term relationship of indefinite duration, with an exclusive mutual commitment in which the Partners agree to be jointly responsible for each other's common welfare and share financial obligations. The Partners may not be related by blood to a degree of closeness which would prohibit legal marriage in the state in which they legally reside.

University of Chicago, Office of Staff Benefits, Questions and Answers for Domestic Partnerships (Jan. 15, 1993) (on file with author). The University requires both members of the domestic partnership to sign a statement certifying that they fall within the above definition. In the section where the partners certify that they are jointly responsible for each other's common welfare and share obligations, the statement provides that such joint responsibility:

> may be demonstrated by the existence of three of the following. We have circled below the types of documentation that we can provide if requested. [a] Domestic Partnership Agreement[;] [b] Joint mortgage or lease[;] [c] Designation of domestic partner as beneficiary for life insurance and retirement contract[;] [d] Designation of domestic partner as primary beneficiary in . . . will[;] [e] Durable property and health care powers of attorney[;] [f] Joint ownership of motor vehicle, joint checking account, or joint credit account.

University of Chicago, Office of Staff Benefits, Statement of Domestic Partnership, Questions and Answers on Domestic Partnerships (Jan. 15 1993) (on file with author).

154. *Id.* ¶ 4.

155. If a member had informed the Board that the relationship was over, the former domestic partner could not claim the Member-Survivor Allowance under section 12(2) Option (d). *See supra* text accompanying notes 40, 124-32.

under section 12(b) are actuarially equivalent.[156] Employees who currently have "domestic partners" have simply been forced to choose other options basically equivalent in cost to the state.[157]

2. Allowing a Domestic Partner to Elect the Receive the Member Survivor Allowance in the Same Circumstances in which a Spouse May Do So

The current retirement statute provides that a member's surviving spouse can elect to receive the Member Survivor Allowance, so long as the member has not already designated someone else and certain other requirements are met.[158] Given the proposed requirements for domestic partnership, a domestic partner should be able to elect to receive a survivor's allowance–as long as the member has not designated someone else. This latter supposition, however, could create the administrative problem of a person or persons claiming, after a member's death, to have been the domestic partner of the deceased employee. This benefit perhaps should not be implemented until the proposed changes to retirement allowance beneficiary provisions are in effect for some time. Perhaps regulations could be promulgated that establish what a person claiming the benefit would need to prove in order to prevail. Examples might include registration as a domestic partner with the decedent under a local ordinance, joint ownership of assets, and other factors.[159] If the parties were living together at the time of the member's death, and the survivor can establish that he or she was the domestic partner of the decedent, then the partner should be able to elect to obtain the benefit. If the parties were not living together at the time of the member's death, the Board must find that they were

156. *See supra* text accompanying notes 65, 98-102.

157. Because principles of fairness are involved, the fact that this proposal might cost the Commonwealth slightly more to administer the retirement system by including domestic partnership survivor allowances should not be fatal. *See* Report from Stanford University's Subcommittee on Domestic Partners' Benefits, June 1992, § 3 (on file with author).

158. *See supra* text accompanying notes 40, 124-32. The requirements include that the spouse and member must have been married for at least a year and must have been living together at the time of the member's death. MASS. GEN. L. ch. 32, §§ 12(2)(c), 12B (1992). If they were not living together at the time of the member's death, the Board must conclude that they had been living apart for "justifiable cause other than desertion or moral turpitude on the part of the [surviving] spouse" for the benefits to be provided. MASS. GEN. L. ch. 32, § 12(2)(d) (1992).

159. For example, the University of Chicago policy discussed above contains a list of a number of objective criteria designed to determine the existence of a domestic partnership, such as joint property ownership, designation of each other as primary beneficiary in wills, designation of each other as power of attorney, and so forth. *See supra* note 153.

living apart for a justifiable cause other than desertion on the part of the surviving domestic partner.[160]

3. Allow Domestic Partners to Receive Accidental Death Benefits in the Same Circumstances in Which Spouses May Receive Such Benefits

Given the requirements for a relationship to be considered a domestic partnership as outlined above, it is reasonable to apply generally the same standards to the receipt of accidental death benefits by spouses as by domestic partners.[161] This is particularly true when one considers that the definition of domestic partner contained in this article is more closely tailored to that of a relationship of actual dependence or interdependence than that contained in the existing statute. A spousal relationship does not necessarily include all of the elements required for a nonspousal couple to meet the definition of "domestic partner."[162] The benefits would be paid to the surviving spouse or domestic partner who had been designated as the beneficiary under the Joint and Last Survivor and Member Survivor Allowance provisions. That person would receive the benefits provided that the couple had been living together at the time of the member's death, or if the Board finds that the couple had been not living together at the time of the member's death due to the desertion of such domestic partner by the member.[163] The benefit could be extended to an individual designated by a member before death as a domestic partner and eventually to a person who could establish the existence of a domestic partnership at the time of death.[164] The benefit should terminate if a surviving domestic

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160. MASS. GEN. L. ch. 32, § 12(2) Option (d) (1992). *See supra* text accompanying notes 126-30. This provision should not involve the Board in burdensome factual determinations any more than the existing statute does, in circumstances where the member has not designated anyone, the couple was living apart, and the surviving member of the couple claims to be entitled to the allowance. *See supra* text accompanying notes 125-28. It is not suggested that the phrase "moral turpitude" be included in these amendments, indeed perhaps it should not be included in the statute. As noted above, the statute contains several contexts in which the phrase "moral turpitude" appears, but nowhere is the term defined.

161. *See supra* text accompanying notes 116-23.

162. *See supra* text accompanying notes 150-51.

163. *See supra* text accompanying notes 116-23.

164. Generally, an employee who has a domestic partner and wishes to provide for him or her will hopefully fill out the appropriate beneficiary form. In the context of "accidental death benefits," which are paid automatically to the member's spouse if they were living together, § 9(1), even if the member had not filled out any beneficiary form under § 12(2) Option (c), it is important to provide the opportunity for a surviving domestic partner to establish the existence of the relationship for purposes of the accidental death provisions since no opportunity for automatic payment of the benefit exists. Perhaps the statute instead should allow employees to select a beneficiary for these benefits.

partner enters a new relationship in the nature of a domestic partnership, just as the benefit terminates when a surviving spouse remarries.[165]

VI. CONCLUSION

The retirement statute contains rules which are in certain respects too rigid to apply fairly to all of the Commonwealth's public employees and their families. For example, the system contains strict restrictions on who an employee may designate as a beneficiary of his or her retirement allowance, limiting it to certain specific relatives, regardless of the closeness or lack of closeness in the actual relationship.[166] Moreover, the actual relationship of the parties can limit benefits, e.g., the Member Survivor Allowance cannot be claimed by a surviving spouse who deserted the deceased spouse.[167] Thus, in some respects, the retirement system reflects the fact that simple "bright line" familial relationships such as marriage may not always be sufficient to determine fairly who should receive benefits. At the same time, the system unjustifiably places limitations on who an employee can designate as a beneficiary, in disregard of the actual nature of relationships, which may be just as intimate and involve as much financial dependence as relationships within a legally recognized family.

Certain amendments could and should be made in the retirement statute to create a clear category of "domestic partner" for employee-members.[168] This provision would allow members to designate a person who could receive the portion of their pension available to designated surviving family members under the Joint and Last Survivor and Member Survivor beneficiary provisions.[169] A designated domestic partner should also be able to receive accidental death benefits.[170] The designation of "domestic partner" should not involve the Board or the courts in any more case-by-case determinations about member's relationships than the existing statute already requires.[171]

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165. *See supra* text accompanying note 130. While enforcement of this rule could be difficult for domestic partners, enforcement of the lose-benefits-if-you-remarry rule must be difficult too, because how will the Commonwealth know that a surviving spouse has remarried? Presumably receipt of surviving spouse accidental death benefits is conditioned upon the recipient's agreement to inform the Board if she remarries and provides for forfeiture if she does not so inform the Board. This rule could be extended to recipients of domestic partner accidental death benefits.

166. MASS. GEN. L. ch. 32, § 12(2) Option (c), Option (d) (1992).

167. MASS. GEN. L. ch. 32, § 12(2)(d) (1992).

168. *See supra* text accompanying notes 147-52.

169. *See supra* text accompanying notes 147-52, 158-60.

170. *See supra* text accompanying notes 161-65.

171. *See supra* text accompanying note 126. *See also* Donnelly v. Contributory Retirement Appeals Bd., 15 Mass. App. Ct. 19, 443 N.E.2d 416 (1982), discussed

These changes should not result in a significant monetary burden on the Commonwealth, since the retirement allowance options under section 12(2), Chapter 32 of the Massachusetts General Laws are all actuarially equivalent.[172] The proposed changes would not be difficult to administer, and indeed are in many respects similar to systems already operating in other contexts.[173] The proposed changes provide a practical opportunity to improve further the retirement system and to remedy the inequities it unfortunately still promotes.[174]

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supra note 116. The rarity of reported cases on issues such as whether parties were "living together" suggests that litigation on such issues is relatively infrequent.

172. *See supra* text accompanying notes 64-65.

173. *See supra* text accompanying notes 134-43.

174. *See supra* text accompanying notes 133-65.

Director and Shareholder Liability for Massachusetts Corporations' Distributions to Shareholders: A Suggestion for Change in Standards of Director Liability

James E. Tucker*

I. INTRODUCTION

Directors who declare, and shareholders who receive, distributions from a profitable Massachusetts business corporation[1] in the ordinary course of business stand little risk that they will incur liability for such distributions. Nonetheless, when a profitable corporation experiences unexpected difficulties, or when a corporation experiences economic troubles that it had feared but hoped would not occur, sections 61 and 45 of the Massachusetts Business Corporation Law (MBCL)[2] can impose liability on directors and shareholders for current and past distributions.

Section 61 may impose liability on directors who authorize an insolvent corporation's distribution or a distribution that makes a corporation insolvent. Section 45 imposes liability on shareholders who receive a distribution from an insolvent corporation or a distribution that makes a solvent corporation insolvent. Fraudulent conveyance law gives creditors rights against shareholders under the same circumstances, and when a corporation makes a distribution intending to defraud its

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1. Massachusetts law permits several types of corporations, including business corporations, not for profit corporations, banks, insurance companies, and utilities. *See, e.g.*, MASS. GEN. L. ch. 156B (1992), MASS. GEN. L. ch. 180 (1992). When this article uses the term "corporation," it refers only to Massachusetts business corporations subject to Chapter 156B of the Massachusetts General Laws.

2. MASS. GEN. L. ch. 156B (1992).

creditors. When directors intend a distribution to prefer shareholders and creditors, corporate common law also imposes liability on those directors who authorize the distribution, without regard to the corporation's solvency. Corporate common law also imposes liability on directors for distributions without regard to the corporation's solvency when, because the natural consequence of the distribution is to prefer shareholders over creditors, the court will infer intent to prejudice creditors. Whenever corporate common law imposes liability on directors for distributions, it imposes liability on the shareholders who receive the distributions as well.

Under MBCL section 65, directors who act in good faith and with reasonable prudence have a defense to liability under section 61. Shareholders remain liable under section 45 even if section 65 exempts directors from liability under section 61. Corporations cannot adequately indemnify directors against liability under section 61. Thus, to escape section 61 liability, and in order to escape the wrath of shareholders forced to disgorge a distribution under section 45, directors must know when a distribution creates real risk of liability.

Although any distribution may create liability under sections 61 and 45, case law indicates that liability arises most often when corporations make what might be called "extraordinary distributions." Extraordinary distributions can take many forms. An extraordinary distribution occurs when a corporation redeems or purchases a material or controlling stockholder's interest. Such redemptions or purchases may result from a management buyout of a closely held firm's shareholders, the consummation of a leveraged buyout, including those taking a public company private, or when a closely held corporation converts to a partnership structure. An extraordinary distribution may also occur when a corporation redeems a venture capitalist's investment, particularly when the corporation's articles of organization require redemption if the corporation has not gone public by a certain date. In addition, a corporation may make an extraordinary distribution if the corporation pays dividends in a year that it lost money, particularly at a time when its projects future losses, if the corporation dissolves, or if the corporation otherwise distributes a liquidating dividend.[3]

Older Massachusetts corporations' articles of organization sometimes permit distributions only to the extent that the corporation has "legally

3. A liquidating dividend distributes paid-in capital to shareholders, whereas an ordinary dividend distributes accumulated income, known as retained earnings. DONALD KIESO & JERRY WEYGANDT, INTERMEDIATE ACCOUNTING 628-29 (Accounting for the Issuance of Capital Stock; Reacquisition of Shares) (2d ed. 1977) [hereinafter INTERMEDIATE ACCOUNTING]. The text accompanying notes 11-18 describes paid-in capital and retained earnings in more detail.

available" capital or surplus.[4] Alternatively, some articles of organization require distributions at a future date or under certain circumstances, in each case to the extent that the corporation has capital "legally available."[5] Legally available capital limitations do nothing more than incorporate into articles of organization the section 61, section 45, and corporate common law limits on distributions. Thus, directors and shareholders may incur liability for, and Massachusetts corporations do not have capital legally available for, any distribution to shareholders made while the corporation is insolvent, any distribution that leaves the corporation insolvent, or, without regard to the corporation's solvency, any distribution intended to, or the natural consequence of which is to, prefer shareholders over creditors.

The MBCL does not define insolvent, but other relevant law suggests that a corporation is insolvent under sections 61 or 45 if any one of three conditions exist. First, a corporation is insolvent if the corporation's liabilities exceed the fair market value of its assets, assuming an orderly liquidation. Second, a corporation is insolvent if it has unreasonably small capital for its current or planned activities. Finally, a corporation is insolvent if the corporation knows or should know that it will not be able to pay its current or future debts as they mature.

A corporation may be quite healthy and reasonably expect indefinite future profitable existence, even though the corporation's liabilities exceed the orderly liquidation value of its assets. Thus, a corporation can be insolvent when the corporation has no reason to believe that it will ever be unable to pay all its creditors. When such a corporation makes a distribution, section 61 may impose liability on the corporation's directors. As a result, section 61 unreasonably may impose liability on directors who honestly and prudently manage corporate affairs. Consequently, this article suggests that the Massachusetts legislature amend the MBCL. The MBCL should not impose liability on directors for distributions when directors acting in good faith, as if disinterested, and with reasonable prudence, reasonably believe that the corporation is, and that the distribution will leave it, able to pay the corporation's expected debts as those debts mature in the ordinary course.

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4. *See, e.g.*, Nedder v. Knapp Shoes, Inc., 32 Mass. App. Ct. 462, 464, 590 N.E.2d 713, 714 (1992). *See also* Richard M. Buxbaum, *Preferred Stock–Law and Draftsmanship*, 42 CAL. L. REV. 243, 250 (1954); 7 Bus. Orgs. (MB) § 141.05[1] (1993).

5. Even if articles of organization do not qualify a mandatory dividend, redemption or repurchase provision by adding "to the extent that capital is legally available," the corporation's obligation to shareholders, while mandatory, may nonetheless be unenforceable. *See, e.g.*, Crimmins & Pierce Co. v. Kidder Peabody Acceptance Corp., 282 Mass. 367, 376, 185 N.E. 383, 387 (1933). *See infra* text accompanying notes 172-76.

General Concepts/Historical Background

In this article, the term "distribution" refers to a corporation's giving corporate funds or other corporate property to a shareholder on account of the shareholder's stock ownership. Thus, this article collectively describes dividend payments, stock redemptions, and a corporation's purchase of its own stock as "distributions."[6] The principles this article discusses apply, however, whenever a corporation distributes its property to a shareholder and the shareholder does not give the corporation reasonably equivalent value in return.

A corporation does not make a distribution when it issues a stock dividend. Stock dividends merely divide a corporation's equity into smaller units of ownership. Stock dividends do not increase any shareholder's pro rata share of the corporation's equity.[7] Neither does a corporation make a distribution when it redeems stock by giving a shareholder a note or other promise to pay.[8]

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6. This article uses various forms of the word "distribute" in the same context and with the same limitations. Each of the state and federal statutes this article examines applies to several types of corporate distributions to shareholders. Except where noted, the statutes and cases this article discusses are relevant to all distributions, including without limitation, dividends, stock redemptions, and stock repurchases.

7. INTERMEDIATE ACCOUNTING, *supra* note 3, at 629.

8. A corporation that redeems stock by giving the shareholder a note does not give the shareholder any of the corporation's property unless and until the corporation pays all or part of the note. No reported Massachusetts case interpreting sections 61 or 45, or their immediate predecessors Chapter 156, § 37 and Chapter 158, § 44 of the Massachusetts General Laws, imposes liability on shareholders to whom a corporation gave a note, as yet unpaid, to redeem the shareholders' stock, or on the directors who authorize such notes. At least four reasons may explain why no decisions impose liability on directors or shareholders for unpaid redemption notes. First, a corporation's own note has no value to the corporation. While a solvent corporation might be able to negotiate its own note, liability under sections 61 and 45 depend on the corporation's insolvency. No insolvent corporation could renegotiate a note that its creditors forced a shareholder, under section 45, to return to the corporation. Second, sections 61 and 45 implicitly seek to keep an asset pool available to cover corporate debt. A corporation does not reduce the asset pool by issuing a note. Third, to creditors, there is no functional difference between a corporation's promise to redeem stock at some point in the future and the corporation's promise to pay for a current redemption at some point in the future. Even mandatory promises to redeem stock are unenforceable if the corporation is insolvent when the redemption date arrives. Crimmins & Pierce Co. v. Kidder Peabody Acceptance Corp., 282 Mass. 367, 376, 185 N.E. 373, 388 (1933). A mandatory promise to pay for an earlier redemption need not be treated differently. Fourth, Chapter 156B, § 106 permits corporations to redeem stock when the corporation dissolves, only if the corporation has property left after paying all of the corporation's creditors. When a corporation redeems stock by issuing a redemption note, the redemption is not effectively completed until the corporation pays the note.

Sections 61 and 45 purport to distinguish stock redemptions from stock purchases while nonetheless treating them similarly. There is no longer any functional difference between stock redemptions and stock purchases, if there ever was. Accordingly this article describes both as "redemptions."

The MBCL imposes no explicit limits on a corporation's power to pay dividends or to redeem the corporation's stock. Before Massachusetts adopted the MBCL, Massachusetts law prohibited stock redemptions[9] and purchases[10] that prejudiced the corporation's creditors. Massachusetts law also prohibited dividends that impaired "legal capital."[11]

Massachusetts lawyers sometimes draft articles of organization that limit distributions to "legally available capital." This practice may have arisen when Massachusetts law prohibited dividends that impaired a corporation's "legal capital." Perhaps the practice arose before Massachusetts statutes imposed limits on distributions, and continued because the statutes' limits were implicit. However the practice arose, accounting and legal concepts of capital underlie all current and historical limits on distributions, as well as the meaning of legally available capital.

Generally accepted accounting principles (GAAP) define two types of capital that are relevant to the issues this article discusses. The first type of capital is "paid-in capital." The original purchaser of each share of a corporation's stock "pays in" capital equal to the price the shareholder pays for the stock.[12] When a corporation redeems its stock, the corporation returns to the shareholder the paid-in capital attributable to the redeemed stock.[13] Thus, stock redemptions reduce a corporation's paid-in capital.[14] A corporation's paid-in capital ordinarily changes only when the corporation issues or redeems stock.[15] Consequently, a corporation's paid-in capital ordinarily equals the aggregate amount of

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Consequently, the "distributions" for which sections 61 and 45 impose liability do not include redemption notes, but only payments on them. *But see In re* SPM Manufacturing Corporation, 163 B.R. 411 (Bankr. D. Mass. 1994).

9. *See, e.g.*, Scriggins v. Thomas Dalby Co., 290 Mass. 414, 195 N.E. 749 (1935).

10. *Id.*; Winchell v. Plywood Corp., 324 Mass. 171, 174-75, 85 N.E.2d 313, 315 (1949).

11. Crocker v. Waltham Watch Co., 315 Mass. 397, 53 N.E.2d 230 (1944).

12. C. ROLLIN NISWONGER & PHILIP E. FESS, ACCOUNTING PRINCIPLES 396, 420-21 (11th ed. 1973) [hereinafter ACCOUNTING PRINCIPLES].

13. *Id.* at 421. The redemption price often exceeds the paid-in capital attributable to the stock. *Id.* The corporation reduces retained earnings by the difference between the redemption price and the paid-in capital. *Id.*

14. *Id.*

15. *See generally* INTERMEDIATE ACCOUNTING, *supra* note 3, at 594-610. The corporation receives nothing when someone purchases the corporation's stock on the open market.

capital the corporation raised when the corporation issued its outstanding stock, net of any redemptions.[16]

The second type of capital was once called "capital surplus" and is now called "retained earnings."[17] Retained earnings ordinarily equal the corporation's aggregate reported net income and net losses since the date the corporation was incorporated, less all dividends the corporation has paid.[18] Together, paid-in capital and retained earnings comprise a corporation's "stockholders' equity."

Before Massachusetts adopted the MBCL, Massachusetts courts prohibited corporations from paying dividends that impaired "legal capital."[19] The courts defined legal capital as "property sufficient to balance the capital stock liability,"[20] less the amount of any accumulated deficit.[21] Thus, Massachusetts law once limited dividends to retained earnings. By adopting the MBCL, which contains no express limit on dividends, Massachusetts abandoned the legal capital concept.

The legal capital concept reflected what this article calls the "corporate priorities." The corporate priorities give a corporation's creditors inchoate rights to the corporation's assets. Those rights are superior to the corporation's shareholders' rights to distributions. In the ordinary course, a shareholder's rights are "merely to have the assets devoted to the proper business of the corporation."[22] Notwithstanding the legal capital concept, even a dividend paid from current or retained earnings might prefer shareholders over creditors[23] by giving shareholders assets the corporation needs to pay its creditors. The proper

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16. *Id.*; *see also id.* at 621-43 (Stockholders' Equity: Additional Paid-in Capital and Retained Earnings). The summary of accounting principles in this article ignores the effect of liquidating dividends. Liquidating dividends return paid-in capital to the shareholders.

17. *See id.* at 621-43.

18. *Id.* at 621. This statement also ignores the effect of liquidating dividends on a corporation's equity.

19. *See, e.g.*, Crocker v. Waltham Watch Co., 315 Mass. 397, 53 N.E.2d 230 (1944).

20. *Id.* at 412, 53 N.E.2d. at 238.

21. *Id.* at 415, 53 N.E.2d. at 239. A corporation has an accumulated deficit if the corporation's aggregate undistributed income and net losses since the date the corporation was incorporated is a net loss. *See also* Chalmers A. Peairs, 13 MASS. PRAC. SERIES, *Business Corporations*, § 345 (Dividend Accounting) (1971) [hereinafter *Business Corporations*]. This discussion assumes that the corporation has no "watered stock." "Watered stock" is stock to which the corporation has attributed a paid-in capital amount that exceeds the value of the assets the corporation received when it issued the stock. *Id.* § 271.

22. 18B AM. JUR. 2D *Corporations* § 1224 (1985). In general, shareholders cannot compel a corporation to pay a dividend unless the directors declare a dividend and then fail to pay it. Robert M. Rodman, 5A MASS. PRACT. SERIES, *Methods of Practice* § 1226 (1981).

23. Part VII demonstrates how dividends paid from current earnings can prejudice creditors. *See infra* text accompanying notes 208-26.

business of a corporation does not include preferring shareholders over creditors. Thus, the corporate priorities prohibit a distribution that will leave a corporation's creditors unpaid, even if the distribution is a dividend payable from current earnings.

When a shareholder purchases a corporation's stock, the shareholder enters into a contract with the corporation,[24] the terms of which are contained in the articles of organization and relevant statutes.[25] That contract includes the corporation's promise to redeem the shareholder's stock when the corporation dissolves, if the corporation has property available after the corporation pays all its creditors.[26] This qualified promise reflects the corporate priorities. Moreover, the shareholder's contract rights are subordinate to the creditors' rights to corporate assets throughout the corporation's existence.[27] At common law, a corporation could not pay dividends when in "financial distress [or] destitute of surplus or net profits"[28] and even mandatory redemption provisions were unenforceable if they would prejudice creditors.[29]

When a corporation gives corporate property to a shareholder in a stock redemption, the corporation returns to the shareholder the paid-in capital attributable to the redeemed stock.[30] By definition, redemptions impaired "legal capital" under Massachusetts common law. Thus, if the courts wanted to allow redemptions except those that preferred shareholders over creditors, the courts could not simply extend the rule prohibiting dividends that impaired legal capital to cover all distributions. A thorough-going application of such a rule would have prevented all redemptions. Consequently, Massachusetts courts did enforce redemption contracts, but only to the extent that they were "made in good faith and without prejudice to creditors."[31]

The rule against distributions that prejudiced creditors states the essence of the common law approach to the corporate priorities. The rule prohibiting dividends that impaired legal capital was a method, since abandoned, of determining when a particular distribution, dividends,

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24. *See* Crocker v. Waltham Watch Co., 315 Mass. 397, 402, 53 N.E.2d 230, 233 (1944) and cases cited therein.

25. *Id.*

26. *See* MASS. GEN. L. ch. 156B, § 106 (1992). *See also* Willson v. Laconia Car Co., 275 Mass. 435, 442, 176 N.E. 182, 185 (1931) ("in liquidation or winding up all the debts of the corporation must be paid in full" before shareholders receive any distribution).

27. Part IV describes the current statutory limits on corporate distributions that prejudice a corporation's creditors. *See infra* text accompanying notes 124-67.

28. *Willson*, 275 Mass. at 441, 176 N.E. at 184.

29. Crimmins & Pierce Co. v. Kidder Peabody Acceptance Corp., 282 Mass. 367, 376, 185 N.E. 383, 388 (1933).

30. ACCOUNTING PRINCIPLES, *supra* note 12, at 421.

31. Scriggins v. Thomas Dalby Co., 290 Mass. 414, 418, 195 N.E. 749, 751 (1935) (citations omitted).

prejudiced creditors. Thus, this article views the various common-law rules enforcing the corporate priorities as subsets of an overarching rule against distributions that prejudice creditors by preferring shareholders over creditors.[32] Sections 61 and 45 seek the same goal as the common-law rule and currently define when most distributions, including dividends, prejudice creditors.[33]

II. THE MASSACHUSETTS BUSINESS CORPORATION LAW

A. *Introduction*

Nothing in the MBCL explicitly adopts the common-law rule that prohibited distributions that preferred shareholders over creditors. Neither section 61 nor section 45 states when a corporation has legal authority to issue dividends or to redeem its stock,[34] and neither expressly prohibits any distribution.[35] No other MBCL provision expressly limits corporate power to make distributions either.[36] The case law interpreting sections 61 and 45 is sparse. Thus, the extent of corporate power to make distributions is not readily apparent.

This article argues that directors and shareholders are liable for, and that a corporation does not have capital "legally available" for, distributions that give the corporation restitution remedies. Sections 61 and 45 give a corporation restitution remedies against directors who approve, and shareholders who receive, a distribution if the corporation is insolvent when the corporation makes the distribution or if the distribution makes the corporation insolvent. Without regard to the corporation's solvency, the common law gives a corporation a restitution remedy against directors who approve a distribution knowing the distribution prefers shareholders over the corporation's creditors, and against

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32. Consequently, this article speaks alternatively of the common-law rule against preferring shareholders over creditors and the common-law rule against prejudicing creditors.

33. Part V describes surviving common law restrictions on distributions. *See infra* text accompanying notes 168-88.

34. MASS. GEN. L. ch. 156B, § 61 (1992); MASS. GEN. L. ch. 156B, § 45 (1992).

35. MASS. GEN. L. ch. 156B, § 61 (1992); MASS. GEN. L. ch. 156B, § 45 (1992).

36. *See* MASS. GEN. L. ch. 156B (1992). In this respect, the MBCL's approach differs from that of the Delaware corporation statute. The Delaware statute expressly limits corporations' ability to make distributions. *See* DEL. CODE ANN. tit. 8, §§ 154, 170, 224 (1993).

Chapter 156B, § 102 of the Massachusetts General Laws, however, implies that a dissolved corporation may not distribute assets to its shareholders unless the corporation first pays all its "debts and obligations." Similarly, if a court appoints a receiver for a corporation, the receiver may distribute assets to the shareholders only after the receiver pays "all debts." MASS. GEN. L. ch. 156B, § 106 (1992). Although §§ 102 and 106 reflect the corporate priorities, the reported cases interpreting those sections provide no help in interpreting §§ 61 and 45.

shareholders who receive such distributions. Whenever, because of a distribution, a corporation has restitution remedies against its directors or shareholders, the corporation's creditors may avoid the distribution under both the Uniform Fraudulent Conveyance Act (UFCA) as adopted in Massachusetts (MUFCA)[37] and the Federal Bankruptcy Code (Bankruptcy Code).[38] MUFCA and the Bankruptcy Code give creditors remedies if a corporation distributes funds (i) intending to defraud the corporation's creditors, (ii) when the corporation was insolvent, (iii) and the distribution made the corporation insolvent, (iv) and after the distribution the corporation had unreasonably small capital, or (v) intending to, or believing that, the corporation would later be unable to pay its debts as the debts matured.[39] Parts IV through VII describe when distributions create restitution remedies under sections 61 and 45 and corporate common law and when distributions create avoidance remedies under MUFCA and the Bankruptcy Code.

B. *MBCL sections 61 and 45*

1. Liability Due to Insolvency

With one exception,[40] anytime directors incur liability under section 61 for authorizing a distribution,[41] the shareholders who receive the

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37. MASS. GEN. L. ch. 109A (1992).

38. 11 U.S.C. §§ 101 (1988).

39. For a discussion of the MUFCA and Bankruptcy Code remedies, see *infra* notes 103-23 and accompanying text.

40. See *infra* notes 168-70 for a discussion of the exception.

41. MASS. GEN. L. ch. 156B, § 61 provides:

> Unauthorized distributions; liability of directors
>
> Directors of a corporation who vote to authorize any distribution by the corporation to one or more of its shareholders, whether by way of a dividend, repurchase or redemption of stock, or otherwise, except a distribution of stock of the corporation, which is in violation of the corporation's articles of organization shall be jointly and severally liable to the corporation for the amount by which such distribution exceeds that which could have been made without violation of the corporation's articles of organization, but only to the extent such excess distribution is not repaid to the corporation. If the corporation is insolvent or is rendered insolvent by the making of any such distribution, whether or not in violation of the articles of organization, the directors who voted to authorize such distribution shall be jointly and severally liable to the corporation for the amount of such distribution made when the corporation is insolvent, or for the amount of such distribution which exceeds that which could have been made without rendering the corporation insolvent, but in either event only to the extent such distribution, or such excess, is not repaid to the corporation. In no event shall the directors who authorized any such distribution be liable under this section if such distribution could have been made without violating the articles of organization or rendering the

distribution will incur liability under section 45.[42] The extent of directors' and shareholders' liability varies, however.

Section 61 imposes liability on corporate directors who authorize the corporation to distribute funds while the corporation is insolvent or to make a distribution that leaves the corporation insolvent.[43] Section 45 imposes liability on a corporation's shareholders who receive a distribution if the corporation was insolvent before the distribution, or if the distribution made the corporation insolvent.[44] Although the concept of insolvency is central to any understanding of sections 61 and 45, neither section defines the term.

The corporation, its shareholders, and its creditors may enforce liability under sections 61 and 45.[45] Under section 61, directors are liable for that portion of a distribution made after the point at which the corporation becomes insolvent.[46] Under section 45, an insolvent corporation may demand that a shareholder reimburse any funds the corporation distributed to the shareholder after the corporation became insolvent.[47] Thus, sections 61 and 45 create restitution remedies. Presumably, sections 61 and 45 seek restitution because insolvent corporations' distributions to shareholders upset the corporate priorities.

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corporation insolvent at the time when such distribution was authorized, although subsequent payment of such distribution or any part thereof causes such violation or insolvency.

Id.

42. Section 45, Chapter 156B of the Massachusetts General Laws provides:
Stockholders' liability on distribution causing insolvency.
Stockholders to whom a corporation makes any distribution, whether by way of dividend, repurchase or redemption of stock, or otherwise, except a distribution of stock of the corporation, if the corporation is, or is thereby rendered, insolvent shall be liable to the corporation for the amount of such distribution made, or for the amount of such distribution which exceeds that which could have been made without rendering the corporation insolvent, but in either event, only to the extent of the amount paid or distributed to them respectively. A stockholder who pays on a judgment, or otherwise, more than his proportionate share of such distribution or excess shall have a claim for contribution against the other stockholders, which, unless otherwise provided in the articles of organization, shall be in proportion to the amounts so paid or distributed to them respectively.

Id.

43. MASS. GEN. L. ch. 156B, § 61 (1992).

44. MASS. GEN. L. ch. 156B, § 45 (1992).

45. Sections 61 and 45 vest the cause of action in the corporation. The shareholders have derivative causes of action. The creditors may reach and apply the corporation's cause of action. MASS. GEN. LAWS ANN. ch. 156B, § 61 note (West 1988) (Boston Bar Committee); *see also* Allen v. Prudential Trust Co., 242 Mass. 78, 136 N.E. 410 (1922).

46. MASS. GEN. L. ch. 156B, § 61 (1992).

47. MASS. GEN. L. ch. 156B, § 45 (1992).

a. Director Liability

Section 61's restitution remedy is enforceable only against those directors who "authorize" a distribution when the corporation is insolvent or would become insolvent because of the distribution.[48] MBCL section 65 absolves a director who approves such a distribution from liability if the director acted in good faith and with reasonable prudence.[49] Thus, section 61 creates liability for directors who, failing to act in good faith and with reasonable prudence, authorize a distribution while a corporation is insolvent or which makes the corporation insolvent.

Such directors are jointly and severally liable under section 61 for the amount of funds distributed after the point at which the corporation becomes insolvent.[50] If the shareholders refunded any portion of the

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48. Any director who voted against the distribution would avoid liability. It is not clear that directors can avoid liability by abstaining or otherwise avoiding voting. *See, e.g.*, Scriggins v. Thomas Dalby Co., 290 Mass. 414, 195 N.E. 749 (1935). Thus, directors seeking to avoid liability under § 61 should vote against the distribution if they fear that the corporation is or will become insolvent.

Section 61 provides that "in no event shall the directors who authorized any . . . distribution be liable under this section if such distribution could have been made without . . . rendering the corporation insolvent at the time when such distribution was authorized, although subsequent payment of such distribution or any part thereof causes such violation or insolvency." MASS. GEN. L. ch. 156B, § 61 (1992). This provision would apply to the following hypothetical:

> The directors approve a mandatory distribution payable in three years. The corporation's shareholders approve the directors' action to the extent that law requires. When the directors vote, the corporation is solvent and the corporation would be solvent if the corporation made the distribution immediately. When the distribution date arrives, the corporation is insolvent or would be insolvent if it made the distribution. The corporation makes the distribution.

Under § 61, the directors who originally voted for the future distribution would not be liable. But, § 61 does not absolve the directors in office when the distribution date arrives. Thus, § 61 appears to be designed, in part, to ensure that the directors in office three years later make an affirmative decision that a distribution will not prejudice creditors before permitting the corporation to make the distribution.

49. MASS. GEN. L. ch. 156B, § 65 (1992). This article describes the elements of good faith and reasonable prudence in Part VI, which attempts to give directors some practical guidance. *See infra* text accompanying notes 189-207.

50. By imposing personal liability on directors who approve distributions after the point at which a corporation becomes insolvent, § 61 arguably prohibits these distributions. It is irrelevant to directors and shareholders whether they incur liability because a distribution is voidable or because the distribution is prohibited. Consequently, this article does not attempt to determine whether distributions that create reimbursement remedies are prohibited. *Cf.* Barrett v. Continental Illinois Nat'l Bank & Trust Co., 882 F.2d 1, 4 (1st Cir. 1989) (a voidable transfer said to "violate" MUFCA even though MUFCA does not expressly prohibit any transfer), *cert. denied*, 494 U.S. 1028 (1990).

distribution, that refund would offset the directors' liability.[51] Nonetheless, the directors may not be able to force the shareholders to refund any distribution. No reported case interpreting sections 61 or 45 or their immediate predecessors requires that the corporation first seek to recover an improper distribution from the shareholders before seeking restitution from the directors. Moreover, neither the reported cases interpreting sections 45 or 61 or their immediate predecessors nor other MBCL provisions expressly give directors contribution or subrogation rights against the shareholders. Even if Massachusetts law gives directors contribution or subrogation rights against the shareholders, the law cannot guarantee the shareholders' ability to pay.

Directors might attempt to recover from the corporation using MBCL section 67.[52] Section 67 permits corporations to indemnify directors against damages the directors may incur in overseeing the corporation, provided that the directors in good faith believed that they were acting in the corporation's best interests. A case will ordinarily arise under sections 61 and 45 only because a corporation is insolvent. Thus, the corporate indemnity may be valueless. Consequently, directors who incur liability under section 61 may be left with recourse to only the other directors.

b. Shareholder Liability

Under section 45, shareholders must refund a distribution if the corporation was insolvent when it made the distribution.[53] If the distribution made the corporation insolvent, the shareholders must refund the distribution, except to the extent that the corporation could have made the distribution without becoming insolvent.[54] The shareholders' liability under section 45 is strict—the good faith of the directors who authorize a distribution or of the shareholders who receive a distribution is not a defense to liability. Any shareholder who repays the corporation more than his or her pro rata share of any refundable distribution has contribution rights against the other shareholders.[55] Those contribution rights are in proportion to the amounts the corporation distributed to the other shareholders.[56]

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51. *Id.*

52. MASS. GEN. L. ch. 156B, § 67 (1992). The third paragraph of Chapter 156B, § 67 of the Massachusetts General Laws suggests that directors may also have common law rights to indemnification. In general, the subject of indemnification is beyond the scope of this article. See, however, *infra* text accompanying notes 189-207, for a discussion of directors' § 65 defense to § 61 liability.

53. MASS. GEN. L. ch. 156B, § 45 (1992).

54. *Id.*

55. *Id.*

56. *Id.*

C. *Summary*

Corporations have restitution rights against shareholders who receive, and directors who authorize, distributions by an insolvent corporation, or distributions that leave a corporation insolvent. MBCL section 65 absolves directors who act in good faith and with reasonable prudence from liability under section 61. Thus, the MBCL may often impose liability for distributions on shareholders, but not directors. Whether the MBCL will impose liability on shareholders or directors depends upon the definition of insolvency.

Part IV of this article concludes that sections 61 and 45 use fraudulent conveyance law tests to determine insolvency. Thus, directors should not approve a distribution that would leave a corporation insolvent under the fraudulent conveyance law insolvency tests. Fraudulent conveyance law cases contain extensive discussion of insolvency concepts. Corporate law cases do not. Accordingly, Part III briefly describes the fraudulent conveyance law tests, before Part IV explains how sections 61 and 45 use those tests.[57] Relying on *United States v. Tabor Realty Corp.*,[58] Part III uses cases under each of MUFCA and the Bankruptcy Code to support conclusions about language in the other statute when the principles are functionally similar.

III. FRAUDULENT CONVEYANCE LAW

A. *Introduction*

In general, fraudulent conveyance law gives creditors rights when a corporation makes a distribution with an actual intent to hinder, delay, or defraud the corporation's creditors—without regard to the corporation's solvency—or when the law deems the distribution constructively fraudulent—without regard to the corporation's intent.[59] The UFCA "codifies law of ancient lineage."[60] Thus, as it did at common law, current fraudulent conveyance law continues to give creditors remedies when a corporation makes a distribution and fails either of two solvency tests, commonly called the balance sheet and equity tests.

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57. An extensive examination of the significant body of fraudulent conveyance law is beyond the scope of this article. Moreover, this discussion also considers fraudulent conveyance law only in the context of distributions, although the law is not limited to corporations or distributions.

58. 803 F.2d 1288, 1299 (3d Cir. 1986), *cert. denied sub nom.* McClellan Realty Co. v. United States, 483 U.S. 1005 (1987).

59. *See In re* Roco Corp., 701 F.2d 978, 981 (1st Cir. 1983).

60. Boston Trading Group v. Burnazos, 835 F.2d 1504, 1508 (1st Cir. 1987). *See also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 43 (1989) ("fraudulent conveyance actions are . . . quintessentially suits at common law . . . .").

The balance sheet test measures a corporation's assets against its liabilities.[61] The equity test measures a corporation's ability to meet its maturing obligations.[62] Fraudulent conveyance law actually states two tests for equity insolvency, but most courts find them related[63] or "nearly the same."[64] The results of all insolvency tests depend on critical timing and valuation issues.

From a financial perspective, "equity" is the difference between one's assets and liabilities.[65] When a corporation's assets exceed its liabilities, the corporation's shareholders' equity is positive. When a corporation's liabilities exceed its assets, the corporation has negative stockholders' equity. Notwithstanding its name, the equity test measures working capital, or cash flow—not equity.[66] Deferring to convention, this article nonetheless uses the term equity test.

MUFCA gives protected creditors,[67] and Bankruptcy Code section 548[68] gives the trustee,[69] a cause of action against shareholders when a corporation distributes capital if (i) the corporation intends to defraud its creditors,[70] (ii) the corporation is insolvent on a balance sheet basis,[71] or (iii) the distribution makes the corporation insolvent on a balance sheet basis.[72] MUFCA and the Bankruptcy Code also give

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61. *See, e.g.*, Constructora Maza, Inc. v. Banco de Ponce, 616 F.2d 573, 577 (1st Cir. 1980). The balance sheet test is also known as the "bankruptcy test." This article does not use that term because it is possible to define insolvency as the state of being in bankruptcy proceedings. The Eastern District of New York's holding that insolvency under § 45 requires an adjudication of bankruptcy was based upon the 1964 version of § 45 that required an adjudication of bankruptcy. *See* Gonzales v. Progressive Tool & Die, Co., 463 F. Supp. 117, 120 (E.D.N.Y. 1979). In 1981, Massachusetts amended § 45 to eliminate the bankruptcy requirement.

62. *See, e.g.*, Kreps v. Commissioner of Internal Revenue, 351 F.2d 1, 19 (2d Cir. 1965).

63. *In re* Vadnais Lumber Supply, Inc., 100 B.R. 127, 137 (Bankr. D. Mass. 1989) (interpreting § 548, the court ruled that unreasonably small capital "must be related in some way to ability to pay debts," but concluded that the tests are different).

64. Moody v. Security Pac. Business Credit, Inc., 127 B.R. 958, 996 (W.D. Pa. 1991) (interpreting the UFCA), *aff'd*, 971 F.2d 1056 (3d Cir. 1992) [hereinafter *Moody I*].

65. JOHN C. BURTON ET AL., HANDBOOK OF ACCOUNTING AND AUDITING 3-15 (1981) [hereinafter ACCOUNTING HANDBOOK].

66. *See infra* text accompanying notes 103-09.

67. MASS. GEN. L. ch. 109A, § 9 (1992).

68. 11 U.S.C. § 548 (1988).

69. Under many circumstances the Bankruptcy Code permits the distributing corporation or its creditors to enforce the trustee's rights under § 548. *See* FED. R. BANKR. P. 9001. This article discusses enforcement by the trustee, even though the trustee, the corporation, or the corporation's creditors might bring the enforcement action.

70. MASS. GEN. L. ch. 109A, § 7 (1992); 11 U.S.C. § 548(a)(1) (1988).

71. MASS. GEN. L. ch. 109A, § 4 (1992); 11 U.S.C. § 548(a)(2)(B)(i) (1988).

72. MASS. GEN. L. ch. 109A, § 4 (1992); 11 U.S.C. § 548(a)(2)(B)(i) (1988).

creditors a cause of action against shareholders when a corporation distributes capital and the corporation (i) has or will be left with insufficient capital,[73] or (ii) will not be able to pay its expected debts.[74] These last two bases of liability test equity insolvency.

Balance sheet and equity tests are alternative ways of determining whether the same transfer will harm creditors.[75] Thus, although fraudulent conveyance law now defines insolvency on a balance sheet basis,[76] it still embodies and helps define the equity insolvency test.

B. *Balance Sheet Insolvency*

Under MUFCA section 4,[77] a conveyance for less than fair consideration is constructively fraudulent if made by an insolvent corporation or if the conveyance makes the corporation insolvent. Under section 548, a transfer for less than reasonably equivalent value is constructively fraudulent if made by an insolvent corporation or if the conveyance makes the corporation insolvent.[78] The differences between a conveyance and a transfer, and between fair consideration and reasonably equivalent value, are irrelevant insofar as liability for corporate distributions is concerned. A corporate distribution is both a conveyance and a transfer because the definitions of both of those terms include the payment of money or other property.[79] A corporation receives no direct value or consideration when it redeems its own stock,[80] or when

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73. MASS. GEN. L. ch. 109A, § 5 (1992); 11 U.S.C. § 548(a)(2)(B)(ii) (1988).

74. MASS. GEN. L. ch. 109A, § 6 (1992); 11 U.S.C. § 548(a)(2)(B)(iii) (1988).

75. *See* Moody v. Security Pac. Business Credit, Inc., 971 F.2d 1056, 1070 n.22 (3d Cir. 1992) [hereinafter *Moody II*].

76. MASS. GEN. L. ch. 109A, § 2 (1992).

77. MASS. GEN. L. ch. 109A, § 4 (1992). Section 4 provides: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." *Id.*

78. In relevant part, § 548 reads: "(a) The trustee may avoid any transfer of . . . property . . . if the debtor . . . (2)(A) received less than a reasonably equivalent value in exchange for such transfer . . . and (B)(i) was insolvent on the date that such transfer was made . . . or became insolvent as a result of such transfer . . . ." 11 U.S.C. § 548 (1988).

79. Under § 1 of Chapter 109A, the term "conveyance" includes: "'every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance." MASS. GEN. L. ch. 109A, § 1 (1992).

Under 11 U.S.C. § 101 (54) (1988), transfers include: "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property . . . ." *Id.*

80. *In re* Roco Corp., 701 F.2d 978, 982 (1st Cir. 1983) (interpreting § 548). *See also* United States v. Tabor Realty, 803 F.2d 1288 (3d Cir. 1986) (interpreting UFCA), *cert. denied sub nom.* McClellan Realty Corp. v. United States, 483 U.S. 1005 (1987).

the corporation pays a dividend.[81] Thus, by definition, a Massachusetts corporation's distribution is a constructively fraudulent conveyance if the corporation is insolvent or if the distribution makes the corporation insolvent, in each case on a balance sheet basis.

Under MUFCA section 2, a corporation is insolvent on a balance sheet basis if the "fair salable value of [its] assets is less than the amount that will be required to pay [its] probable liability on [its] existing debts as they become absolute and matured."[82] Under the Bankruptcy Code, a corporation is insolvent on a balance sheet basis when the corporation's debts exceed the value of its property at a fair valuation.[83] Under both MUFCA and the Bankruptcy Code, "debts" include any liability, contract or tort, whether matured or unmatured, liquidated or unliquidated, absolute or contingent.[84] Thus, for purposes of testing insolvency, MUFCA and the Bankruptcy Code ignore the Massachusetts rule that a tort is not a debt until judgment.[85] Balance sheet insolvency tests purport to impose an objective standard that ignores intent.[86] Valuation processes are, however, inherently subjective.

This discussion of balance sheet insolvency assumes that the corporation prepares financial statements on a GAAP[87] basis. A corporation is insolvent on a GAAP basis if the corporation's balance sheet liabilities exceed its balance sheet assets. To test its solvency under MUFCA and section 548(a)(2)(B)(i), a corporation must adjust its GAAP balance sheet and recalculate its equity. GAAP basis balance sheets list assets at the corporation's cost, net of depreciation, even if the asset is actually worth more.[88] The corporation would add to its liabilities any

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81. United States v. 58th Street Plaza Theater, Inc., 287 F. Supp. 475, 498 (S.D.N.Y. 1968). *See also* Moseley v. Briggs Realty Co., 320 Mass. 278, 284 (1946) (holding that corporation did not receive fair consideration for liquidating dividend) (interpreting MUFCA).

82. MASS. GEN. L. ch. 109A, § 2 (1992).

83. 11 U.S.C. § 101(32) (1988).

84. MASS. GEN. L. ch. 109A, § 1 (1992). Under the Bankruptcy Code, "debts" include any liability on a claim, 11 U.S.C. § 101(12) (1988), and "claims" include any obligation, including contingent and unmatured obligations. 11 U.S.C. § 101(5) (1988). A tort claim is contingent until it is liquidated by a court's entering judgment. *See* 2 DAVID G. EPSTEIN ET AL., BANKRUPTCY § 7-5 (1992).

85. *See supra* note 84. *See also* Burke v. Marlboro Awning Co., 330 Mass. 294, 113 N.E.2d 222 (1953) (a contingent tort claim is not a debt).

86. *See* MASS. GEN. L. ch. 109A, § 4 (1992); 11 U.S.C. § 548(a)(2)(B) (1988).

87. GAAP is an acronym for generally accepted accounting principles.

88. GAAP prohibits the recognition of unrealized gain. INTERMEDIATE ACCOUNTING, *supra* note 3, at 759, 1131. For example, assume a corporation purchased one block of downtown Boston in 1868 for $10,000 and that the land is now worth $5,000,000. On its GAAP balance sheet, the corporation reports the land at the price the corporation paid for the land, $10,000. GAAP does not permit the corporation to report the appreciation until the corporation sells the land and realizes the gain. *Id.*

debt the corporation probably must pay, even if the corporation would not show the debt on its GAAP balance sheet.[89] The corporation would be insolvent if its adjusted liabilities exceeded its adjusted assets.

To determine whether it is balance sheet insolvent under MUFCA section 2, a corporation would restate its assets at their present fair salable value. No reported Massachusetts case defines fair salable value. Consequently, a Massachusetts court would rely on the decisions of other states that have adopted the UFCA.[90] Construing the same UFCA provision, the Pennsylvania Supreme Court has ruled that "the market value of an asset is generally controlling."[91] That court, however, also noted that present fair salable valuations must allow a period of time for marketing.[92] Thus, MUFCA's present fair salable value standard is substantially similar, at least in concept, to bankruptcy's fair valuation

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GAAP takes the opposite approach to asset value declines. GAAP requires corporations to depreciate assets, except land, over their expected useful life. *Id.* at 435. GAAP also requires corporations to report immediately the loss on any asset that irreparably declines in value. *Id.* at 410-11. Assume a corporation purchased land in 1985 for $1,000,000 and that the corporation discovers in 1987 that the land is irreparably radioactive. GAAP requires that the corporation report a loss of $1,000,000 on the land in 1987, even though the corporation has not sold the land.

89. Except for in the footnotes, GAAP balance sheets list as liabilities only "probable future sacrifices of economic benefits stemming from present legal, equitable, or constructive obligations . . . to transfer assets or provide services . . . in the future as a result of past transactions or events affecting the enterprise." ACCOUNTING HANDBOOK, *supra* note 65, at 3-13 (citing EXPOSURE DRAFT (Revised) on *Elements of Financial Statements of Business Enterprises* ¶ 22 (FASB 1979)). Thus, corporations report only those liabilities that accrue on or before the balance sheet date. But GAAP can take an economic rather than a legal view of when an obligation accrues. Under GAAP, a corporation accrues liability for all rent called for in a lease only if the lease is, in essence, a purchase. *Id.* at 23-24. Accordingly, except in footnotes, GAAP balance sheets generally do not disclose rent payable under many leases. Thus, under GAAP such rent obligations accrue only as and when the corporation has use and occupancy of the premises (monthly), not when the corporation signs a lease.

Moreover, GAAP balance sheets do not disclose many contingent liabilities. GAAP balance sheets limit liabilities to only those obligations that the corporation probably must pay, and then, only if the corporation can reasonably determine the amount the corporation probably must pay. INTERMEDIATE ACCOUNTING, *supra* note 3, at 411. For example, a GAAP balance sheet does not disclose a tort liability unless the injured party has sued the corporation, and the corporation has determined both that the corporation will probably have to pay and the amount it will probably have to pay.

90. *See Moody II*, 971 F.2d 1056, 1063 (3d Cir. 1992).

91. Fidelity Trust Co. v. Union Nat'l Bank, 169 A. 209, 213 (Pa. 1933), *cert. denied*, 291 U.S. 680 (1934).

92. *Id.*

standard, which values assets at their "fair market value . . . within a reasonable period of time."[93]

First Circuit courts apply a balance sheet test to test a corporation's solvency under section 548(a)(2)(B)(i).[94] The First Circuit's balance sheet test is not, however, a GAAP test. GAAP balance sheets assume that the corporation has an indefinite life.[95] The First Circuit's balance sheet test assumes the corporation's immediate, though orderly liquidation.[96] These assumptions result in materially different asset values.[97] Consequently, a corporation that is solvent under GAAP may be insolvent under the First Circuit's balance sheet test.

Under the First Circuit's balance sheet test, courts adjust GAAP balance sheets to reduce the stated value of any assets that cannot be sold for their stated value in a reasonable time.[98] Courts also upwardly

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93. *In re* Ipswich Bituminous Concrete Prod., Inc., 79 B.R. 511, 516 (Bankr. D. Mass. 1987).

94. Constructora Maza, Inc. v. Banco de Ponce, 616 F.2d 573, 577 (1st Cir. 1980). If litigated in federal court, liability for Massachusetts corporations' distributions would most often be litigated in the First Circuit. Consequently, this article focuses on the First Circuit cases.

95. INTERMEDIATE ACCOUNTING, *supra* note 3, at 24. GAAP values assets on a "going concern" basis unless the corporation's liquidation is imminent. *Id.* When a corporation is a going concern, GAAP does not reduce stated asset values to recognize unrealized losses on any asset that still has value to the corporation. For example, suppose a corporation purchased a block of downtown land for $10,000,000 five years ago. Also assume that a general decline in market values followed the acquisition. Consequently, the land would sell for only $7,500,000 if the corporation sold the land within the next six months. As long as the corporation is a going concern, the corporation will value the land at $10,000,000, because GAAP assumes that the corporation will realize the economic value of its investment during the corporation's life. ACCOUNTING HANDBOOK, *supra* note 65, at 29-35.

96. *See Constructora Maza,* 616 F.2d at 577 ("[r]eduction in the face value of assets may be appropriate if those assets are not susceptible to liquidation"); *Ipswich Bituminous Concrete Prod., Inc.*, 79 B.R. at 511 ("[a]ssets should be reduced by the value of assets not readily susceptible of liquidation").

97. The Third Circuit Court of Appeals has held that present fair salable value analyses use going concern valuations. *Moody II*, 971 F.2d 1056, 1068 (3d Cir. 1992). That court, however, uses a different concept of going concern than accountants and investors do. In general, the GAAP value of an asset to a going concern is its book value (actual cost, net of depreciation or amortization). To an investor, going concern value is the capitalized value of a group of assets' future earnings. ERICH A. HELFERT, TECHNIQUES OF FINANCIAL ANALYSIS 215-19 (1977). The Third Circuit's going concern valuation is more appropriately described as "going concern on something approaching a liquidation basis." *Moody II*, 971 F.2d at 1069. That method results in values significantly less than book value (going concern value was $5-6 million when book value was $17.7 million before $11 million in capital improvements, *Id.*), and may result in values significantly less than the capitalized earning stream.

98. *Constructora Maza*, 616 F.2d at 577; *In re* Roco Corp., 701 F.2d 978, 983 (1st Cir. 1983).

adjust the value of assets with a fair market value greater than their GAAP value.[99] Thus, a corporation that long ago acquired substantial real estate assets could be insolvent under GAAP, but solvent under the First Circuit's balance sheet test.

The Bankruptcy Code[100] and MUFCA[101] definitions of "debts" require that courts add to the corporation's liabilities any debts GAAP does not include in the balance sheet. Debts a court might add to the GAAP balance sheet include contingent liabilities and operating lease obligations.[102] By setting a time limit during which assets must be disposed of, and by adding debts to a corporation's GAAP balance sheet, both the MUFCA and the Bankruptcy Code tests are likely to reduce a corporation's GAAP net worth and render a corporation that is solvent under GAAP insolvent under MUFCA and section 548.

C. *Equity Insolvency*

As noted earlier, fraudulent conveyance law contains two tests for equity insolvency. Under the MUFCA section 5[103] and Bankruptcy Code section 548(a)(2)(B)(ii)[104] test, a distribution is a fraudulent conveyance if the corporation makes the distribution when the corporation is engaged or is about to engage in a business for which the corporation has unreasonably small capital. Under the MUFCA section 6[105] and

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99. *Constructora Maza*, 616 F.2d at 577; *Roco Corp.*, 701 F.2d at 983. As footnote 88 explains, GAAP does not recognize market appreciation, except in the case of marketable securities, until a corporation sells an appreciated asset.

100. *In re* Worcester Quality Foods, Inc., 152 B.R. 394, 403 (Bankr. D. Mass. 1993); 11 U.S.C. §§ 101(5), (12) (1988).

101. MASS. GEN. L. ch. 109A, § 1 (1992).

102. *See Worcester Quality Foods*, 152 B.R. at 403. *See also supra* note 89.

103. MASS. GEN. L. ch. 109A, § 5 (1992). Section 5 provides:

> Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction, for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction, without regard to his actual intent.

Id.

104. In relevant part, § 548 reads: "(a) The trustee may avoid any transfer of . . . property . . . if the debtor . . . (2)(A) received less than a reasonably equivalent value in exchange for such transfer (B)(ii) was engaged in business or a transaction . . . for which any property remaining with the debtor was an unreasonably small capital." 11 U.S.C. § 548 (1988).

105. MASS. GEN. L. ch. 109A, § 6, provides:

> Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature is fraudulent as to both present and future creditors.

Id.

Bankruptcy Code section 548(a)(2)(B)(iii)[106] test, a distribution is a fraudulent conveyance if a corporation makes the distribution intending to, or believing that it will, incur debts beyond the corporation's ability to pay the debts as they mature.

As noted earlier, GAAP defines capital as the difference between a corporation's assets and liabilities. Although the values attributed to assets and liabilities may differ under the GAAP and the statutory balance sheet tests, a corporation is solvent under both when the corporation's assets exceed its liabilities. GAAP and statutory balance sheet tests both measure the amount of a corporation's capital. The first equity test measures the adequacy of the corporation's capital–not its amount. In contrast, the second equity test measures ability to pay current and future debts as they mature[107] by evaluating projected working capital or cash flow.[108] A corporation experiences negative cash flow if the corporation's expenditures exceed the corporation's cash receipts. Absent cash reserves, when a corporation projects negative cash flow,[109] the corporation intends to incur debts that the corporation will not be able to pay as the debts mature.

Notwithstanding the functional differences between the two equity tests, courts commonly analyze cash flow to determine whether a corporation has adequate capital.[110] As noted earlier, courts often find the two tests related[111] or "nearly the same."[112] This article concurs with those analyses, at least insofar as they require both equity tests to

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106. In relevant part, § 548 reads:

> (a) The trustee may avoid any transfer of . . . property . . . if the debtor . . . (2)(A) received less than a reasonably equivalent value in exchange for such transfer . . . and (B)(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548 (1988).

107. *See In re* Vadnais Lumber Supply, Inc., 100 B.R. 127, 137 (Bankr. D. Mass. 1989).

108. Working capital is the excess of current assets over short-term liabilities. Current assets are cash, marketable securities and other assets that a business reasonably expects to convert to cash, sell or consume within the business' normal operating cycle. 1 Acct. Res. Bull., Accounting Standards, Original Pronouncements No. 43, ch. 3, ¶ 4 (Fin. Accounting Standards Bd. 1994) [hereinafter ARB 43]. Current liabilities are those debts that the corporation reasonably expects to pay within a short time, usually a year. *Id.* ch. 3, ¶ 7.

109. Assuming that the projections do not cause the corporation to change its plans.

110. *See, e.g., Moody II*, 971 F.2d 1056, 1072 (3d Cir. 1992) ("the focus of the adequacy of capital inquiry in a leveraged buyout should be the reasonableness of the parties' cash flow projections").

111. *Vadnais Lumber*, 100 B.R. at 137.

112. *Moody I*, 127 B.R. 958, 996 (W.D. Pa. 1991), *aff'd*, 971 F.2d 1056 (3d Cir. 1992).

consider substantially the same factors.[113] Consequently, the remainder of this article discusses the two tests as if they were the same and relies primarily on cases that test capital to explain what factors directors should consider when attempting to determine, under either equity test, whether a corporation is insolvent or will be insolvent if the corporation makes a distribution.

To determine if a distributing corporation is insolvent on an equity basis, courts examine the corporation's capital and cash flow throughout a reasonable period on either side of the distribution date.[114] The courts weigh raw financial data in light of the nature of the corporate "enterprise" and the corporation's capital and cash flow needs during the relevant period.[115] Equity insolvency tests are ultimately reasonableness tests, that require critical examination of the reasonableness of the parties' projections and the assumptions upon which those projections are based.[116] Consequently, courts make a contextual judgment that considers the corporation's state of affairs and the circumstances surrounding the distribution.[117]

Little limits what courts may consider when applying an equity test. Consequently, before making a distribution, a corporation must evaluate its capital and cash flow needs, considering its past objectively and taking a reasonable view of its future prospects.[118] Relevant data include historical and projected cash flow, sales, margins, and earnings.[119] Other relevant data include demand for the company's products or services, budgets, market trends, and ability to obtain financing or refi-

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113. The second, cash-based, equity test contains an intent element that the first, capital-based, test does not. *Compare* MASS. GEN. L. ch. 109A, § 5 (1992) *and* 11 U.S.C. § 548(a)(2)(B)(ii) (1988) *with* MASS. GEN. L. ch. 109A, § 6 (1992) *and* 11 U.S.C. § 548(a)(2)(B)(iii) (1988). The cash-based equity test measures intent to incur debt rather than intent to defraud, however. Courts' broad inquiries into the reasonableness of a corporation's projections and assumptions under capital-based test effectively measure the corporation's intent to thrust itself "undercapitalized . . . into the market place to attract unwary creditors to inevitable loss." Barrett v. Continental Ill. Nat'l Bank & Trust Co., 882 F.2d 1, 5 (1st Cir. 1989), *cert. denied*, 494 U.S. 1028 (1990). Thus, notwithstanding the equity test's intent element, the two tests consider the same factors.

114. *Barrett*, 882 F.2d at 4. *See also Moody II*, 971 F.2d at 1072 ("the focus of the adequacy of capital inquiry . . . should be the reasonableness of the parties' cash flow projections").

115. *Barrett*, 882 F.2d at 4.

116. *Moody II*, 971 F.2d 1056, 1073-74 (3d Cir. 1992).

117. *Barrett*, 882 F.2d at 4.

118. *Moody II*, 971 F.2d at 1073 ("[b]ecause projections tend to be optimistic, their reasonableness must be tested by an objective standard anchored in the company's actual performance").

119. *Id.*

nancing.[120] To be reasonable, projections must take into account difficulties that are likely to arise, including general economic downturns, and incorporate margins for error.[121] The time period for which projections are made must be reasonable as well.[122]

When using an equity test to decide if a distribution was a fraudulent conveyance, courts evaluate whether the corporation's financial projections were reasonable, taking into account surrounding circumstances and general economic risks. Courts also ask whether the corporation could have predicted the economic events that followed the distribution. Thus, courts effectively ask whether the corporation knew or should have known that a distribution would leave the corporation unable to pay its current or future obligations as the corporation expects them to mature.[123]

D. *Conclusion*

Fraudulent conveyance law gives creditors avoidance remedies against shareholders who receive distributions from corporations that are insolvent on either a balance sheet or equity basis. If before or after a corporation makes a distribution, the corporation's debts, defined broadly, exceed the fair market value of the corporation's assets assuming an orderly liquidation, the corporation is insolvent on a balance sheet basis. If, when a corporation makes a distribution, the corporation knows or should know that it will be unable to pay its current or future debts, the corporation is insolvent on an equity basis. Part IV describes how sections 61 and 45 use the same bases to determine when distributions give corporations restitution remedies against shareholders. The factors that directors should consider to determine whether a corporation is insolvent are essentially the same as the factors that directors should consider to avail themselves of section 65's good faith and reasonable prudence defense. Thus, Part VI discusses how those factors impact directors' section 65 defense.

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120. *In re* Omni Mechanical Contractors, Inc., 114 B.R. 518, 531 (Bankr. E.D. Tenn. 1990). *Omni* refers to "business forecasts" by which it appears to mean the projections of the company's prospects in comparison, *inter alia*, to its competitors. *Id.*

121. *Moody II*, 971 F.2d at 1073.

122. *Omni*, 114 B.R. at 531.

123. *See Moody II*, 971 F.2d at 1073 ("test . . . is reasonable foreseeability") (*quoted in In re* Morse Tool, Inc., 148 B.R. 97, 133 (Bankr. D. Mass. 1992)); *see also In re* O'Day Corp., 126 B.R. 370, 407 (Bankr. D. Mass. 1991) ("labor problems, cost variances and cyclicality in the industry were the major contributors to O'Day's fiscal woes and were manifest and readily predictable prior to the LBO").

IV. INSOLVENCY UNDER THE MBCL

A. *Introduction*

The MBCL does not define "insolvent," nor do cases interpreting sections 45 or 61 adequately define the term. Massachusetts cases suggest, however, that sections 61 and 45 test insolvency using both balance sheet and equity tests. Thus, a corporation is insolvent under the MBCL when the corporation's debts exceed the orderly liquidation value of its assets or if the corporation is or will be unable to pay its expected debts as they mature.

This article has established that since at least the turn of the century, Massachusetts law has barred corporations from paying dividends while the corporation was insolvent and from paying dividends that would make the corporation insolvent.[124] Creditors could enjoin such distributions,[125] and still may under MUFCA.[126] The courts enforced redemption contracts only to the extent that a corporation redeemed stock "in good faith and without prejudice to creditors."[127] A corporation undoubtedly would prejudice its creditors if the corporation redeemed stock when the corporation was insolvent or if the redemption left the corporation insolvent. Sections 61 and 45 impose liability when insolvent corporations make distributions and when distributions make solvent corporations insolvent. Thus sections 61 and 45 codify the common-law rule prohibiting distributions by insolvent corporations.[128] What then, is the condition of insolvency upon which this rule turns?

B. *Early Cases*

In a turn of the century case, *Ellis v. French Canadian Co-op.*,[129] the Supreme Judicial Court defined "insolvent" as an early version of section 61, R.L. c. 110, section 58 (section 58), used the term. Under section 58, insolvent meant: "[R]educing the assets of the corporation below the amount of its debts, or . . . depriving it of its cash resources needed for the payment of its immediate obligations . . . ."[130] Therefore, a

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124. *See, e.g.*, Ellis v. French-Canadian Co-op. Ass'n, 189 Mass. 566, 76 N.E. 207 (1905).

125. *Id.*

126. MASS. GEN. L. ch. 109A, § 10 (1992).

127. Scriggins v. Thomas Dalby Co., 290 Mass. 414, 418, 195 N.E. 749, 751 (1935); Winchell v. Plywood Corp., 324 Mass. 171, 174-75, 85 N.E.2d 313, 315 (1949).

128. *See* Brigham v. M & J Corp., 352 Mass. 674, 681, 227 N.E.2d 915, 920 (1967); *see also infra* text accompanying notes 166-67.

129. Ellis v. French-Canadian Co-op. Ass'n, 189 Mass. 566, 567, 76 N.E. 207, 207 (1905) (interpreting R.L. 1902 c. 110, § 58).

130. *Id.*

corporation was insolvent under section 58 if the corporation's liabilities exceeded its assets, even if the corporation could pay its immediate obligations. A corporation was also insolvent if the corporation could not pay its immediate obligations, even though the corporation's assets exceeded its liabilities. Thus, an early version of section 61 used both balance sheet and equity insolvency tests.

Under *Ellis*, a director was not liable for a distribution if the corporation was solvent immediately after the distribution, even though the distribution caused the corporation's insolvency "a considerable time afterwards."[131] *Ellis* did not consider whether a director would be liable for a distribution if the corporation became unable to pay its debts shortly, but not immediately, after the distribution.

Massachusetts common law defined insolvency as the "inability to pay debts in the usual course of trade."[132] It is not clear whether the definition referred (i) only to debts currently due, (ii) only to current debts as they might come due, or (iii) to current debts and any other debts that a corporation intended to incur in the usual course of trade. One commentator suggests that a corporation was insolvent only when the corporation was immediately unable to pay its existing debts as the debts matured:

> a repurchase completed while the corporation was still solvent was not invalidated by subsequent insolvency. It does not appear to have mattered that insolvency followed closely upon the repurchase transaction, as must have often happened when the selling stockholders were knowledgeable insiders trying to rescue some portion of their investment from a corporation known to be on the brink of failure. Perhaps the result would have been different had there been a showing that the repurchase transaction had helped to cause the subsequent insolvency, but there is no evidence of any disposition to import causation concepts into this area.[133]

In fact, showing that a distribution had helped cause insolvency did not change the result. In 1905, section 58 made a corporation's president and directors liable "for making or consenting to a dividend if the corporation is or thereby is rendered insolvent, to the extent of such dividend."[134] In *Ellis*, the French Canadian Cooperative Association paid a dividend. Although the association was solvent immediately

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131. *Id.* at 567, 76 N.E. at 207.

132. Maryland Casualty Co. v. Commissioner of Ins., 372 Mass. 554, 563, 363 N.E.2d 1087, 1094 (1977); Calnan v. Guaranty Sec. Corp., 271 Mass. 533, 542, 171 N.E. 830, 834 (1930) (citing Coleman v. New York, New Haven & Hartford R.R. Co., 215 Mass. 45, 49, 102 N.E. 92, 94 (1913)).

133. David R. Herwitz, *Installment Repurchase of Stock: Surplus Limitations*, 79 HARV. L. REV. 303, 306 (1965).

134. R.L. 1902 c. 110, § 58 (quoted in Ellis v. French-Canadian Co-op. Ass'n, 189 Mass. 566, 566, 76 N.E. 207, 207 (1905)).

before and immediately after the dividend, it became insolvent "a considerable time afterwards."[135] The plaintiffs proved that the dividend was one cause of the association's insolvency. The court ruled: "[t]here is no violation of [section 58] in making a dividend, unless the company is then insolvent, or is actually rendered insolvent thereby, even though the dividend may be one of several causes of insolvency that results a considerable time afterwards."[136]

Relying on *Ellis*, Peairs also suggests that directors and shareholders are liable for a distribution only if a corporation is unable to pay its debts immediately before or after the distribution.[137] Later decisions, however, suggest otherwise.

In a 1929 case, *Calkins v. Wire Hardware Co.*,[138] the Supreme Judicial Court, under section 61's immediate predecessor, Massachusetts General Laws Chapter 156, section 37 (section 37), held directors liable for a distribution that left a corporation unable to pay obligations that the corporation intended to incur. Section 37 made directors "jointly and severally liable for the debts and contracts of the corporation . . . for declaring or assenting to a dividend if the corporation is, or thereby is rendered, bankrupt or insolvent, to the extent of such dividend."[139] Wire Hardware was not bankrupt. Thus, for the court to have imposed liability under section 37, Wire Hardware had to have been insolvent.

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135. *Ellis*, 189 Mass. at 567, 76 N.E. at 207.

136. *Id.*

137. *Business Corporations*, *supra* note 21, § 643 n.73. Peairs's conclusion also relies on Anderson v. Metropolitan Stock Exchange, 198 Mass. 76, 84 N.E. 120 (1908); Flint v. Boston Woven Hose & Rubber Co., 183 Mass. 114, 66 N.E. 592 (1903); Thacher v. King, 156 Mass. 490, 31 N.E. 648 (1892); First National Bank v. Hingham Manufacturing Co., 127 Mass. 563 (1879); and Merchants Bank v. Stevenson, 76 Mass. 232 (1857). Each of those decisions interpreted a Massachusetts law that made directors and sometimes officers personally liable for a corporation's debts to the extent that those debts exceeded the corporation's paid-in capital. Chronologically, those statutes were: Rev. St. 1836, c. 38, § 25; St. 1829, c. 53, § 8 (*Merchants Bank*); St. 1870, c. 224, § 38, cl. 3 (*First National Bank*); Pub. Stat. 1882 c. 106, § 60, cl. 3 (*Thacher*; *Flint*); and R.L. 1902 c. 110, § 58, cl. 3 (*Anderson*). Each of those provisions measured the corporation's existing debts as of a date certain: either the date the corporation incurred its debt to the plaintiff creditor, or the date the creditor filed a lawsuit under the statute. None of those provisions contained any variation of the word "insolvent." None of these cases Peairs cites addressed the Massachusetts definition of insolvency. Thus, those cases are not relevant to whether a corporation is insolvent if its distributions leave it unable to meet expected future obligations.

138. 267 Mass. 52, 165 N.E. 889 (1929).

139. *Id.* at 59, 165 N.E. at 893. The term "dividends," as § 37 used that term, included liquidating dividends and redemptions. *Id.* at 59; Moseley v. Briggs Realty Co., 320 Mass. 278, 282, 69 N.E.2d 7, 10 (1946) ("A liquidating dividend, in distribution of capital assets among stockholders, is a 'dividend . . . .'"). *See also* Pennsylvania Iron Works Co. v. MacKenzie, 190 Mass. 61 (1906) (redemption upon dissolution a "dividend" under § 58).

Wire Hardware engaged Mr. Calkins, an attorney, to represent the company in a federal income tax audit. Just before Wire Hardware's directors voted to engage Mr. Calkins, they distributed all the company's assets to its shareholders. The court pointed out that Wire Hardware's directors knew, before they distributed the company's assets, that the company would engage an attorney to negotiate the income tax.[140] Wire Hardware was solvent on a balance sheet basis when it made the distribution, because it had no debt.[141] Nonetheless, the court held the directors liable under section 37 for making a distribution that rendered Wire Hardware insolvent.[142]

In light of the court's knowledge that the directors intended the corporation to incur future debts, *Calkins* suggests that an equity test of insolvency should include debts that the directors know or should know that the corporation will incur in the future. Thus, *Calkins* contradicts any construction of "insolvent" that suggests a corporation is solvent merely because the corporation is solvent on a balance sheet basis or because the corporation can pay its current debts.

C. *Torts*

Sections 61's and 45's immediate predecessors, section 37 and Massachusetts General Laws Chapter 158, section 44 (section 44), respectively, limited director and shareholder liability for distributions to the corporation's "debts and contracts." In *Burke v. Marlboro Awning Co.*,[143] the Supreme Judicial Court ruled that debts and contracts did not include tort liability that the law "involuntarily . . . imposed . . . in consequence of the negligent or tortious acts of [the corporation's] agents or servants."[144] In *Burke*, shortly after the plaintiffs filed a tort claim against Marlboro Awning, the corporation distributed its assets to its shareholders.[145] Several years after the distribution, the plaintiffs obtained a judgment.[146] Even though Marlboro Awning's directors knew on the distribution date that Marlboro Awning might have to pay the plaintiffs, the court ruled that the plaintiffs could not recover from the directors under section 37 because the tort claim was not a "debt or contract."

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140. Calkins v. Wire Hardware Co., 267 Mass. 52, 57, 165 N.E. 889, 892 (1929).

141. Balance sheet tests include debts for which the corporation is liable, even though those debts are not yet due, and may not ever come due, as in the case of contingent liabilities. Balance sheet tests do not, however, include liabilities the corporation has yet to incur. *See* text accompanying notes 77-102.

142. *Calkins*, 267 Mass. at 58, 165 N.E. at 893.

143. 330 Mass. 294, 113 N.E.2d 222 (1953).

144. *Id.* at 296-97, 113 N.E.2d at 223.

145. *Id.* at 294-95, 298, 113 N.E.2d at 222, 224.

146. *Id.* at 295, 298, 113 N.E.2d at 222, 224.

Under this ruling, sections 37 and 44 upset the corporate priorities, because Marlboro Awning distributed its assets knowing that the corporation would not be able to pay the plaintiffs if they obtained a judgment. Consequently, the court held the directors liable using common law, thereby enforcing the corporate priorities. When it adopted sections 45 and 61, the legislature eliminated the section 37 and section 44 provisions that limited director and shareholder liability to "debts and contracts." These amendments, read in light of *Calkins,* imply that a corporation is insolvent under the MBCL if the corporation knows or should know that the corporation will be unable to pay current or future obligations as they mature, whether those obligations arise in tort or in contract.

D. *Evolving Concepts of Insolvency*

Neither the cases nor the MBCL explicitly define insolvency, however. Consequently, one must examine the relationship between corporate and fraudulent conveyance law notions of insolvency to determine whether sections 61 and 45 impose liability on directors and shareholders when a corporation knows or should know that a distribution will leave the corporation unable to pay current or future contract or tort obligations.

When defining insolvency in the context of distributions, Massachusetts courts have borrowed freely from state fraudulent conveyance law and federal bankruptcy law. Thus, Massachusetts corporate law relies on MUFCA and the Bankruptcy Code to define insolvency.[147] This section briefly describes the history of that reliance.

In *Calnan v. Guaranty Security Corp.,*[148] a case considering corporate insolvency, the Supreme Judicial Court held that Massachusetts corporate common law defined insolvency as the "inability to pay debts in the usual course of trade,"[149] an equity test. For many years before *Calnan,* federal bankruptcy law also used an equity test to define insolvency. The Federal Bankruptcy Act of 1867 defined insolvency as the inability to pay one's debts in the ordinary course of business.[150] In 1926, federal bankruptcy law adopted a balance sheet test. The Federal Bankruptcy Act of 1926 provided that a person was insolvent when the person's assets, at a fair valuation, were insufficient to satisfy his or her debts.[151] At nearly the same time, Massachusetts corporate and fraudulent conveyance law also began to use balance sheet tests.

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147. *Id.* at 300, 113 N.E.2d at 225.
148. 271 Mass. 533, 171 N.E. 830 (1930).
149. *Id.* at 542, 171 N.E. at 834.
150. *See* Mason v. Wylde, 308 Mass. 268, 290, 32 N.E.2d 615, 631, *cert. denied,* 314 U.S. 638 (1941).
151. *See* United States v. Moore, 423 U.S. 77, 84 (1975), and statutes cited therein.

In 1924, Massachusetts adopted MUFCA. Under MUFCA, a person was insolvent when "the present fair salable value of his [nonexempt] assets [was] less than the amount that [would] be required to pay his probable liability on his existing debts as they bec[a]me absolute and matured."[152] Thus, MUFCA's insolvency definition conceptually paralleled the federal bankruptcy definition. In fact, "[u]niform interpretation of the two statutes [is] essential to promote commerce nationally."[153] Thus, when Massachusetts law does not adequately explain a MUFCA provision, a court "may look to decisions construing analogous provisions of the Bankruptcy Code."[154] *Crimmins & Pierce Co. v. Kidder Peabody Acceptance Corp.*,[155] confirms this conclusion. In 1932, the Supreme Judicial Court used the federal bankruptcy balance sheet insolvency test when testing solvency in *Crimmins*, a corporate law case.[156] Thus, Massachusetts corporate law historically relies on federal bankruptcy law to define the balance sheet test, and that test is the same under MUFCA.[157]

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152. Splaine v. Morrissey, 282 Mass. 216, 220, 184 N.E. 670, 671 (1933) (citing G. L. c. 109A, § 2). The MUFCA definition of insolvency remains unchanged. *See* cases cited in MASS. GEN. L. ANN. ch. 109A, § 2 (West 1992).

153. United States v. Tabor Realty Corp., 803 F.2d 1288, 1299 (3d Cir. 1986) (citing Cohen v. Sutherland, 257 F.2d 737, 741 (2d Cir. 1958), *cert. denied sub nom.* McClellan Realty Corp. v. United States, 483 U.S. 1005 (1987)).

154. *Moody II*, 971 F.2d 1056, 1063 (3d Cir. 1992); *In re* Morse Tool, Inc., 148 B.R. 97, 130 (Bankr. D. Mass. 1992).

155. 282 Mass. 367, 185 N.E. 383 (1932).

156. *Id.*

157. Massachusetts corporate law, which Chapter 156B of the Massachusetts General Laws governs, and commercial law, which Chapter 106, governs, also once had different insolvency tests. In 1915, the Supreme Judicial Court held that "insolvency . . . in the case of a [corporate] trader . . . does not spell insolvency in case of all persons." Holbrook v. International Trust Co., 220 Mass. 150, 107 N.E. 665 (1915). The court soon abandoned this approach in Calnan v. Guaranty Corp., 271 Mass. 533, 171 N.E. 830 (1930). *Calnan* cited *Coleman*, a case about insolvent traders, to support this corporate law insolvency definition. *Id.* at 542, 171 N.E. at 833 (citing Coleman v. New York, N.H., & H.R. Co., 215 Mass. 45, 49, 102 N.E. 92, 94 (1913)). Thus, Massachusetts came to define insolvency similarly under corporate and commercial law.

Like MUFCA, Massachusetts commercial law also continues to test solvency on both balance sheet and equity bases. The Uniform Commercial Code (UCC) as adopted in Massachusetts declares a person insolvent when he or she "either has ceased to pay his [or her] debts in the ordinary course of business or cannot pay his [or her] debts as they become due or is insolvent within the meaning of the federal bankruptcy law." MASS. GEN. L. ch. 106, §§ 1-201 (1992). The UCC's reference to bankruptcy law insolvency includes balance sheet test insolvency under 11 U.S.C. § 101 (32) (1988). The UCC may also refer to 11 U.S.C. § 303(h)(i) (1988), which permits creditors to force into involuntary bankruptcy debtors who are not paying their debts as the debts come due.

E. *Implications of Changing Notions of Insolvency*

One might conclude from the cases cited in the previous section that corporate and fraudulent conveyance law have abandoned testing equity insolvency. To the contrary, no reported Massachusetts case has suggested that corporate law has abandoned testing insolvency on both a balance sheet and equity basis. The section 61 predecessor that *Ellis* considered, section 58, tested solvency using both balance sheet and equity tests. In *Calkins*, Wire Hardware, which was solvent under the balance sheet test, was nonetheless insolvent under section 61's immediate predecessor, section 37. Thus, *Calkins* added debts that the corporation intended to incur to the equity test. When the legislature eliminated from sections 61 and 45 the limitations that, under their immediate predecessors, freed directors and shareholders from unliquidated, contingent tort liability, it expanded the sections 61 and 45 insolvency concepts. The more reasonable conclusion, therefore, is that sections 61 and 45 impose liability on directors and shareholders for distributions that leave a corporation unable to pay obligations, including tort obligations, that the corporation knows or should know that it will incur.[158]

Moreover, MUFCA "codifies law of ancient lineage."[159] As noted earlier, fraudulent conveyance law continues to provide creditors with remedies when a corporation makes a distribution and fails either a balance sheet or an equity test.[160] Thus, MUFCA takes the same approach that corporate law did in 1929:[161] even when a corporation is solvent on a balance sheet basis, it grants creditors remedies when the corporation makes a distribution that leaves the corporation unable to pay debts the corporation intends to incur. Fraudulent conveyance law thus parallels the insolvency analysis implicit in *Calkins*.[162] Therefore, fraudulent conveyance law decisions can explain how to apply the corporate law equity test.

In re Tufts Electronics, Inc., supports this conclusion. In *Tufts*, the First Circuit Court of Appeals found that a distribution which did not violate section 61 also was not a fraudulent conveyance under MUFCA.[163] Although the *Tufts* Court did not define explicitly what it meant by

158. *See also* GEORGE M. TREISTER ET AL., FUNDAMENTALS OF BANKRUPTCY LAW § 3.02(c)(2), at 115 (1988) ("traditional insolvency, in the equity sense . . . involves a prediction that the debtor will be unable in the future to pay maturing debts").

159. Boston Trading Group v. Burnazos, 835 F.2d 1504, 1508 (1st Cir. 1987). *See also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 56 (1989) ("fraudulent conveyance actions . . . are quintessentially suits at common law . . . . ").

160. *See supra* text accompanying notes 59-76.

161. *See supra* text accompanying notes 103-23.

162. *See* discussion accompanying *supra* notes 138-42.

163. 746 F.2d 915, 917-18 (1st Cir. 1984).

solvency, the court did find that the corporation violated neither statute because the corporation was "solvent" on the distribution date, had a positive net worth when the corporation's fiscal year ended approximately six months later, and was able to pay creditors for eighteen months after the distribution.[164] The court implicitly assumed that the MBCL and MUFCA insolvency concepts are the same.[165]

But *Tufts* does not refer to the balance sheet or equity insolvency tests by name, the court's findings indicate it used both tests. The balance sheet test measures net worth. The equity test measures ability to pay creditors.

Although *Tufts* did not explicitly hold that a corporation applying an equity test should consider debts the corporation intends to incur, *Tufts* does support this article's conclusion that directors should use the fraudulent conveyance law balance sheet and equity insolvency tests to test a corporation's solvency under sections 61 and 45. The *Tufts* Court ruled: "The law is clear that rights of creditors are involved only where there has been prejudice to creditors, and prejudice arises where the transaction is a fraudulent conveyance or one which led to corporate insolvency."[166] Distributions are actual fraudulent conveyances if the corporation intends to defraud its creditors and constructively fraudulent conveyances if the corporation is insolvent on a balance sheet or equity basis. *Tufts* did not distinguish between actual and constructively fraudulent conveyances when it held that fraudulent conveyances prejudice creditors. Thus, a distribution by a corporation insolvent on an equity basis prejudices its creditors. The purpose of sections 61 and 45 "is to prevent distributions to stockholders . . . which would be prejudicial to creditors."[167] Sections 61 and 45, therefore, must use both equity and balance sheet insolvency tests.

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164. *Id.*

165. In 1987, Bankruptcy Judge Gabriel made the same assumption. *In re* Ipswich Bituminous Concrete Products, Inc., 79 B.R. 511 (Bankr. D. Mass. 1987). In *Ipswich*, Judge Gabriel found that the debtor's stock redemption was a fraudulent conveyance under the Bankruptcy Code's fraudulent conveyance provision, 11 U.S.C. § 548. Judge Gabriel used a balance sheet test to determine the debtor's insolvency and then ruled:

> Since the court has found that the Debtor was insolvent (or was at least rendered insolvent by the distribution, the Court has no difficulty finding that [the directors] are jointly and severally liable for the distribution pursuant to § 61 of the MBCL as well as § 548 of the Bankruptcy Code.

Ipswich, 79 B.R. at 518.

166. *Tufts*, 746 F.2d at 917.

167. *See* Brigham v. M & J Corp., 352 Mass. 674, 681, 227 N.E.2d 915, 920 (1st Cir. 1967). Liability under §§ 61 and 45 for distributions by insolvent corporations, or distributions that leave corporations insolvent, arise in the same circumstances. Thus, § 45's purpose must be the same as § 61's.

F. *Summary*

First at common law, and then after Massachusetts began to enact business corporation statutes, Massachusetts corporate law relied on fraudulent conveyance law to define insolvency. Fraudulent conveyance law defines insolvency using a balance sheet test, but continues to protect creditors using equity tests that reflect common law insolvency concepts. Consequently, to test whether a corporation is insolvent under sections 61 and 45, directors may use the fraudulent conveyance law balance sheet and equity tests. Directors may incur liability under section 61 if they approve, and shareholders may incur liability under section 45 if they receive, a distribution from a corporation insolvent under either fraudulent conveyance law insolvency test. Part VII discusses the implications of this conclusion for directors. Before that, however, Part V explains when corporations have capital legally available for distributions, and Part VI explains directors' defenses to section 61 liability.

V. THE MEANING OF LEGALLY AVAILABLE CAPITAL

The one time when section 61 might impose liability on directors but section 45 may not impose liability on shareholders is when directors approve distributions that violate a corporation's articles of organization.[168] Section 45 does not expressly impose liability on shareholders who receive such distributions.[169] At least in theory, when articles of organization limit distributions to legally available capital, section 61 might impose liability on directors who authorize a distribution in excess of legally available capital while the shareholders escape section 45 liability.[170] Thus, before authorizing any distribution, directors of any Massachusetts corporation governed by articles of organization that limit distributions to "legally available" capital must determine when capital is legally available.

A. *Sections 61 and 45*

At a minimum, legally available capital limitations refer to the MBCL's limits on distributions. Buxbaum supports the suggestion that articles of organization that limit distributions to "legally available" capital at least impose the restrictions that sections 61 and 45 contain. He wrote:

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168. MASS. GEN. L. ch. 156B, § 61 (1992).

169. *See* MASS. GEN. L. ch. 156B, § 45 (1992).

170. In practice, however, this § 61 provision imposes liability on directors only when directors approve a distribution that violates express limits stated in the corporation's articles of organization.

> The common corporate provision for [distributions] is that they be paid 'out of funds legally available therefore.' This phrase equates the source of the [distributions] to the applicable statutory provisions [Buxbaum cites the precursors of sections 45 and 61 (Massachusetts General Laws Chapter 156, section 37 and Massachusetts General Laws Chapter 158, section 44) as those provisions] and leaves problems of definition to the latter . . . . Usually the limit of the statute is the desired corporate limit; hence the popularity of the 'out of funds legally available.'[171]

Thus, because of sections 61 and 45, insolvent Massachusetts corporations never have funds legally available for distribution and solvent Massachusetts corporations do not have funds legally available for distribution to the extent that a distribution would make the corporation insolvent.

Pre-MBCL cases support the further conclusion that all Massachusetts articles of organization impliedly limit distributions to legally available capital,[172] which makes legally available capital a circular concept. In *Crocker v. Waltham Watch Co.*,[173] the court ruled that public policy prohibited enforcing a mandatory dividend requirement that "might result in the destruction of the corporation."[174] In *Crimmins & Pierce Co. v. Kidder Peabody Acceptance Corp.*,[175] the court ruled that redemption contracts "are subject to the implied limitation that they cannot be enforced if the effect is to render the corporation insolvent."[176] *Crocker* and *Crimmins* reflect the corporate priorities and the common-law rule against preferring shareholders over creditors. The incorporation of the common law into sections 61 and 45 appears to be the source of the circularity of legally available capital limitations. The common law, however, continues to limit distributions beyond the sections 61 and 45 limits. Legally available capital restrictions, express and implied, thus impose the section 61, the section 45, and common law limits on distributions.

B. *Common Law*

In *Calkins*, the court imposed liability for a distribution on Wire Hardware's directors because Wire Hardware was insolvent, on an equity

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171. Buxbaum, *supra* note 4, at 250. *See also id.* at 266 ("the point made in discussing dividends [quoted above] applies [to redemptions]"); *see generally* 7 Bus. Orgs. (MB) § 141.05[1] (1993) ("[a]n 'improper dividend' is one made from funds not legally available for the purpose").

172. *See also supra* text accompanying notes 26-29.

173. 315 Mass. 397, 53 N.E.2d 230 (1942).

174. *Id.* at 406, 53 N.E.2d at 235 (citing Lockhart v. Van Alstyne, 31 Mich. 76 (1935)).

175. 282 Mass. 367, 185 N.E. 383 (1933).

176. *Id.* at 376, 185 N.E. at 387. Sections 45 and 61 treat dividends, redemptions, and stock purchases similarly. As noted earlier, redemptions and repurchases are substantively indistinguishable. Thus, the principles of *Crocker* and *Crimmins* apply to all distributions.

basis, under section 61's immediate predecessor, section 37.[177] The court also ruled that a common-law rule against prejudicing creditors survived the legislature's enactment of section 37. In addition to the Wire Hardware directors' section 37 liability, the court found them liable on the common-law grounds that: "[t]he directors of a corporation who distribute substantially all its assets to its stockholders are personally liable to refund the amount so distributed to the amount of unpaid debts, even though the corporation had no creditors at the date of distribution and the debts were later incurred."[178] *Calkins* used this rule to hold Wire Hardware's directors liable to Wire Hardware for debts that they knew Wire Hardware would incur after the distribution.

In *Burke v. Marlboro Awning Co.*, Marlboro Awning's directors approved a distribution shortly after (perhaps because) the plaintiffs filed a tort suit against the corporation.[179] In *Burke*, the court ruled that section 37 did not impose liability on directors for the tort damages because the terms "debts or contracts," for which section 37 imposed liability, did not include tort claims.[180] On the basis of the *Calkins* common-law rule, the *Burke* Court held the directors liable despite section 37's limitations.

Section 37 would have subsumed the *Calkins* common-law rule if distributions prejudiced creditors only when a corporation was insolvent or only when they left a corporation insolvent.[181] Thus, for the *Calkins* common-law rule to provide an independent basis for liability, it must mean that directors incur liability, without regard to the corporation's solvency, when they approve a distribution knowing that it will prejudice creditors.[182] Corporations intend the natural consequences of their

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177. Calkins v. Wire Hardware Co., 267 Mass. 52, 165 N.E. 889 (1929); *see supra* text accompanying notes 138-42.

178. Calkins v. Wire Hardware Co., 267 Mass. 52, 60, 165 N.E. 889, 893 (1929) (citing Williams v. Boice, 38 N.J. 364, 370 (1884); Hurlbut v. Strong's Bank of Green Bay, 22 N.W. 852 (Wis. 1885); Moxham v. Grant, 1 Q.B. 88 (1900)); *accord* Burke v. Marlboro Awning Co., 330 Mass. 294, 113 N.E.2d 222 (1953).

179. Burke v. Marlboro Awning Co., 330 Mass. 294, 113 N.E.2d 222 (1953); *see also supra* text accompanying notes 143-46.

180. *Burke*, 330 Mass. at 297, 113 N.E.2d at 224.

181. The common-law rule's purpose was not just to make directors liable for contingent, unliquidated obligations such as torts. In *Calkins*, the debts that Wire Hardware intended to incur were neither contingent, as no event giving rise to liability had yet occurred, nor torts.

182. There is no reason to limit the principle underlying the *Calkins* common-law rule to distributions that completely liquidate a corporation's assets. The corporate priorities prohibit preferring one shareholder over creditors with the same force that they prohibit preferring all shareholders. Neither §§ 61 and 45 nor their predecessors distinguished between the redemption of one shareholder's stock and the redemption of all shareholders' stock. Moreover, the *Calkins* Court did not use the common-law rule to remedy any flaw in the statutory scheme governing dissolution. MBCL's current dissolution provisions are essentially unchanged from those in effect

actions.[183] Therefore, when a corporation's directors distribute property that the corporation needs to pay its creditors, the corporation prefers shareholders over creditors. Therefore, when the directors approve a distribution knowing that the corporation needs the property to pay its creditors, the directors must intend the natural consequence: prejudice to creditors. Thus, *Calkins* demonstrates that the common-law rule prohibiting distributions that prejudice creditors imposes liability on directors who approve a distribution intending to prejudice creditors or a distribution, the natural consequence of which is to prefer shareholders over creditors, without regard to the corporation's solvency. Creditors would be prejudiced if shareholders retained distribution proceeds that a corporation needed to pay its creditors. Consequently, the common-law rule prohibiting distributions that prejudice creditors[184] must also impose liability on shareholders, without regard to the corporation's solvency under the same circumstances.

Conceptually, there may not be much difference between the common-law rule that prohibits distributions that are intended to prejudice creditors or which naturally prejudice creditors, without regard to solvency, and the statutory rule that prohibits distributions by a corporation that is insolvent because the corporation knows or should know that it will not be able to pay its debts. In fact, it is not clear that a corporation could make a distribution that prejudiced creditors unless the corporation was insolvent on equity basis, and this article assumes that corporations solvent on an equity basis cannot make distributions that prefer shareholders over creditors. In both *Calkins* and *Burke* the corporations were insolvent on an equity basis under the current test. Therefore, the common-law rule's benefit is primarily procedural. Creditors can rely on the common-law rule when the creditors cannot or do not want to prove insolvency, so long as the creditors can prove that the directors knew that the distribution prejudiced creditors, or should have known that the distribution prejudiced creditors because prejudice was the distribution's natural consequence. In this respect, the common-law rule augments statutory restitution remedies much like the fraudulent conveyance actual fraud rules augment the constructive fraud avoidance remedies. Moreover, as the *Burke* Court did, courts can use the common-law rule to impose liability when creditors fail to plead or prove insolvency.

Sections 61 and 45 now embody the common-law rule that creditors are prejudiced when an insolvent corporation makes distributions, and

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when the court decided *Calkins*, at least insofar as corporations' authority to distribute assets after dissolution is concerned. *Compare* MASS. GEN. L. ch. 156B, §§ 100, 103 *with* MASS. GEN. L. ch. 155, §§ 51, 51A (repealed).

183. Hutchins v. Mead, 220 Mass. 348, 349, 108 N.E. 67, 68 (1915).

184. *See, e.g.*, Scriggins v. Thomas Dalby Co., 290 Mass. 414, 195 N.E. 749 (1935).

when distributions leave a corporation insolvent.[185] Consequently, sections 61 and 45 define most instances when a distribution prejudices creditors. To recover under sections 61 and 45, creditors must prove insolvency. Creditors do not need to prove insolvency to recover under the common-law rule. In adopting sections 61 and 45, the legislature made no changes to their predecessors that suggest an intent to rescind the *Calkins* and *Burke* common-law rule.[186] Thus, under those cases, directors and shareholders incur liability when a corporation makes a distribution intended to, or the natural consequence of which is to, prejudice creditors,[187] without regard to the corporation's solvency. Therefore, because such distributions give a corporation restitution rights under corporate common law, a corporation does not have capital legally available to make them.[188]

C. *Conclusion*

Corporations do not have capital legally available for distributions that impose liability on directors or shareholders under statutory or corporate common law, even if the corporation's articles do not limit distributions to legally available capital. Articles of organization that limit distributions to "legally available capital" may have been intended to refer only to common and statutory corporate law limits on distributions. Nevertheless, when a distribution creates liability under section 61, section 45, or corporate common law, it creates liability under fraudulent conveyance law as well. Therefore, corporations do not have capital legally available for distributions that create liability under corporate law or fraudulent conveyance law.

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185. *See* Brigham v. M & J Corp., 352 Mass. 674, 681, 227 N.E.2d 915, 920 (1967); *supra* text accompanying note 167.

186. *Compare* MASS. GEN. L. ch. 156B, §§ 61, 45 (1992) *with* MASS. GEN. L. ch. 156, § 37 (1958) *and* MASS. GEN. L. ch. 158, § 44 (1958).

187. For an alternative basis of director liability, see Robinson v. Watts Detective Agency, Inc., 685 F.2d 729, 736-37 (1st Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), where the court appears to hold directors liable for a fraudulent conveyance because they breached their fiduciary duty of good faith.

188. One consequence of corporate and fraudulent conveyance law using the same balance sheet and equity tests is that any distribution that creates remedies under §§ 61 and 45 because the corporation is insolvent creates remedies under fraudulent conveyance law as well. This result suggests that legally available capital limitations may have been intended to preclude corporations from making fraudulent conveyances. When a corporation makes a distribution intending to prefer its shareholders, the corporation makes an actually fraudulent conveyance. MASS. GEN. L. ch. 109A, § 7 (1992); 11 U.S.C. § 548(a)(1) (1988). It is possible, if not likely, that legally available capital limitations may never have been intended to refer specifically to fraudulent conveyance law. Nonetheless, the confluence of corporate statutory and common law remedies with fraudulent conveyance law means that corporations do not have capital legally available for fraudulent conveyances, even if their articles of organization do not limit distributions to legally available capital.

VI. DIRECTORS' DEFENSES TO SECTION 61 LIABILITY

So far, this article has described how the corporate priorities prohibit distributions that prefer shareholders over a corporation's creditors, how Massachusetts law continues to enforce liability for distributions that so prejudice creditors, how the tests for solvency are the same under the MBCL and fraudulent conveyance law, how those tests include both the balance sheet and the equity tests, and how corporations do not have capital legally available for distributions that create restitution remedies under section 61, section 45, or common law. This article has also described how creditors can reach and apply a corporation's remedies under sections 61 and 45. MBCL section 65, however, limits creditors' rights to enforce against directors a corporation's section 61 restitution remedies as long as directors act in good faith and with reasonable prudence. Moreover, fraudulent conveyance law does not impose liability on directors. Thus, under both fraudulent conveyance law and the MBCL, shareholders often will have to disgorge a distribution while the directors escape liability. Where directors do not profit from the distribution, or intend to leave corporate creditors unpaid, this result reflects the corporate priorities. This section explains how directors may use section 65 to protect themselves from liability for distributions.

Section 65[189] gives directors who perform their duties in good faith and with reasonable prudence a defense against liability under section 61. To obtain section 65's defense, directors must exercise "such care as an ordinarily prudent person in a like position would use under similar circumstances."[190] Thus, to avoid liability under section 61, directors must act both in good faith and with the care one would expect of a prudent director faced with the same circumstances.

Few cases interpret section 65, but the subject of bad faith has a long history. Bad faith "imports a dishonest purpose or some moral obliquity" that goes beyond mere bad judgment or negligence.[191] Thus, directors would lack good faith if they intended a distribution to prefer shareholders over creditors. Directors act in bad faith if, motivated by self-interest or ill-will, they breach a known duty or if they make a decision that "partakes of the nature of fraud."[192] Section 61 reflects directors' duties to respect the corporate priorities. Thus, under section 65, directors not motivated by self-interest or intending to prefer shareholders over creditors will escape section 61 liability for a distribution if, after satisfying their duty of care, directors determine that

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189. MASS. GEN. L. ch. 156B, § 65 (1992).

190. *Id.*

191. Spiegel v. Beacon Participations, 297 Mass. 398, 416, 8 N.E.2d 895, 907 (1937).

192. *Id.*

the corporation is not insolvent, and that the distribution will not leave the corporation insolvent.

Good faith is most likely to become an issue when one or more directors considering a distribution is also a shareholder and, thus, is self-interested. When a director will receive a distribution, good faith "requires a full and honest disclosure of all relevant circumstances to permit a disinterested decision maker to exercise its informed judgment."[193] Courts will vigorously scrutinize distributions that benefit directors[194] to determine whether the directors' decision to distribute capital was "reasoned and principled."[195]

Massachusetts also has a long history of defining prudence, which should explain the processes directors must follow to obtain section 65's shield from liability. In *Spiegel v. Beacon Participations, Inc.*,[196] the Supreme Judicial Court ruled that directors must act with reasonable intelligence, but cannot be held responsible for "mere errors of judgment or want of prudence."[197] Historically, directors who acted in good faith escaped personal liability unless their decisions exhibited "clear and gross negligence."[198] This standard is the basis for a business judgment rule of a sort, under which "courts abstain from interfering in business judgments."[199] Under this rule, directors can avoid liability for bad judgment if they fully inform themselves.

The standard of care cases do not adequately tell directors how to meet their duty. Peairs, however, states that the duty of care requires directors to be personally familiar with the effects of their votes and with the corporation's financial status, while giving decisions their best considered judgment and inquiring and making suggestions about matters within the directors' purview.[200] The disclosure requirements that Massachusetts law imposes on interested directors also illuminate directors' duty of care. Interested directors must disclose "all relevant circumstances" so that the other directors may "exercise . . . informed judgment."[201] This suggests that the duty of care requires directors to

193. Dynan v. Fritz, 400 Mass. 230, 242-43, 508 N.E.2d 1371, 1378 (1987).

194. Houle v. Low, 407 Mass. 810, 824, 556 N.E.2d 51, 59 (1990); Johnson v. Witkowski, 30 Mass. App. Ct. 697, 712, 573 N.E.2d 513, 522, *review denied*, 411 Mass. 1104, 581 N.E.2d 481 (1991).

195. *Houle*, 407 Mass. at 824, 556 N.E.2d at 59.

196. 297 Mass. 398, 416, 8 N.E.2d 895, 907 (1937).

197. *Id.* at 410, 8 N.E.2d at 904.

198. *Id.* at 411, 8 N.E.2d at 904.

199. *Houle*, 407 Mass. at 824, 556 N.E.2d at 59; Johnson v. Witkowski, 30 Mass. App. Ct. 697, 711 n.22, 573 N.E.2d 513, 522 n.22, *review denied*, 411 Mass. 1104, 581 N.E.2d 481 (1991).

200. *Business Corporations*, *supra* note 21, § 465.

201. Dynan v. Fritz, 400 Mass. 230, 242-43, 508 N.E.2d 1371, 1378 (1987).

consider all relevant circumstances and exercise informed judgment.[202] Integrating Peairs's view of the duty of care with the equity insolvency tests Part III describes confirms that, at least insofar as distributions are concerned, directors' duties require them to consider all relevant circumstances and exercise informed judgment.

Directors must be personally familiar with the effects of their votes.[203] Thus, directors must consider whether a distribution will create liability under sections 61 or 45. A distribution creates liability under sections 61 and 45 if the directors know or should know that the corporation is insolvent on either a balance sheet or equity basis. Thus, to determine whether a distribution will create liability, directors must be personally familiar with the corporation's financial status.[204] To determine solvency directors must critically examine the corporation's current status and future prospects, the reasonableness of projections, and the assumptions upon which projections are based.[205] This examination, combined with the directors' duty to inquire,[206] requires directors to consider all circumstances relevant to the corporation's financial status before making a distribution. If, after considering those circumstances, the directors in good faith, but mistakenly, conclude that the corporation is solvent on both a balance sheet and equity basis, section 65 will protect the directors from liability under section 61.

Section 65 absolves from liability directors who act in good faith and meet the duty of care if the directors reasonably rely on the corporation's financial records, officers, employees, consultants, or a committee of directors,[207] even if those sources give the directors incorrect data. To protect themselves, directors should nonetheless critically consider that data and inquire about matters the information providers may not have considered.

It is in directors' self-interest to document why they concluded that a corporation would not be insolvent after a distribution. By documenting their decision, directors develop the proof that they may need to defend a charge that the corporation was insolvent on either a balance sheet or equity basis or prefer its shareholders. The directors can also use the documentation to prove their good faith and prudence. Moreover, the process of documenting decisions often points out factors or rationales that the directors may not have fully considered, enabling

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202. *See also Spiegel*, 297 Mass. at 418, 8 N.E.2d at 908 (directors did not exercise reasonable care or sound judgment, and were inattentive to their duties).

203. *Business Corporations*, *supra* note 21, § 465.

204. *Id.*

205. *Moody II*, 971 F.2d 1056, 1073-74 (3d Cir. 1992).

206. *Business Corporations*, *supra* note 21, § 465.

207. MASS. GEN. L. ch. 156B, § 65 (1992).

them to consider those factors or rationales fully before making a decision.

This article assumes that a corporation solvent on an equity basis cannot make a distribution that violates the common-law rule against distributions that prejudice creditors. Thus, directors who approve a distribution should not incur liability under the common-law rule if the directors, having complied with their duty of care, determine that the corporation is solvent on both a balance sheet and equity basis. If the directors know that the corporation is insolvent under either test, or do not test solvency using both tests, the directors may incur liability under both section 61 and the common-law rule because section 65 only protects directors who act with both good faith and prudence.

VII. IMPLICATIONS OF MBCL'S DUAL INSOLVENCY TESTS: A SUGGESTION FOR CHANGE

Under section 65, directors who act in good faith and with reasonable prudence escape liability under section 61 if they mistakenly determine that the corporation is solvent, and the distribution will not leave the corporation insolvent. Directors' good faith does not, however, relieve shareholders of liability under section 45 and fraudulent conveyance law. At least since *Calkins*, a corporation prejudiced creditors if the corporation made a distribution while it was insolvent on either a balance sheet or an equity basis. Sections 61 and 45 impose liability when a corporation is insolvent under either test. A corporation may be insolvent on a balance sheet basis, even though it reasonably projects no danger of leaving any creditor unpaid. Similarly, a corporation can be solvent on balance sheet basis, but have cash flow problems. Thus, when a corporation is solvent under one test, but not the other, directors may incur liability under section 61. Moreover, if the directors fail to test the corporation's solvency under both tests, section 65 may not relieve them of section 61 liability. Thus, directors who approve distributions in the honest belief that even after the distribution the corporation will indefinitely be able to pay its creditors, may nonetheless lose their section 65 defense if the corporation is insolvent on a balance sheet basis. This Part VII uses two examples to explain these principles. This part concludes with a suggestion for a change in the standard of director liability for distributions.

A. *Director Liability*

Consider first the easiest case. An old corporation in a declining business purchased its only manufacturing facility, complete with equipment, many years ago and has since fully depreciated the plant and equipment. The corporation has dwindling cash reserves, few other current assets, and only trade debt. The corporation's falling sales leave it unable to pay its trade creditors on time, because the corporation

harbors its cash. As the corporation cannot bring itself to reduce its workforce, it has lost money for several years. Earlier dividends to the shareholders, combined with the recent losses, have depleted retained earnings. The directors believe the corporation's sales and cash flow will continue to decline indefinitely. The corporation's founder is eighty-nine years old and wants to retire. The articles of incorporation obligate the corporation to purchase the founder's stock when he retires. The directors must decide whether the corporation can purchase the founder's stock.

On the preceding facts, the corporation is insolvent on a GAAP basis,[208] and under the equity test.[209] Assume also that the corporation's land and building have little value to anyone else, because they are in a wetland that the law now characterizes as an area of critical environmental concern. Consequently, the fair market and liquidation values of those assets are less than the corporation's debts. On these facts, the directors cannot, in good faith and acting with reasonable prudence, determine that the corporation is solvent under the balance sheet test.[210] Thus, directors will incur liability under section 61, and the corporation's founder will incur liability under section 45, if the corporation redeems the founder's stock. This result coincides with the common-law rule that mandatory redemption provisions were unenforceable if they would prejudice creditors.[211]

Assume instead that the corporation's plant is not in a wetland, and the corporation's advisors unequivocally opine that if the corporation put the plant up for sale, someone would buy it within four months. Three appraisals conclude that the fair market value of the land substantially exceeds the corporation's trade debt. Now the corporation is solvent under the balance sheet test,[212] but insolvent under the equity test.[213] Consequently, if the corporation redeemed the founder's stock, the creditors could attach the corporation's rights under sections 61 and 45 and force the directors and the founder to reimburse the redemption proceeds. Moreover, section 65 would not relieve the directors from liability for approving the distribution because the directors cannot, acting in good faith and with reasonable prudence, determine that the corporation meets both the balance sheet and equity tests.

At first glance, redeeming the founder's stock under these circumstances does not appear to harm the creditors, because the plant's value

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208. *See supra* text accompanying notes 87-89.
209. *See supra* text accompanying notes 103-23.
210. *See supra* text accompanying notes 77-102.
211. *See* Crimmins & Pierce Co. v. Kidder Peabody Acceptance Corp., 282 Mass. 367, 185 N.E. 383 (1932).
212. *See supra* text accompanying notes 77-102.
213. *See supra* text accompanying notes 103-23.

gives the corporation a substantial equity cushion. Redeeming the stock would, however, conflict with the corporate priorities. Remember that a shareholder's contract with the corporation ultimately includes a promise to redeem the shareholders' stock, but only if the corporation has property available after paying all its creditors.[214] By imposing liability for a distribution when a corporation has an equity cushion but projects negative cash flow, the corporate priorities take the position that when a corporation's solvency is in doubt shareholders are entitled to redemptions only after the corporation's creditors are paid. Under the facts assumed thus far, the equity cushion is declining because trade debt continues to increase. At some point, the equity cushion will not be adequate to cover the corporation's debt. To permit the founder to keep the redemption proceeds while the equity cushion disappears would prejudice creditors.[215]

Assume a different case. In 1987, five people formed Imaginary, a service industry, Subchapter S corporation. Within months, Imaginary obtained several lucrative long-term contracts. Now wildly successful, Imaginary employs 100 people and reasonably expects an untroubled future. The five shareholders are the best of friends and are in excellent health. In 1988, Imaginary signed a ten-year lease for two floors in a downtown ocean-view high rise. It was not until 1991 that Imaginary actually used all the space.

Imaginary's five shareholders contributed little capital, but on the strength of its first contracts Imaginary was able to convince a bank to loan Imaginary the money needed to finance its early growth. Imaginary's success depends upon the market's perception of the shareholders' expertise, and the shareholders' relationships with the CEOs of Imaginary's customers. Thus, Imaginary's bank would accelerate the loan upon the death of the shareholders. Imaginary used most of the loan proceeds to pay for lavish tenant improvements to its high-rise office space, and the rest to cover the overhead for the office space that lay empty from 1988 to 1991. Due to changes in the real estate market, Imaginary's rent is twice the current fair market value for comparably improved space.

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214. *See supra* text accompanying notes 22-29.

215. It also prejudices creditors to force them to resort to legal process in order to collect their debts. If a corporation has sufficient cash to redeem stock or to pay its debts, but would have to liquidate its assets in order to do both, shareholders should bear the burden of liquidating the assets. If the corporation paid its shareholders first, the corporation would force the creditors through the extended process of attaching the corporation's rights under §§ 61 or 45, voiding the redemption under MUFCA, or liquidating the corporation, forcing the corporation's involuntary bankruptcy using 11 U.S.C. § 303, or using Chapter 156B, §§ 105 and 106 of the Massachusetts General Laws to have a receiver appointed who would liquidate the corporation's assets and pay its creditors.

Largely based on the undepreciated cost of a new computer system and the unamortized cost of the tenant improvements, Imaginary's assets exceed its liabilities on a GAAP basis. Imaginary is paying the loan in equal monthly installments over fifteen years. The last payment is due in December 2003. As each year passes, Imaginary's net cash flow before dividends increases. Each January, the directors award its senior professionals industry-standard-size bonuses and declare the five shareholders a big dividend that uses up most of Imaginary's remaining net cash flow.

Until recently, Imaginary's five shareholders were the only directors. In mid-1993, Imaginary acquired a little cachet by adding two Harvard Business School professors to its board. At the end of 1993, after paying employee bonuses, Imaginary had nearly $3,500,000 in cash. The shareholders want to take dividends of $600,000 each. The business school professors, who have some passing familiarity with section 61, are concerned that distributing most of Imaginary's cash will subject them to liability. Will the directors incur liability if they approve $3,000,000 in dividends?

Under the equity test Imaginary is solvent.[216] Under the balance sheet test, however, Imaginary is insolvent.[217] The balance sheet test adds Imaginary's lease obligation to the balance sheet as if the lease were presently payable in full.[218] That obligation should be reduced, however, by the amount Imaginary would reasonably expect to recover by subletting the space.[219] Thus, because Imaginary's rent is twice the fair market value for comparably improved space, the balance sheet test would also reduce Imaginary's equity by half the rent. The balance sheet test would also reduce Imaginary's equity by the unamortized value of the tenant improvements, for which Imaginary would receive nothing from a subtenant.[220] Finally, because there is a very limited market for used computers, the balance sheet test would reduce Imaginary's equity by most of the undepreciated value of Imaginary's computer system.

On these facts, there is no reason for the directors to believe that Imaginary will not be able to pay its debts, including the lease and the loan, as Imaginary expects them to come due. If Imaginary makes a distribution, however, sections 61 and 45 will create liability for Imaginary's directors and shareholders because Imaginary is insolvent under the balance sheet test. This suggests that sections 61 and 45

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216. *See supra* text accompanying notes 103-23.

217. *See supra* text accompanying notes 77-102.

218. *In re* Worcester Quality Foods, Inc., 152 B.R. 394, 403 (Bankr. D. Mass. 1993).

219. Imaginary's ability to sublet is analogous to intangible contribution and subrogation rights that the Second Circuit Court of Appeals has ruled must be included insolvency analyses. *In re* Ollag Construction Equipment Corp., 578 F.2d 904, 908 (2d Cir. 1978).

220. *Worcester Quality Foods*, 152 B.R. at 403.

require corporations to establish reserves against all debts, using valuations that assume that the corporation will sell its assets rather than continue in business. Few, if any, corporations follow this practice.

Imaginary's directors believe in good faith that there is no practical risk that Imaginary's good fortune will not continue indefinitely. Consequently, all seven directors approve the dividend. The shareholder/directors are unconcerned about their liability under section 61, because if anything adverse occurs they will be liable under section 45. The outside directors, though nervous that Imaginary is "technically insolvent," determine their risk under section 61 is infinitesimal, and approve the dividend.

Three months later the five shareholders leave for a retreat in Aspen where they will consider how to further improve customer satisfaction. They all board the same plane to Denver. In complete defiance of the laws of probability and the mortality tables, the plane promptly crashes into Boston's harbor, where all the passengers drown. Imaginary's customers start to flee the firm in droves. The bank calls the loan. Imaginary dissolves, but finds a subtenant for all its leased premises, albeit at half the lease's rental rate. Thus, the bank is unpaid and Imaginary is still obligated for half the remaining rent under the lease. The bank and the landlord attach Imaginary's rights under sections 61 and 45, and sue the shareholders' estates and the two outside directors.

Under section 61, the two outside directors are jointly and severally liable, with each other and the estates, to reimburse the dividend. The shareholders' estates are also liable for the dividends Imaginary paid the five shareholders in the three years preceding the date of the lawsuit, up to the amount of Imaginary's unpaid debts.[221] Imaginary's unpaid debts are less than the aggregate amount of those distributions. Nonetheless, the five shareholders had always lived high-off-the-hog, and the estates' assets are inadequate to cover Imaginary's debts. Thus, the outside directors, though they honestly believed that the 1993 dividends would not prejudice Imaginary's creditors, must pay the bank and the landlord.

B. *A Suggestion for Change*

Perhaps loans were nearly always asset-based in the days when the rule against prejudicing creditors arose. Now lenders and landlords commonly extend credit on the basis of cash flows.[222] When there is no reason to believe that a corporation will not be able to pay its debts as the corporation honestly believes that the debts will come, it is unreasonable to hold directors liable for distributions because the

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221. MASS. GEN. L. ch. 156B, §§ 61, 103 (1992).

222. *See generally* INTERMEDIATE ACCOUNTING, *supra* note 3, at 6-7 (A Historical Perspective).

liquidation value of the corporation's assets is insufficient to cover debts the corporation and its creditors believe will be paid out of future cash flows. Moreover, holding directors liable on this basis conflicts with recent legislative efforts to ensure an available pool of qualified corporate directors by absolving them of liability when they act in good faith, with reasonable prudence, and in the belief that their actions are in the corporation's best interests.[223]

Consequently, the legislature should amend the MBCL so that directors are never liable for distributions if the directors, acting in good faith, with reasonable prudence, and as if disinterested (where they are interested), and taking into account all relevant factors,[224] determine that the corporation's solvency is not in reasonable doubt based on the equity test, and without regard to the balance sheet test.[225] The changes would impose a rule that closely corresponds to this section's first conclusion: when a corporation's solvency is in doubt on an equity basis, shareholders are entitled to distributions only after the corporation's creditors are paid.[226]

It would violate the corporate priorities to protect a corporation's shareholders from liability while the corporation's creditors go unpaid. Thus, there is no need to change section 45. Absolving shareholders of liability under section 45 when directors erroneously, but in good faith, authorize a distribution believing that the distribution will not harm the corporation's creditors, would conflict with the corporate priorities, and would not, in any event, relieve shareholders from fraudulent conveyance law liability.

VIII. CONCLUSION

Sections 61 and 45, respectively, may impose liability on directors who authorize, and shareholders who receive, distributions from an insolvent corporation or distributions that make a corporation insolvent. Fraudulent conveyance law also imposes liability upon shareholders who receive such distributions. Corporate common law imposes liability on directors, without regard to solvency, if the directors intend a distribution to prefer shareholders, or if the natural consequence of a distribu-

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223. *See, e.g.*, St. 1989, c. 242, § 13 (amending § 65); § 67.

224. The equity test decisions define the relevant factors. *See supra* text accompanying notes 103-23.

225. Unless, as Judge Queenan did in *In re Vadnais Lumber*, the legislature incorporates capitalization test concepts into the balance sheet test by valuing the "going concern value of the enterprise as a whole." *See In re* Vadnais Lumber v. Byrne, 100 B.R. 127, 131 (1989).

226. The changes would also protect directors from liability under the *Calkins* common-law rule insofar as a court could not plausibly find that directors who met their duties of good faith and care could have made a distribution intending to, or the natural consequence of which was to, prefer shareholders over creditors.

tion is to prefer shareholders over creditors. Fraudulent conveyance law imposes liability on shareholders if a corporation makes a distribution intending to prefer shareholders over creditors. Massachusetts corporations do not have capital legally available to make any distribution that creates liability under section 61, section 45, corporate common law, or fraudulent conveyance law.

Section 61, section 45, and fraudulent conveyance law test insolvency using both balance sheet and equity tests. If the corporation is insolvent under either test, a distribution creates liability under the MBCL and fraudulent conveyance law. A corporation is insolvent under the balance sheet test if the corporation's liabilities exceed the fair market value of its assets, assuming an orderly liquidation. A corporation is insolvent under the equity test if the corporation knows or should know that it will not be able to pay its current or future debts as the corporation expects those debts to mature.

Under MBCL section 65, directors who act in good faith and with reasonable prudence have a defense to liability under section 61 and corporate common law. Directors who approve a distribution before assuring themselves that the corporation is solvent on both a balance sheet and equity basis, however, may not escape section 61 liability. Thus, directors of a healthy corporation which expects indefinite future profitable existence may incur liability for approving a distribution if the corporation's liabilities exceed the fair market liquidation value of the corporation's assets, and the corporation unexpectedly experiences economic decline. Consequently, section 61 unreasonably imposes liability on directors who honestly and prudently manage corporate affairs. The General Court should amend the MBCL to eliminate that liability. Section 65 should exempt directors from liability under section 61 if the directors, acting in good faith, as if disinterested, and with reasonable prudence, determine that the distribution will not leave the corporation unable to pay its current debts, and the debts the corporation expects to incur, as the debts mature by their terms.

COMMENTS

Just Say No . . . Driving: *Rushworth v. Registrar of Motor Vehicles* and The Massachusetts License Suspension Law

I. INTRODUCTION

With an estimated twenty-four million illegal drug users in the United States[1] many lawmakers have concluded that the threat of traditional criminal sanctions has failed to slow the ever burgeoning demand for illicit drugs.[2] The perception that "casual" or recreational drug users are undeterred by the existence of conventional criminal penalties for their activities has motivated some state and federal legislatures to enact laws aimed not solely at punishing drug suppliers, but instead at holding the casual drug user "accountable" for his or her role in the demand side of the illegal drug trade.[3] Lawmakers have endeavored to promote such "user accountability" by imposing on drug offenders a panoply of penalties in addition to the fines and prison sentences traditionally proscribed by the criminal justice system.[4] One method that some

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1. Ron Stodghill II, *Will Fear Make Americans Kick The Drug Habit?*, BUS. WK., Sept. 11, 1989, at 30.

2. "The concept of 'user accountability' is . . . an acknowledgement that most casual users of marijuana or cocaine simply do not go to jail–not in this era of prison overcrowding and aggressive prosecution of drug traffickers. Fine and probation . . . lack the sting that is likely to deter would-be users . . . ." Sean P. Murphy, *SJC to Consider Challenge to License-Lifting Over Drugs*, BOSTON GLOBE, Apr. 2, 1992, at 21.

3. "Wouldn't it be nice if these casual drug users woke up and realized that they are at fault for children growing up without fathers because they died . . . making a drug bust . . . . It truly amazes me to think they feel so removed from these activities." 138 CONG. REC. E440 (daily ed. Feb. 26, 1992) (statement of Rep. Solomon).

4. These alternative measures include civil asset forfeiture, denial of federal student loans and other benefits, and the suspension of the driver's licenses of convicted drug offenders. *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988). The attitude many legislators have adopted is one that accepts the notion that virtually any means of discouraging the casual drug user is acceptable. New Jersey was the first state to enact a mandatory license suspension law. N.J. STAT. ANN. § 2C:35-16 (West 1992). "Any person convicted of any drug offense in New Jersey automatically loses his driver's license . . . . And we tell people

believe to be an especially effective deterrent to the casual drug user is the forfeiture or suspension of the driving privileges of persons convicted of drug offenses.[5]

In *Rushworth v. Registrar of Motor Vehicles*,[6] the Massachusetts Supreme Judicial Court considered the constitutionality of one such "user accountability" statute.[7] Chapter 90, section 22(f) of the Massachusetts General Laws directs the Registrar of Motor Vehicles to suspend the driver's license of an individual convicted of any violation of the State Controlled Substances Act.[8] The *Rushworth* Court upheld this statute as a valid exercise of the state legislature's police power.[9] In reaching this conclusion, the Massachusetts Supreme Judicial Court became one of the few state high courts to have upheld the mandatory suspension of the driver's license of any person convicted of a drug offense that was unrelated to the operation of a motor vehicle.[10]

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who argue . . . that they will lose their jobs [if their right to drive is suspended] that if your job was that important to you, you should have thought about that before you used drugs." Ronald Susswein, *Part II: Successful Strategies For Combatting Casual Drug Use*, Heritage Foundation Reports, Mar. 20, 1990, at 17.

However, not all legislators agree with the concept of user accountability:

> [O]ur nation already has a user accountability system in place. Those who possess or use drugs in violation of the law are subject to jail terms and fines. In fact, the same system . . . applies to almost every criminal act including murder . . . . Apparently . . . [some lawmakers] feel that our judicial system imposes appropriate sentences in all instances except for drug crimes.

134 CONG. REC. H7290-91 (daily ed. Sept. 8, 1988) (statement of Rep. Cardin).

5. Stodghill, *supra* note 1, at 30. "The rationale here is not, as it is in the case of drunk driving, to get the dangerous driver off the road. Here, the dominant theory is punishment. This is something that hurts and gets people's attention." Ronald Susswein, *Part II: Successful Strategies For Combatting Casual Drug Use*, Heritage Foundation Reports, Mar. 20, 1990, at 17.

6. 413 Mass. 265, 596 N.E.2d 340 (1992).

7. MASS. GEN. L. ch. 90, § 22(f) (1990). The statute provides that:

> The registrar shall suspend, without hearing, the license or right to operate of a person who is convicted of a violation of any provision of chapter ninety-four C or adjudged a delinquent by reason of having violated any provision of chapter ninety-four C; provided, however, that the period of such suspension shall not exceed five years; provided further, that any person so convicted who is under the age of eighteen years or who is adjudged a delinquent child by reason of having violated any provision of chapter ninety-four C, and is not licensed to operate a motor vehicle shall, at the discretion of the presiding judge, not be so licensed for a period no later than when such person reaches the age of twenty-one years.

Id.

8. *Id.*

9. *Rushworth*, 413 Mass. at 274, 596 N.E.2d at 346.

10. *See* Johnson v. Wyoming, 838 P.2d 158 (Wyo. 1992) (striking down a Wyoming minor license suspension statute); People v. Lawrence, 565 N.E.2d 322 (Ill. App. Ct. 1990) (striking down an Illinois statute mandating the revocation of drug

The importance of the automobile in American society today can hardly be overstated. With public transportation options of limited availability except in highly developed urban areas, most Americans are dependent on their automobile in many aspects of their daily lives.[11] The *Rushworth* holding clearly sends a message to the legislature that it may constitutionally suspend or revoke this important privilege in virtually any conceivable situation and thus sets a dangerous precedent for future legislation.[12]

This Comment focuses upon the reasoning of the *Rushworth* Court and argues that the court erred in concluding that section 22(f) is constitutional. This Comment also argues that the Massachusetts legislature's use of mandatory license suspensions as a solution to the state's illegal drug problem is unwise and unlikely to succeed. Part II of this Comment outlines the background of the *Rushworth* case by discussing section 22(f) and its implementation by the Registrar of Motor Vehicles in the context of federal drug policies and statutes.[13] The facts and procedural history of *Rushworth v. Registrar of Motor Vehicles*, as well as the Supreme Judicial Court's decision, are presented in Part III.[14] Part IV analyzes the court's opinion in *Rushworth* and its potential implications for the future.[15] Part V of this Comment suggests a number of conclusions and comments drawn from analysis of the *Rushworth* case.[16]

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offenders' driver's licenses). *Contra* Commonwealth v. Strunk, 582 A.2d 1326 (Pa. Super. Ct. 1990) (upholding a Pennsylvania law that suspended the driver's license of any minor convicted of possession of alcohol, regardless of whether a motor vehicle was involved); State v. Smith, 276 A.2d 369 (N.J. 1971) (affirming a New Jersey statute suspending licenses of drug offenders). However, recently the United States Supreme Court refused to hear an appeal of the Georgia Supreme Court's decision to uphold that state's license suspension statute against a constitutional challenge. *See* Quiller v. Bowman, 425 S.E.2d 641 (Ga. 1993), *cert. denied sub nom.* Quiller v. Miles, 114 S. Ct. 72 (1993).

11. *See infra* notes 155-70 and accompanying text.

12. Legislatures have found that the threat of suspending a driver's license may be successfully used in a variety of areas: to encourage high school students to remain in school (West Virginia, Arkansas, Florida, Louisiana, and Texas statutes authorize the revocation or denial of a driver's license to minors who drop out of school); to encourage fathers who have failed to pay court-mandated child support to meet their obligations; and to add "teeth" to any state or local regulation, law or ordinance that imaginative law-makers may fashion (Washington state legislators proposed a bill that would suspend the driver's license of a minor who is convicted of "defacing property with paint or a similar substance," i.e., graffiti). Mark Matassa, *Will Dropouts Be Forced To Stop Driving?–Bill Would Make Those Who Quit School Forfeit License*, SEATTLE TIMES, Jan. 16, 1990, at A1.

13. *See infra* notes 17-63 and accompanying text.

14. *See infra* notes 64-149 and accompanying text.

15. *See infra* notes 150-230 and accompanying text.

16. *See infra* pages 30-31.

II. BACKGROUND

A. *Federal Drug Policy and Legislation*

The Massachusetts statute challenged in *Rushworth* exemplifies one of the weapons that state and federal governments have increasingly relied on to wage what is popularly known as the "War On Drugs."[17] In order to understand the importance of the *Rushworth* decision, one should first consider the Massachusetts License Suspension Law in the context of federal drug policies intended to promote user accountability as well as the overwhelming political pressure to "crack down on drugs."[18] The 1980s saw a dramatic increase in the efforts of Congress and the President to stem the tide of illegal drug use in the United States.[19] These efforts were driven by the political pressure resulting from the public's belief that drug use constituted the nation's top problem.[20]

In September 1989, President Bush released the President's Drug Control Strategy which described a number of measures aimed at "first time and occasional [drug] users who, because their activities are too often viewed as . . . inconsequential, now avoid any penalty whatsoever."[21] One Congressional response to the President's call for increased user accountability was to amend title 23, section 104(a) of the United States Code.[22] The amended statute directs the Secretary of Transportation to withhold, beginning in 1993, five percent of the amount of any federal highway funds apportioned to a state unless it had adopted a form of license suspension law for drug offenders.[23] The amount

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17. *See* Michael Schecter, Note, *Fear and Loathing and The Forfeiture Laws*, 75 CORNELL L. REV. 1151 (1990); Christopher D. Sullivan, Note, *"User Accountability" Provisions in the Anti-Drug Abuse Act 1988: Assaulting Civil Liberties in the War on Drugs*, 40 HASTINGS L.J. 1223 (1989).

18. President's Address to the Nation on Drug Control Strategy, 25 Weekly Comp. Pres. Doc. 1304 (Sept. 5, 1989).

19. Sullivan, *supra* note 17, at 1226-27.

20. *Id.*

21. Plaintiff's Reply Brief, Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 596 N.E.2d 340 (1992) (quoting the President's Drug Control Strategy of September, 1989). The proposed sanctions included civil forfeiture, ineligibility for various federal loans and other programs, as well as driver's license suspensions. *Id.*

22. Act of Nov. 5, 1990, § 333. In October of 1991, § 333 was repealed and replaced by a revision to 23 U.S.C. § 159 (1992). The provisions of the new statute have the same effect on state highway funding. *Id.*

23. *Id.* The statute requires the funds to be withheld "unless the State has enacted . . . a law that requires in all circumstances, or requires in the absence of compelling circumstances warranting an exception . . . the revocation, or suspension for at least six months, of the driver's license of any individual who is convicted [of] any violation of the [federal] Controlled Substances Act, or . . . any drug offense."

withheld will increase to ten percent of a state's share of federal highway funds if the statutory requirements have not been met by 1995, and for each year thereafter.[24]

The apportionment law allows a state to avoid a reduction in its federal highway funding levels by enacting a statute conforming to the federal requirements,[25] or alternatively, by supplying written documentation of the governor's opposition to such legislation.[26] A state that opposes such a statute must obtain certification that both houses of the state legislature have also objected by resolution in order to avoid the reduction in highway funds.[27]

Massachusetts, by enacting section 22(f), joins the small, yet growing, minority of states that mandate the suspension of a driver's license for conviction of a "disassociated"[28] drug offense.[29] When Congress enacted the 1990 amendment to the Highway Apportionment Law, only New Jersey had in place a license suspension statute that met the amendment's requirements.[30] Since 1990, eight more states in addition to Massachusetts have enacted legislation imposing mandatory driver's license suspensions on convicted drug offenders.[31] However, with the 1995 statutory deadline approaching, it seems likely that this minority will grow as states seek to preserve their federal highway funding levels.[32] The *Rushworth* decision will clearly guide high courts in other

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23 U.S.C. § 159(3)(A)(i) (Supp. IV 1992).

The statute also contains a requirement that the state law delay for at least six months the issuance of a driver's license to any drug offender who did not possess a license at the time of conviction. *Id.* § 159 (3)(A)(ii).

24. *Id.*

25. *Id.* § 159 (3)(b).

26. *Id.*

27. *Id.* State legislatures that are opposed to the enactment of a license suspension law are required by the statute to take the politically uncomfortable action of going on the record as being against anti-drug legislation supported by Congress. The arm-twisting effect on state legislatures was fully intentional. As an anonymous official indicated, "[t]his forces the states to be accountable. We're not going to force you, but if you don't want to do it [pass a license suspension law], you'll have to be public about it." *States Are Pressed to Suspend Driver Licenses of Drug Users*, N.Y. TIMES, Nov. 16, 1990, at 33.

28. Defined for the purpose of this Comment as an offense or crime that does not involve the operation or use of a motor vehicle. *See* Johnson v. Wyoming, 838 P.2d 158 (Wyo. 1992).

29. *See infra* notes 34-47 and accompanying text.

30. N.J. STAT. ANN. § 2C:35-16 (West 1992). The New Jersey License Suspension Law conforms to the federal requirements by imposing mandatory six-month minimum license suspensions on all individuals convicted of violating the State Controlled Substances Act. *Id.*

31. *See infra* notes 37-45 and accompanying text.

32. For example, should New York fail to conform to the federal statute's requirements, the state will forfeit more than $16 million per year in federal highway funds beginning in 1993, and $32 million per year in 1995 and beyond. *Group Sees*

jurisdictions in the event that they must consider similar constitutional challenges.[33]

B. *Survey of State License Suspension Laws*

Statutes that allow for the suspension or revocation of a drug offender's driver's license have been enacted in many states. The overwhelming majority of these statutes fall into one of two categories: (1) those that revoke or delay the issuance of the licenses of minors convicted of or adjudicated delinquents for drug or alcohol related offenses, and (2) those statutes that grant a trial judge the option of suspending a convicted drug offender's license as part or all of his or her sentence.[34] These types of legislation, however, fail to conform to the Federal Highway Apportionment Act, which requires states to impose *mandatory* license suspensions of at least six months duration on *all* convicted drug offenders, regardless of age.[35]

In spite of the impending deadlines set by the Federal Highway Apportionment Act, only a minority of states have to date met its requirements.[36] With the enactment of section 22(f), Massachusetts joins New Jersey,[37] Colorado,[38] Georgia,[39] Pennsylvania,[40] Delaware,[41] Florida,[42] Louisiana,[43] Mississippi,[44] and South Carolina[45] as the only states that impose mandatory driver's license suspensions on all drug offenders.[46] With the *Rushworth* decision, the Massachusetts

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No Need To Yank Drug Offenders' License, UPI, Dec. 29, 1992.

33. In the wake of the Federal Apportionment Law, many states are considering statutes similar to Chapter 90, § 22(f). The Massachusetts state senator who sponsored the Massachusetts License Suspension Law has indicated that he has received calls from many legislators in other states about Chapter 90, § 22(f), requesting assistance in drafting their own statutes. Telephone Interview with William MacLean, Massachusetts State Representative (Sept. 23, 1992).

34. *See* Michael S. Vaugh et al., *A Legislative and Constitutional Examination of "Abuse and Lose" Juvenile Driving Statutes*, 19 AM. J. CRIM. L. 411 (1992).

35. *See supra* notes 22-27 and accompanying text.

36. *See supra* notes 22-27 and accompanying text.

37. N.J. STAT. ANN. § 2C:35-16 (West 1992).

38. COLO. REV. STAT. § 42-2-122(1)(L) (1993).

39. GA. CODE ANN. § 40-5-75 (1992) (upheld by the Georgia Supreme Court in Quiller v. Miles, 425 S.E.2d 641 (Ga. 1993), *cert. denied*, 114 S. Ct. 72 (1993)).

40. Controlled Substances, Drug, Device, and Cosmetic Act, § 13(m), Pub. L. No. 233, No. 64.

41. DEL. CODE ANN. tit. 21, § 4177H (1993).

42. FLA. STAT. ch. 322.055(1) (1992).

43. LA. REV. STAT. ANN. § 32:430(A)(3) (West 1992).

44. MISS. CODE ANN. § 63-1-71 (1993).

45. S.C. CODE ANN. § 56-1-745 (Law. Co-op. 1991).

46. The California and Maine legislatures have enacted resolutions that express opposition to the enactment of a mandatory license suspension statute in compliance with the Highway Apportionment Law. It is ironic that California has chosen to opt

Supreme Judicial Court becomes only the second state supreme court to have considered and upheld such a statute.[47]

C. *The Massachusetts License Suspension Law: section 22(f)*

Historically, Massachusetts has, with few exceptions,[48] limited the sanction of license suspension to offenses that directly relate to the fitness of the driver to operate a motor vehicle or to the promotion of safety on the public highways.[49] The Massachusetts Legislature ignored the customary relationship between a violation and its subsequent penalty and enacted a "user accountability" law on July 17, 1989 when then Governor Michael Dukakis signed Chapter 241 of the Acts of 1989,[50] adding section 22(f) to Massachusetts General Laws Chapter 90.[51] The statute, which became effective on September 6, 1989,[52] directs the Registrar of Motor Vehicles to suspend, for a period of up to five years, the driver's license of any person convicted of violating any provision of the Massachusetts Controlled Substances Act.[53] Section 22(f) also contains provisions for delaying the issuance of a driver's license to any unlicensed person under the age of eighteen who has been adjudged a delinquent by reason of a drug conviction.[54] A trial judge

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out of the Apportionment Law because it was specifically aimed at states like California that have decriminalized the use of marijuana. "These California druggies would have you believe it is OK and legal to smoke marijuana . . . . These are the very people who never stop to think about the damage inflicted by drugs on our society." 138 CONG. REC. E440 (daily ed. February 26, 1992) (statement of Rep. Solomon).

47. The New Jersey Supreme Court upheld the state license suspension law in New Jersey *ex rel.* L.M. Juvenile, 550 A.2d 1252 (1988), *cert. denied*, 114 N.J. 485, 555 A.2d 609 (1989). The Florida Appeals Court has overturned a lower court's ruling that state license suspension law was unconstitutional in Florida v. Terr Lite, 592 So. 2d 1202 (1992), *aff'd*, 617 So. 2d 1058 (1993).

48. For example, falsifying a driver's license, MASS. GEN. L. ch. 90, § 24B, and littering on the public highway, § 22G, are offenses that may lead to license suspension, but have a tenuous connection with the rationale of safety on the roadway or the fitness of the operator.

49. Most offenses enumerated in Chapter 90 of the Massachusetts General Laws that could result in the suspension of an offender's license are clearly related to general highway safety concerns: driving under the influence of drugs or alcohol, § 24; habitual traffic offender, § 22F; and homicide by motor vehicle, § 24G.

50. 1989 Mass. Acts 241.

51. *Id.*

52. An emergency declaration was filed by Governor Dukakis in the office of the Secretary of the Commonwealth on September 6, 1989, making § 22(f) effective immediately. *Id.*

53. MASS. GEN. L. ch. 94C (1990).

54. *Id.*

may, at his or her discretion, prevent a youthful drug offender from obtaining a driver's license until reaching the age of twenty-one.[55]

With the exception of setting the maximum duration of license suspension at five years, section 22(f) provides the Registrar with no guidelines for its implementation.[56] The Registrar, therefore, established a "Suspension Schedule"[57] in order to provide some consistency to the license suspensions mandated by section 22(f).[58] The Schedule sets out standard suspension times ranging from a minimum of one year to a maximum of five years, the length of suspension corresponding to the seriousness of the crime for which the offender was convicted.[59] The Registrar also instituted an "Early Reinstatement Process" that provides an opportunity for an offender to request that the Registrar consider the reinstatement of his or her license once fifty percent of the suspension period has elapsed.[60]

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55. MASS. GEN L. ch. 90, § 22(f) (1990). It is only in this portion of § 22(f) that the legislature provides any discretion whatsoever *to the judiciary* regarding the license suspensions. For all other violators of Chapter 94C, the loss of their driver's license is solely a matter for the Registrar of Motor Vehicles to determine. In addition, the Registrar, under the Suspension Schedule, considers only that provision of Chapter 94C which the offender has violated in determining the duration of the suspension. The underlying facts of the case, or the offender's particular situation is not considered. *See infra* note 57-63 and accompanying text.

56. Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 266, 596 N.E.2d 340, 342 (1992). Thus, the legislature conferred exceedingly broad discretion on the Registrar of Motor Vehicles, allowing him to decide whether to suspend the license of a person convicted of any violation of the Controlled Substances Act for any duration, from one day to five years. Plaintiffs' Brief at 4, *Rushworth* (No. SJC-05907); Brief for the Plaintiffs at 4, *Rushworth* (No. SJC-05907).

57. The Suspension Schedule established five general categories of drug offenses, each indicating a different period of license suspension. The driver's licenses of persons convicted of simple possession offenses, as well as other minor violations of Chapter 94C, are suspended for one year. Two year suspensions are mandated for convictions of possession with intent to distribute Class D or E substances and those convicted for possession of Class A, B, or C substances with intent to distribute lost their license for three years. Offenders convicted of possession of a Class D or E substance also received a three year suspension if it constituted a second or subsequent offense. Second or subsequent convictions of possession with intent to distribute a Class A, B, or C substance or possession of cocaine result in a four year suspension. The most serious trafficking, manufacturing and distributing offenses carry a full five year suspension of the offender's driver's license. Appendix to Plaintiffs' Brief at 33, *Rushworth* (No. SJC-05907).

58. MASS. GEN. L. ch. 90, § 22(f) (1990).

59. *See supra* note 57 and accompanying text.

60. At an offender's request, the Registry will entertain a request to reinstate a suspended license by holding a hearing to evaluate his or her case. The Hearing Officer would consider a number of factors in order to make his or her decision, including whether: (1) the offender's license has been turned in to the Registry; (2) the causes of the drug violations have been dealt with; (3) continued suspension will cause severe hardship; (4) evidence shows that the drug offender has not operated

Due to administrative delays in establishing the Suspension Schedule, the first license suspension under the mandate of section 22(f) did not occur until June 2, 1990.[61] As of June 30, 1992, the Registry of Motor Vehicles reported that the statute had produced a total of 11,612 license suspensions of an estimated 8,000 drug offenders.[62] The Registry also reports that very few of the licenses suspended under the provisions of section 22(f) have been returned via the Early Reinstatement Program.[63]

III. *RUSHWORTH V. REGISTRAR OF MOTOR VEHICLES*

A. *Facts*

Each of the three *Rushworth* plaintiffs, William Rushworth, William Sullivan, and James B. Peterson, Sr. were convicted of separate violations of the Massachusetts Controlled Substances Act.[64] On February 2, 1990, William Rushworth was arrested and charged with possession of marijuana after a single cigarette of the substance was found on the passenger seat of his automobile.[65] On advice of counsel, Rushworth admitted to sufficient facts and was found guilty of violating Massachusetts General Laws Chapter 94C, section 34,[66] and was fined $500.[67] On November 12, 1990, Rushworth received notification from the Registrar of Motor Vehicles that his motor vehicle operator's license was being suspended for one year as a result of his conviction for drug possession pursuant to Massachusetts General Laws Chapter 90, section

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a vehicle during the time of his license suspension; and (5) there is no evidence of further drug offenses. The Registry indicates that its decision to reinstate a suspended license early is entirely discretionary on its part. *See supra* note 57 and accompanying text.

61. Telephone Interview with Gerald E. St. Hilaire, Esq., Chief Legal Counsel, Massachusetts Registry of Motor Vehicles (Sept. 12, 1992).

62. *Id.* A number of individuals have been convicted of multiple violations of Chapter 94C and have had their licenses suspended more than once. Although the Registrar tracks the number of total suspensions under § 22(f), they do not account for repeat offenders. The number of individuals who have been affected by the provisions of § 22(f), therefore, is a rough estimate. The total number of suspensions cited does not include suspensions caused by other violations (e.g., driving under the influence of alcohol, operating to endanger, leaving the scene of an accident, etc.) *Id.*

63. *Id.*

64. Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 266, 596 N.E.2d 340, 341-42 (1992).

65. Plaintiffs' Brief at 6, *Rushworth* (No. SJC-05907). Rushworth claimed that the marijuana belonged to his passenger who police had arrested pursuant to a warrant moments before his own arrest. Affidavit of William Rushworth at 1, Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 596 N.E.2d 340 (1992) (No. 91-1951-D).

66. MASS. GEN. L. ch. 94C, § 34 (1990) (Illegal Possession of a Class E Substance).

67. *Rushworth*, 413 Mass. at 267, 596 N.E.2d at 342.

22(f).[68] At the time he lost his license, Rushworth was employed as a truck driver, a position that he was forced to vacate after the appeal of his license suspension was denied.[69]

William Sullivan was arrested when a search of his truck at a Department of Transportation checkpoint revealed a small quantity of marijuana and a single pill for which he had no prescription.[70] Sullivan was charged and subsequently convicted of violating Massachusetts General Laws Chapter 94C, section 34.[71] He was fined and placed on probation for six months.[72] Sullivan's driver's license was then suspended by the Registrar for one year.[73] Sullivan, a self-employed truck driver at the time he lost his operator's license, did not appeal the suspension.[74]

James B. Peterson, Sr. was arrested in his home after a police search pursuant to a warrant uncovered two ounces of marijuana.[75] Peterson was charged and convicted of possession of a class D substance with intent to distribute, fined, and sentenced to two years in the house of correction.[76] The Registrar notified Peterson of the suspension of his driver's license for a two year term, and the suspension was not appealed.[77] At the time his license was suspended, Peterson owned a home thirty miles from his place of employment, in a town with no public transportation.[78]

B. *Procedural History*

The plaintiffs filed their complaint against the Registrar of Motor Vehicles on March 26, 1991 in the Massachusetts Suffolk Superior Court.[79] The complaint requested that the court order the Registrar to reinstate the plaintiffs' suspended driver's licenses, and to enter a declaratory judgment finding section 22(f) unconstitutional.[80] The plaintiffs alleged that section 22(f) violated their due process and equal

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68. Plaintiffs' Brief at 6, *Rushworth* (No. SJC-05907).

69. *Id.*

70. *Rushworth*, 413 Mass. at 267-68, 596 N.E.2d at 342.

71. Sullivan was convicted of possession of marijuana and possession of an unscheduled prescription drug. *Id.*

72. *Id.* at 268, 596 N.E.2d at 342.

73. Plaintiffs' Brief at 7, *Rushworth* (No. SJC-05907).

74. *Id.*

75. *Rushworth*, 413 Mass. at 268, 596 N.E.2d at 342.

76. *Id.* Peterson's sentence of two years was with 30 days to be served and the remainder suspended. *Id.*

77. *Rushworth*, 413 Mass. at 268, 596 N.E.2d at 342-43.

78. *Id.*

79. Complaint For Declaratory And Injunctive Relief, Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 596 N.E.2d 340 (1992) (No. SJC-05907).

80. *Id.*

protection rights under both the Massachusetts Declaration of Rights[81] and the Fourteenth Amendment[82] to the United States Constitution.[83] The complaint further alleged that the statute was in violation of the prohibition against double jeopardy contained in the United States Constitution's Fifth Amendment.[84] In his answer, the Registrar of Motor Vehicles denied the plaintiffs' claims and asserted that the complaint failed to state a claim on which relief could be granted because each of the plaintiffs had failed to fully exhaust all of his available remedies.[85]

The parties submitted a statement of agreed facts and exhibits and the trial judge granted their Joint Motion to Reserve and Report the case to the Appeals Court on January 14, 1992.[86] The Massachusetts Supreme Judicial Court then accepted the plaintiffs' application for direct review on the constitutionality of section 22(f).[87]

C. *The Rushworth Opinion*

The *Rushworth* Court held that the license suspension provisions of section 22(f) violated neither the substantive due process nor the equal protection rights of the plaintiffs and did not constitute a second civil punishment in violation of the Double Jeopardy Clause.[88] The court accordingly rejected all of the plaintiffs' requests for relief.[89]

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81. MASS. CONST. pt. 1, arts. I, X, XII. *See infra* note 92.

82. U.S. CONST. amend XIV. *See infra* notes 91 and 121.

83. Complaint for Declaratory and Injunctive Relief, Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 596 N.E.2d 340 (1992) (No. SJC-05907).

84. U.S. CONST. amend. V. *See infra* note 138.

85. Defendant's Answer, *Rushworth*, 413 Mass. 265, 596 N.E.2d 340 (1992) (No. SJC-05907). The court denied the defendant's motion to dismiss, stating that a failure to exhaust all available remedies is not fatal to a declaratory judgment action where "government action is alleged to be occurring under a statute which is unconstitutional . . . ." *Rushworth*, 413 Mass. at 269 n.4, 596 N.E.2d, 596 N.E.2d at 343 n.4.

86. *Rushworth*, 413 Mass. at 266, 396 N.E.2d at 342. The Joint Motion to Reserve and Report was pursuant to MASS. GEN. L. ch. 231, § 111 (1990) and MASS. R. CIV. P. 64.

87. Application For Direct Appellate Review Application for Direct Appellate Review, Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 596 N.E.2d 340 (1992) (No. 91-1951-D). Plaintiff's application cited, as rationale for direct review by the Supreme Judicial Court, both the hardship to the thousands of individuals affected by § 22(f), and the lack of any court decisions directly addressing the constitutional issues raised in *Rushworth*. *Id.* at 16.

88. *Rushworth*, 413 Mass. at 274, 596 N.E.2d at 346.

89. *Id.*

1. Due Process

The *Rushworth* Court first considered the question of whether section 22(f) violated the plaintiffs' rights to substantive due process[90] under either the Fourteenth Amendment of the United States Constitution[91] or the comparable provisions of the Massachusetts Constitution.[92] The initial issue that the court addressed was determining which standard of due process review should properly be applied to section 22(f).[93] Under both the Massachusetts and the United States Constitutions, when a law regulates or interferes with an individual's protected or "fundamental" rights,[94] a court must subject the statute to "strict" scrutiny.[95] In order

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90. The *Rushworth* plaintiffs did not claim that § 22(f) had violated their rights to procedural due process.' " [T]he Court [has] previously . . . determined, with respect to analogous automatic suspension statutes, that the underlying criminal proceeding 'provide[s] . . . the notice and hearing . . . required by due process.'" Appellee's Brief on Reservation and Report at 11, *Rushworth* (No. SJC-05907) (quoting Registrar of Motor Vehicles v. Board of Appeal, 382 Mass. 580, 590, 416 N.E.2d 1373, 1379 (1981)).

91. U.S. CONST. amend. XIV, § 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . " *Id.*

92. *Rushworth*, 413 Mass. at 268, 596 N.E.2d at 343. The portions of the Massachusetts Constitution that correspond to the due process protection of the Fourteenth Amendment are Part II, C. 1, § 1, Art. 4 and Arts. 1, 10 and 12 of the Declaration of Rights. Pinnick v. Cleary, 360 Mass. 1, 14 n.8, 271 N.E.2d 592, 601 n.8 (1971).

The pertinent portions of the Declaration of Rights are: "Article I. All people are born free and equal and have certain natural, essential and unalienable rights . . . the right of enjoying and defending their lives and liberties . . . acquiring, possessing and protecting property . . . [and] safety and happiness . . . ." MASS. CONST. pt. 1, art. 1. Article 10 provides:

> Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. [B]ut no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his consent, or that of the representative body of the people.

MASS. CONST. pt. 1, art. 10; *see also* MASS. CONST. pt. 1, art. 12. "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges . . . but by the judgment of his peers or the law of the land." *Id.*

These three provisions of the Massachusetts Constitution have been interpreted by the state courts to provide protection equivalent to that of the Due Process Clause of the United States Constitution. "[T]he words 'the law of the land' in Art. 12 . . . embrace all that is comprehended in the words 'due process of law' in the Fourteenth Amendment [to the United States Constitution]." Pugliese v. Commonwealth, 335 Mass. 471, 475, 140 NB.E.2d 476, 479 (1957).

93. *Id.*

94. "Although there is no precise standard for determining what rights are fundamental, we are guided by what is 'explicitly or implicitly guaranteed by the [United States] Constitution.'" Commonwealth v. O'Neal, 367 Mass. 440, 448-49, 327 N.E.2d 622, 668 (1978) (quoting San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34 (1973)). Those rights recognized by the United States

for a statute to survive strict judicial scrutiny, the state has the difficult burden of showing that the legislation is necessary to promote a "compelling state interest" and that the means chosen to promote this interest are the least restrictive of the affected individual's rights.[96] In all other cases, the court will use a "rational basis" test as the standard of due process review.[97] The party challenging such a statute has the burden of overcoming the presumptive validity of the legislation and of showing that it fails to "bear[] a reasonable relation to a permissible legislative goal."[98] However, "[i]n the ordinary case, such a statute will not be found to run afoul of the due process [protection] . . . unless no state[ment] of facts may reasonably be conceived to justify it."[99] The *Rushworth* Court found that because "it is clear that there is no fundamental right to operate a motor vehicle," section 22(f) would be subject to minimum judicial scrutiny under the rational basis test.[100]

Before applying the rational basis standard to section 22(f), the court then considered the plaintiffs' contention that the due process provisions of the Massachusetts Constitution[101] proscribe a standard of review that is "stricter," or less deferential to the legislature, than does the

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Supreme Court as being "fundamental" in either a due process or an equal protection setting are: the right to travel interstate (Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson 394 U.S. 618 (1969)); the right to vote (Dunn v. Blumstein, 405 U.S. 330 (1972); Reynolds v. Sims, 377 U.S. 533 (1964)); the freedom of religion and association (Williams v. Rhodes, 393 U.S. 23 (1968); Baters v. Little Rock, 361 U.S. 516 (1960)); the right to privacy (Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1960); the freedom of speech and of the press (Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938)).

95. *Rushworth*, 413 Mass. at 269 n.5, 596 N.E.2d at 343 n.5.

96. Commonwealth v. O'Neal, 367 Mass. 440, 448 n.5 (1978).

97. "[A] statute will satisfy due process if it 'bears a reasonable relation to a permissible legislative objective.'" *Rushworth*, 413 Mass. at 268, 596 N.E.2d at 343 (quoting Pinnick v. Cleary, 360 Mass. 1, 14, 271 N.E.2d 592, 601 (1971)). Under the Massachusetts Constitution, the rational basis test involves determining whether the "legislation bears a real and substantial relation to the public health, safety, morals or some other phase of the general welfare." Sperry & Hutchinson Co. v. McBride, Director of Division of Necessaries of Life of the Commonwealth, 307 Mass. 408, 418, 30 N.E.2d 269, 275 (1940).

98. Pinnick v. Cleary, 360 Mass. 1, 14, 271 N.E.2d 592, 601 (1971).

99. Commonwealth v. O'Neal, 367 Mass. 440, 447, 327 N.E.2d 662, 667 (1975) (citing Colella v. State Racing Commission, 360 Mass. 152, 156, 274 N.E.2d 331, 334-35 (1971)).

100. *Rushworth*, 413 Mass. at 269 n.5, 596 N.E.2d at 343 n.5. While the plaintiffs did not claim that state or federal courts recognized a fundamental right to operate a motor vehicle, they did argue that a driver's license did possess the characteristics of an important property right that should not be subjected to arbitrary forfeiture by the state. Plaintiffs' Brief at 14-15, *Rushworth* (No. SJC-05907).

101. *See supra* note 92.

Fourteenth Amendment of the United States Constitution.[102] The plaintiffs maintained that the Fourteenth Amendment standard that upholds a statute if it has a "'reasonable relation to a permissible legislative objective'"[103] is less strict, and offers greater deference to the will of Congress than required under the due process provisions of the Massachusetts Constitution.[104] In order to be valid under the state constitution, a statute must "'bear a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.'"[105] The plaintiffs argue that section 22(f) has no "real and substantial relation" to such permissible legislative goals.[106]

The *Rushworth* Court admitted that it had in the past recognized that a difference between the two due process standards existed.[107] Despite having previously held that a statute could be invalid under state constitutional due process provisions while not violating due process under the Fourteenth Amendment,[108] the court noted that the difference between the two standards of review was insignificant.[109] The court held that section 22(f) was distinguishable from statutes struck down as violative of due process under the State Constitution alone because the invalidated legislation had "little or no perceptible relation

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102. *Rushworth*, 413 Mass. at 269, 596 N.E.2d at 343.

103. Plaintiffs Brief at 16, *Rushworth* (No. SJC-05907) (quoting Pinnick v. Cleary, 316 Mass. 1, 19, 271 N.E.2d 592, 601 (1971)).

104. *Id.* at 17.

105. *Rushworth*, 413 Mass. at 268-69, 596 N.E.2d at 343 (quoting Sperry & Hutchinson v. Director of the Div. of the Necessaries of Life, 307 Mass. 408, 418, 30 N.E.2d 269 (1940)).

106. *Id.*

107. *Id.* The court noted that it has "'*occasionally* been less willing than the Federal courts to ascribe to the Legislature speculative and implausible ends, or to find rational the nexus said to exist between a plausible end and the chosen statutory means,'" *Rushworth*, 413 Mass. at 269, 396 N.E.2d at 343 (quoting Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing, 379 Mass. 368, 373 n.8, 398 N.E.2d 471, 475 (1979)).

108. *Id.* The court cites Coffee-Rich, Inc. v. Commissioner of Public Health, 348 Mass. 414, 204 N.E.2d 281 (1965) (holding a statute prohibiting the sale of an imitation coffee cream product unconstitutional), and Sperry & Hutchinson Co. v. Director of the Division on the Necessaries of Life, 307 Mass. 408, 30 N.E.2d 269 (1940) (holding that a statute that prohibited the issuance of trading stamps by a gasoline distributer had no relation to any identifiable public interest), as instances where legislation was invalidated on state constitutional due process grounds alone. *Id.*

109. *Rushworth*, 413 Mass. at 270, 596 N.E.2d at 343. "[T]he due process provisions of the Massachusetts Constitution . . . afford protection comparable to that supplied by the fourteenth amendment." *Id.* (quoting Boston v. Keene Corporation, 406 Mass. 301, 308 n.8, 547 N.E.2d 328, 332 n.8 (1989)). "'Any differences between the two constitutional standards [governing due process] . . . is narrow.'" *Id.* (quoting *Blue Hills Cemetery*, 379 Mass. at 373 n.8, 398 N.E.2d at 475 n.8 (1979)).

to the discernible public good."[110] The court then held that the proper inquiry to ask of section 22(f), under both state and federal due process provisions, was whether the statute "bears a reasonable relation to a permissible legislative objective."[111]

The *Rushworth* Court then applied the rational basis standard of judicial review to section 22(f) and found that the statute did not infringe on the due process rights of the plaintiffs.[112] The plaintiffs argued that section 22(f) failed to meet this standard because there was no rational nexus between the legislative goals of Chapter 90, the Massachusetts Motor Vehicle Statute,[113] and the automatic suspension of a driver's license for any drug conviction.[114] The plaintiffs asserted that these legislative goals are to promote safety on the public roads and to insure the fitness of licensed individuals to drive an automobile.[115] The plaintiffs argued that the relationship between the legislative purposes of Chapter 90 and the means actually employed (section 22(f)) "is irrational, particularly where the . . . violation is unconnected in any way with the safe operation of a motor vehicle."[116]

The *Rushworth* Court, however, rejected this argument and instead focused the due process inquiry on whether the legislature *could* have identified a permissible purpose for the statute and whether it rationally serves that assumed purpose.[117] Although the legislative history of section 22(f) reveals no explicit goals that the statute was intended to further, the court held that:

> [t]he Legislature could have concluded that the unlawful sale and use of drugs constitutes a serious problem in the Commonwealth, and that license suspensions for those who are convicted of violations of [the Massachusetts Controlled Substances Act] could serve as a deterrent to illegal drug distribution and use, and as a means of rehabilitation.[118]

An additional aim of the legislature, the court noted, could have been to further the general purposes of highway and vehicle safety laws by "keeping impaired drivers off the roads."[119]

As a result, the *Rushworth* Court held that section 22(f) does not violate the plaintiffs' substantive due process rights because the

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110. *Rushworth*, 413 Mass. at 269, 396 N.E.2d at 343.
111. *Id.* at 270, 596 N.E.2d at 344.
112. *Id.*
113. These purposes being primarily "the maintenance of public safety on the highways, the operation of a motor vehicle in a safe and law abiding manner, [and] insuring the fitness of motor vehicle operators . . . ." Plaintiffs' Brief at 18, *Rushworth* (No. SJC-05907).
114. *Id.*
115. *Id.* at 19-20.
116. *Id.*
117. *Rushworth*, 413 Mass. at 270, 596 N.E.2d at 344.
118. *Id.*
119. *Id.*

automatic license suspensions rationally further the presumed "proper legislative objectives" of the statute.[120]

2. Equal Protection

The *Rushworth* Court next addressed the plaintiffs' claim that section 22(f) violates the equal protection rights provided by the Fourteenth Amendment[121] and articles one and ten of the Massachusetts Declaration of Rights.[122] The plaintiffs argued that License Suspension Law was invalid under equal protection since the statute arbitrarily mandates the unequal treatment of similarly-situated individuals by discriminating:

> (1) between [drivers] who have been convicted of [drug offenses] and [those drivers] who have been convicted of other, more serious crimes; (2) between those [drug offenders] who possess driver's licenses and those who do not; and (3) between those who have access to public transportation and those who do not.[123]

When legislation that is challenged on the basis of equal protection infringes upon a fundamental right,[124] or adversely affects a "suspect" class of individuals, the courts will apply strict judicial scrutiny under both the state and federal Constitutions.[125] The United States Supreme Court has identified as being "suspect" those classifications that are based upon race or national origin.[126] Statutes that create "quasi-suspect" classifications, based on gender, illegitimacy, or alienage, are

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120. *Id.*

121. U.S. CONST. amend. XIV, § 1. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

122. *See supra* note 92.

123. *Rushworth*, 413 Mass. at 271, 596 N.E.2d at 344.

124. *See supra* note 94 (listing fundamental rights recognized by the United States Supreme Court). The *Rushworth* Court indicated that it would not recognize a fundamental right to drive an automobile. *See supra* note 100 and accompanying text.

125. *Rushworth*, 413 Mass. at 271, 596 N.E.2d at 345. "'For the purpose of equal protection analysis, our standard of review [strict scrutiny] under . . . the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment to the Federal Constitution.'" *Id.* (quoting Dickerson v. Attorney General, 396 Mass. 740, 743, 488 N.E.2d 757 (Mass. 1986)). As in the due process context, under a strict scrutiny standard, the state must show that the challenged statute is necessary to promote a compelling state interest and is the least restrictive means available of promoting that interest. Commonwealth v. O'Neal, 367 Mass. 440, 447 n.5, 327 N.E.2d 662, 667 (1975).

126. The Court has stated on this point:

> Prejudice against discrete and insular minorities [such as when a statute classifies according to race or national origin] may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect [them] . . . and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

subject to an "intermediate," or middle tier level of judicial scrutiny.[127] For a court to uphold a statute under the intermediate level of review, the state must show that the statute promotes an "important government objective" that is "substantially related to the achievement of those objectives."[128] Statutes that do not interfere with any fundamental rights and that create no suspect or quasi-suspect classifications are reviewed by the court under the rational basis standard.[129]

Although the plaintiffs in *Rushworth* did not assert that section 22(f) discriminates against any suspect or quasi-suspect class, they argued that the court should not apply the minimum judicial scrutiny of the rational basis standard to the statute.[130] The plaintiffs argued that both the United States Supreme Court and the Massachusetts Supreme Judicial Court had previously recognized a stricter rational basis standard of review when a statute regulates certain "important interests."[131] section 22(f), the plaintiffs claimed, should be analyzed using this standard "because the statute imposes such significant restrictions on the plaintiffs['] . . . ability to travel, to work, and to support their families."[132]

The court rejected the plaintiffs' argument and applied the same rational basis standard that it had employed in its due process analysis of section 22(f).[133] The court held that the classifications created by section 22(f) rationally promote the legitimate interests of the state[134] and do not violate the plaintiffs' equal protection guarantees.[135] The court found that "[t]he Legislature appears to have determined that persons convicted of less serious drug offenses should suffer . . . license suspension while more serious offenders should be incarcerated . . . [and] that added measures were needed to discourage drug use among 'casual' drug users and to prevent impaired driving."[136] The court held that the statute's practical effect of disproportionately

127. Craig v. Boren, 429 U.S. 190 (1976).
128. *Id.*
129. *Rushworth*, 413 Mass. at 272, 596 N.E. at 345.
130. Plaintiffs' Brief at 30, *Rushworth* (No. SJC-05907).
131. *Id.* at 29-30. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985); Plyler v. Doe, 457 U.S. 202 (1982); Zobel v. Williams, 457 U.S. 55 (1982); English v. New England Medical Center, 405 Mass. 423, 541 N.E.2d 329 (1989) (supporting plaintiffs' argument that the court should use an expanded rational basis test instead of the "minimal rationality" standard when analyzing a statute affecting certain "important interests."). *Id.*
132. Plaintiff's Brief at 30, *Rushworth* (No. SJC-05907)
133. *Rushworth*, 413 Mass. at 272, 596 N.E.2d at 345.
134. *Id.*
135. *Id.*
136. *Id.*

affecting those drug offenders who possess drivers' licenses did not in itself cause the statute to violate equal protection.[137]

3. Double Jeopardy

The last of the claims considered by the court was the plaintiffs' assertion that section 22(f) imposes multiple punishments for a single criminal offense in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.[138] The plaintiffs argued that directing the Registrar of Motor Vehicles to suspend the driver's licenses of individuals following their convictions constitutes an additional, and unconstitutional, civil penalty on drug offenders.[139]

The plaintiffs relied primarily on the United States Supreme Court's decision in *United States v. Halper*[140] for support of this claim. In *Halper*, the Court held that a defendant previously convicted and punished in a criminal trial "may not be subjected to an additional civil sanction to the extent that [the sanction] may not fairly be characterized as remedial,[141] but only as deterrent or retribution."[142] Thus, under the *Halper* analysis, the court must determine if the second penalty was imposed in a separate civil proceeding and then decide whether the

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137. *Id.*

138. U.S. CONST. amend. V. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

139. *Rushworth*, 413 Mass. at 272, 596 N.E.2d at 345.

140. 490 U.S. 435 (1989). In *Halper*, a manager of a company that provided medical services to federal Medicare recipients was convicted of violating a federal statute by filing a large number of false claims for reimbursement. The manager was sentenced to a prison term and fined $5,000. The federal government then sued him under the federal False Claims Act and recovered a civil penalty of $130,000. The United States Supreme Court found that the civil recovery after the criminal conviction constituted a multiple punishment that violates the Fifth Amendment's Double Jeopardy Clause. *Id.* The plaintiffs also argued that a Massachusetts case, Kvitka v. Board of Registration in Medicine, 407 Mass. 140, 551 N.E.2d 915 (1990), is dispositive. In *Kvitka*, a physician who was convicted of ten counts of criminally dispensing controlled substances was stripped of his license to practice medicine and ordered to pay a $10,000 fine in a subsequent civil hearing before the Board of Registration in Medicine. The SJC, following *Halper*, held that such a fine did not have any remedial purpose, and constituted a multiple punishment in violation of the Fifth Amendment of the United States Constitution. *Id.* at 140, N.E.2d at 915.

141. *Black's Law Dictionary* states that the test of whether a law is remedial or penal in nature is to determine:

> whether it primarily seeks to impose an arbitrary, deterring punishment upon any who might commit a wrong against the public . . . or whether the purpose is to measure and define the damages which may accrue . . . as just and reasonable compensation for a possible loss having a causal connection with the breach of the legal obligation . . . .

BLACK'S LAW DICTIONARY 1294 (6th ed. 1990). The *Halper* Court's implied definition of "remedial" is in accord with Black's. *See Halper*, 490 U.S. at 447-49.

142. *Halper*, 490 U.S. at 449.

penalty is "so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis."[143] The *Rushworth* plaintiffs argued that the suspension of their drivers' licenses by the Registrar was imposed in a second civil proceeding and was intended primarily as punishment for their criminal drug convictions and as a deterrence to casual drug users.[144]

The *Rushworth* Court, however, held that determining whether section 22(f) imposed a remedial or punitive sanction against the plaintiffs was unnecessary to its double jeopardy analysis.[145] The court found that the license suspensions "follow[ed] automatically from a conviction [of a] . . . drug offense as an ancillary part of the criminal proceedings"[146] and were not a result of separate civil actions against the plaintiffs as in *Halper*.[147] In the absence of such separate proceedings, the court found that the legislature was constitutionally free to mandate dual or cumulative punishments, such as those imposed by section 22(f), without violating the prohibition against double jeopardy.[148] The court then ordered the case remanded to the lower court for judgment to be entered finding section 22(f) constitutionally valid.[149]

IV. ANALYSIS

A. *Due Process*

1. Is a Driver's License a "Fundamental" Right?

In order to determine the level of judicial scrutiny to apply when considering whether a statute violates substantive due process, a court must first ascertain the nature of the underlying right or interest affected by the challenged legislation. A statute that regulates a "fundamental" right[150] will be examined with strict scrutiny[151] by the court, while

143. *Id.* at 443.
144. Plaintiffs' Brief at 36-37, *Rushworth* (No. SJC-05907).
145. *Rushworth*, 413 Mass. at 273, 596 N.E.2d at 345. The court also indicates that the rationale underpinning both *Halper* and *Kvitka*, that the Double Jeopardy Clause protects the defendant from a second civil proceeding that is "sought because the government is dissatisfied with the results of the prosecution," is not present in *Rushworth*. *Id.* The court viewed the license suspension as "an ancillary part of the criminal proceedings" and not a separate civil action. *Id.*
146. *Id.* at 273-74, 596 N.E.2d at 345-46.
147. *Id.*
148. *Id.*, 596 N.E.2d at 346.
149. *Id.* at 274, 596 N.E.2d at 346.
150. *See supra* note 94.
151. *See supra* note 95 and accompanying text.

those that affect a discretionary right or privilege will be subject only to a rational basis standard of review.[152]

In *Rushworth v. Registrar of Motor Vehicles*, the court held that "it is clear that there is no fundamental right to operate a motor vehicle."[153] As the Registrar argued, "[t]he [Massachusettts Supreme Judicial] Court has previously enumerated '[t]hose rights which are considered fundamental,' . . . and the 'right to drive' does not fall among them."[154] The view that a driver's license is a state-granted privilege whose importance to an individual does not rise to that of a fundamental right is shared by courts in the vast majority of jurisdictions in the United States.[155] Despite this apparent consensus of opinion, a small number of state and federal courts have recognized that a licensee may have important property and liberty interests in his or her driver's license with which the state may not arbitrarily interfere.[156] These decisions question the validity of concluding that there is no fundamental "right to drive" in light of the preeminence of the privately-owned automobile in virtually all aspects of modern American society.[157] Some courts have reasoned that the right to drive is inexorably linked to the recognized fundamental right to travel interstate.[158] At least one state

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152. *See supra* note 97 and accompanying text.

153. *Rushworth*, 413 Mass. at 269 n.5, 596 N.E.2d at 343 n.5. "We may take it as settled that such a right, federal or state, does not exist." *Id.* (quoting Raper v. Lucey, 488 F.2d 748, 751 (1st Cir. 1973)).

154. Appellee's Brief at 13, *Rushworth* (No. SJC-05907) (citations omitted).

155. *See, e.g.*, Hernandez v. Department of Motor Vehicles, 634 P.2d 917 (Cal. 1981); Florida v. Lite, 592 So. 2d 1202 (Fla. Dist. App. 1992); State v. Michalski, 377 N.W.2d 510 (Neb. 1985); Commonwealth v. Slater, 462 A.2d 870 (Pa. Commw. Ct. 1981); Berberian v. Registrar, 374 A.2d 791 (R.I. 1977); Bieling v. Malloy, 346 A. 2d 204 (Vt. 1975).

156. *See* Bell v. Burson, 402 U.S. 535, 536, 539 (1971) ("Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood . . . . In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."); Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973); Belcher v. Parsekian, 176 A.2d 470 (N.J. 1961); Commonwealth v. Slater, 462 A.2d 870 (Pa. Commw. Ct. 1983); Leverson v. Conway, 481 A.2d 1029 (Vt. 1984); Sanchez v. Department of Labor & Industries, 692 P.2d 192 (Wash. Ct. App. 1984). Most of these cases involved plaintiffs who had asserted that the suspension or revocation of their licenses violated procedural and not, as was the case in *Rushworth*, substantive due process rights. The *Rushworth* plaintiffs brought no claim based on the theory that § 22(f) violated their procedural due process rights as the court had previously held that the criminal proceeding prior to the license suspension "provide[s] . . . the notice and hearing . . . required by due process." Appellee's Brief at 11 n.5, *Rushworth* (No. SJC-05907) (quoting Registrar of Motor Vehicles v. Board of Appeal, 382 Mass. 580 (1981)).

157. *See supra* note 156.

158. *See* Zobel v. Williams, 457 U.S. 55 (1982); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Johnson v. State of Wyoming Hearing Examiner's Office, 838 P.2d 158 (Wyo. 1992); Weaver v. Public Service

supreme court has rejected the view taken by the *Rushworth* Court and found that:

> [the] casual acceptance . . . that a right to drive in this American society is not 'fundamental' lacks both economic and logical application to this present real world . . . . Automobiles and driving, while indispensable generally in this society, also achieve a basic constitutional status for standards of preemptive regulations *as a simple fact of life.*[159]

Although Americans rely on their automobiles for conducting a myriad of social, recreational, and practical tasks, the one of primary importance to most people is in traveling to their place of employment. The 1990 Census revealed that ninety percent of all workers in the United States who commute to their jobs depend upon a private automobile to transport them on a daily basis.[160] The vast majority of this population has little or no access to any viable alternative public modes of transportation.[161] Most individuals in the United States have a substantial economic interest in retaining their jobs, and in 1993, that interest is increasingly dependent upon the right to drive an automobile.

The practical economic necessity of having a driver's license and the hardships occasioned by its summary suspension are well illustrated in *Rushworth.* The suspensions mandated by section 22(f) have caused two of the plaintiffs to lose their jobs as truck drivers, and substantially hampered the third plaintiff's ability to continue to work at his place of employment, a distance of thirty miles from his home.[162] As a result of his conviction for possession of a single marijuana cigarette, William Rushworth was criminally fined $500.[163] After his driver's license was suspended, Rushworth lost his truck driving job paying over $400 per week and subsequently obtained local part-time employment that paid him less then $100 a week.[164] This precipitous drop in income caused by the suspension of Rushworth's license caused him to suffer obvious

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Commission of Wyoming, 278 P. 542 (Wyo. 1929).

159. Johnson v. Wyoming Hearing Examiner's Office, 838 P.2d 158, 175 n.12 (Wyo. 1992). The Wyoming Supreme Court cites a number of cases where the United States Supreme Court has indicated that the constitutionally protected right to interstate travel is inevitably intertwined with the ability to operate an automobile. *Id.* A Colorado court has also held that "[t]he fact that the exercise of the right of citizens to drive causes danger to other drivers where harm may occur so that regulation is appropriate *does not make it any less a fundamental right." Id.* (emphasis added). Campbell v. State, Department of Revenue, Division of Motor Vehicles, 491 P.2d 1385 (Colo. 1971). *But see* Heninger v. Charnes, 613 P.2d 884 (Colo. 1980).

160. Wendell Cox and Jean Love, *Critical Issues: How Privatization Can Solve America's Infrastructure Crisis,* Heritage Foundation Reports (1992).

161. *Id.*

162. Plaintiffs' Brief at 15-16, *Rushworth* (No. SJC-05907).

163. *See supra* notes 64-69 and accompanying text.

164. Plaintiffs' Brief at 15-16, *Rushworth* (No. SJC-05907).

and severe financial hardship.[165] The strong connection between an individual's interest in retaining a driver's license and his or her economic well-being is unmistakable and yet, with the *Rushworth* decision, the Supreme Judicial Court has indicated that the state may suspend or revoke this important interest for offenses having at best a tenuous connection to the use of a motor vehicle or the offender's fitness as a driver.[166]

Those states that, like Massachusetts, authorize mandatory license suspension for individuals convicted of disassociated drug offenses recognize the important interest represented by a driver's license and most provide some means of mitigating the economic hardship caused by the loss of a license.[167] Even the Federal Highway Apportionment Act provides for a form of mitigation by directing the states to suspend the licenses of all drug offenders "in the absence of compelling circumstances warranting an exception . . . ."[168] The most prevalent of these mitigating measures, an "occupational license," allows the offender to operate a motor vehicle only while in transit between the offender's home and his or her place of employment.[169] Under an occupational license, the drug offender suffers the punishment and receives the deterrent effect of the mandatory license suspensions, but avoids the economic hardship attendant to losing his or her job. Section 22(f) contains no such mitigating or discretionary provisions.[170] The existence of these provisions underscore the importance of the interest an individual has in retaining a driver's license. Although the court correctly found that previous Massachusetts and federal case law overwhelmingly rejected the concept of a "fundamental" right to drive, its decision clearly ignores the practical economic and social necessity of the automobile in today's society.

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165. *Id.*

166. *See* Johnson v. Wyoming, 838 P.2d 158, 173 (Wyo. 1992).

> If we are going to use driver's license suspension as a punishment for disassociated offenses, then the right to drive in our society becomes contingent upon conduct which has nothing to do with the creation of a hazard on the highways or the requirement of the individual to have access to a vehicle in order to be a productive citizen and maintain gainful employment.

Id.

167. *See supra* notes 37-46 and accompanying text.

168. 23 U.S.C. § 159(a)(3)(A) (1988 & Supp. 1991).

169. *See supra* notes 37-45.

170. *See supra* note 55. The only provision for discretion granted to the trial judge is in considering whether to delay the issuance of a minor's license. Section 22(f) affords no such discretion to adult offenders who must commute to their place of employment. *Id.*

2. What Is The Massachusetts Due Process Standard?

Unless a court finds that, as the Supreme Judicial Court refused to in *Rushworth*, a statute challenged under substantive due process regulates or interferes with a fundamental right, the standard of review applied is the rational basis test.[171] The *Rushworth* Court held that with few exceptions the rational basis standard under the United States Constitution[172] was identical to that standard under the due process provisions of the Massachusetts Constitution.[173] The *Rushworth* Court rejected the plaintiffs' contention that the state due process standard was "stricter," or less deferential to the legislature, than the Fourteenth Amendment standard.[174] The plaintiffs' argument for a different standard under the state constitution was based upon what the Registrar argued was a "minor variation in language [that] makes . . . [no] meaningful difference in practice . . . ."[175] Under the United States Constitution, a statute challenged on due process grounds will be upheld if it has a "reasonable relation" to the legislative goal, while a statute must have a "real and substantial relation" to that permissible goal under Massachusetts due process provisions.[176] In *Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing*,[177] the court noted that "[w]hile the State and Federal [due process] standards are phrased in virtually identical terms . . . '[t]he Constitution of a State may

171. *See* Commonwealth v. Franklin Fruit Co., Inc., 383 Mass. 228, 446 N.E.2d 63 (1983); Marshfield Family Skateland, Inc. v. Marshfield, 389 Mass. 436, 450 N.E.2d 605 (1983); Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); Shell Oil Co. v. Revere, 383 Mass. 682, 421 N.E.2d 1181 (1981).

172. U.S. CONST. amend. XIV. The statute must "bear a reasonable relation to a permissible legislative objective." Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971).

173. "[A] statute will satisfy due process [under Articles 1, 10, and 12 of the Massachusetts Declaration of Rights and Part II, Clause 1, Section 1, Article 4 of the Massachusetts Constitution] if it 'bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.'" Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 268-69, 596 N.E.2d 340, 343 (1992) (quoting Sperry & Hutchinson Co. v. McBride, Director of Div. of Necessaries of Life of the Commonwealth, 307 Mass. 408, 418, 30 N.E.2d 269 (1940))).

174. Massachusetts courts have "*occasionally* been less willing than the Federal courts to ascribe to the Legislature speculative and implausible ends, or to find rational the nexus said to exist between a plausible end and the chosen statutory means." Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing, 379 Mass 368, 373 n.8, 398 N.E.2d 471, 475 n.8 (1979) (citing Coffee-Rich, Inc. v. Comm. of Pub. Health, 348 Mass. 414, 421-26, 204 N.E.2d 281, 286 (1965)).

175. Appellee's Brief, at 17 n.8, *Rushworth* (SJC-05907).

176. *See supra* notes 103-05 and accompanying text.

177. 379 Mass. 368, 398 N.E.2d 471 (1979).

guard more jealously against the exercise of the State's police power.'"[178] In addition, Massachusetts courts "are not bound by Federal decisions, which in some respects are less restrictive than our Declaration of Rights."[179] However, the *Rushworth* Court held that any difference between the . . . [state and federal] standards was narrow, and "the due process provisions of the Massachusetts Constitution . . . afford protection comparable to [the federal constitution]."[180] The court disregards the qualifying language of *Blue Hills Cemetery* which states that the "narrow" distinction between the state and federal due process standards is "in the area of economic regulation."[181] As the plaintiffs note, "the difference is presumably more pronounced where other interests [such as an individual's interest in retaining a driver's license] are implicated."[182] The plaintiffs' argued that Massachusetts courts have historically afforded the legislature greater deference in fashioning statutes that regulate economic issues because "[e]very economic classification is in some manner arbitrary [and] drawing the lines between classification is a task to be exercised at the discretion of the appropriate branch of government . . . the legislature."[183] The court's previous holding that "any difference between the two constitutional standards in the area of economic regulations . . . is narrow," clearly implies that the court would consider the difference to be more substantial in cases involving other interests.[184] The right to drive would surely qualify as such an important interest. Under a "strict" standard of due process review, rejected in *Rushworth*, the court would have examined the nexus between the challenged statute and "those permissible public ends the Legislature may *plausibly* be said to have been pursuing."[185]

Finding instead that no "stricter" due process review was appropriate in their consideration of section 22(f), the *Rushworth* Court instead

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178. *Id.* at 373 n.8 (quoting Coffee-Rich, Inc. v. Commissioner of Public Health, 348 Mass. 414, 421, 204 N.E.2d 281, 286 (1965)).

179. *Id.* (quoting Corning Glass. Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 416, 294 N.E.2d 354, 358 (1973)).

180. Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 268-69, 596 N.E.2d 340, 342 (1992).

181. *Blue Hills Cemetery*, 379 Mass. at 373 n.8, 398 N.E.2d at 475-76 n.8.

182. Plaintiffs' Reply Brief at 2, *Rushworth* (No. SJC-05907). Other state constitutions also provide greater due process protection than that of the Fourteenth Amendment. *See, e.g.*, City of Russellville v. Vulcan Materials Co., 382 So. 2d 525 (Ala. 1980); City of Crowley Firemen v. City of Crowley, 280 So. 2d 897 (La. 1973); Maryland State Board of Barber Examiners v. Kuhn, 312 A.2d 216 (Md. 1973); In re Aston Park Hospital, Inc., 193 S.E.2d 729 (N.C. 1973).

183. Plaintiffs' Reply Brief at 4, *Rushworth* (No. SJC-05907).

184. *Id.* at 2.

185. Plaintiffs' Brief at 17 *Rushworth* (No. SJC-05907) (quoting Leigh v. Board of Registration in Nursing, 395 Mass. 670, 481 N.E.2d 1347 (1985)).

applied the minimal judicial scrutiny of the rational basis standard. Under this standard, the plaintiffs had the task of overcoming the statute's presumption of validity by proving that section 22(f) either failed to promote *any* proper legislative purpose, or did not "rationally relate[] to the achievement of that purpose"[186] Since the court, under the rational basis standard, needs only to identify some permissible legislative goal, not necessarily that identified by the legislature, the Supreme Judicial Court found that section 22(f) rationally promotes the proper purposes of discouraging illegal drug use and keeping impaired operators from driving.[187]

B. *Equal Protection*

Having found that the Massachusetts license suspension statute satisfies state and federal due process requirements, the court then turned to the plaintiffs' claim that section 22(f) violates state and federal equal protection.[188] Under the equal protection provisions under both the Fourteenth Amendment and the Massachusetts Declaration of Rights, a court will apply the rational basis standard unless the challenged statute infringes upon a fundamental right[189] or affects a suspect or quasi-suspect class.[190] This standard of review is identical to that employed by the court in its due process analysis of section 22(f).[191] Having previously found that section 22(f) rationally relates to permissible legislative objectives, the *Rushworth* Court not surprisingly upheld the statute on equal protection grounds.[192] The plaintiffs unsuccessfully argued that section 22(f) arbitrarily targets drug offenders for mandatory license suspensions while not effecting virtually all other offenders convicted of non-driving related crimes.[193] Under the rational basis test, the plaintiffs have a severe burden to overcome the statute's presumption of validity.[194] In addition, the legislature has broad powers to specially target those convicted of drug offenses and not other criminal offenders "for in confronting a multitude of evils, [they] may address . . . the phase of the problem most urgently requiring . . .

186. Shell Oil Co. v. Revere, 383 Mass. 682, 686, 421 N.E.2d 1181, 1183 (1981).
187. *Rushworth*, 413 Mass. at 270-71, 596 N.E.2d at 344.
188. *Id.* at 270, 596 N.E.2d at 344.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. Even individuals convicted of some serious driving related crimes are not subject to mandatory license suspensions. For example, an offender convicted of operating to endanger or leaving the scene of an accident face mandatory license suspension only after a third conviction within a five year span. Plaintiffs' Brief at 31, *Rushworth* (No. SJC-05907).
194. *See supra* notes 98-99 and accompanying text.

action."[195] The court found that the legislature could have rationally intended the section 22(f) sanctions to discourage drug use among "casual" users, which the court held, is a legitimate legislative goal.[196]

C. *Double Jeopardy*

It is the *Rushworth* Court's perfunctory dismissal of the plaintiffs' double jeopardy claims[197] that seems most conducive to criticism when analyzing the decision.[198] The Supreme Court has held, in *United States v. Halper*,[199] that the Double Jeopardy Clause of the Fifth Amendment protects criminal defendants from "three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense."[200] It is this third possible abuse scenario that the *Rushworth* plaintiffs argued is created by the operation of section 22(f).[201]

The Supreme Court, in *Halper*, articulated a two-pronged method of determining whether a statute that, like section 22(f), imposes a civil sanction following a criminal conviction violates the constitutional prohibition against double jeopardy.[202] Under *Halper*, a statute that imposes a noncriminal penalty on "a defendant who already has been punished in a criminal prosecution"[203] for the same conduct will violate the Double Jeopardy Clause when: (1) the sanction is imposed in a separate noncriminal proceeding, and (2) the civil penalty "appears to qualify as 'punishment' in the plain meaning of the word . . . ."[204] The Court specifically notes that *Halper* does not prevent the state from "seeking and obtaining both the full civil penalty and the full range of

195. Commonwealth v. McQuid, 369 Mass. 925, 927-28, 344 N.E.2d 179, 180-81 (1976).

196. *Rushworth*, 413 Mass. at 272, 596 N.E.2d at 345.

197. *Id.* at 272-74, 596 N.E.2d at 345-46. As noted by the defendant, the plaintiffs make no parallel double jeopardy claim under Massachusetts law. "[O]ur conclusions have been consistent with the views expressed by the Supreme Court . . . concerning Double Jeopardy." Appellee's Brief on Reservation and Report, *Rushworth* (No. SJC-05907) (quoting Shabazz v. Commonwealth, 387 Mass. 291, 439 N.E.2d 760 (1982)). Interestingly, the Supreme Court, in *Halper*, referred to the fact that "[a]s early as 1641, the Colony of Massachusetts in its 'Body of Liberties' stated 'No man shall be twise sentenced by Civill Justice for one and the same Crime, Offense or Trespasse.'" United States v. Halper, 490 U.S. 435, 440 (1989) (quoting AMERICAN HISTORICAL DOCUMENTS 1000-1904, 43 Harvard Classics 66, 72 (C. Eliot ed. 1910)).

198. *See supra* notes 139-49 and accompanying text.

199. 490 U.S. 435 (1989).

200. *Id.* at 440.

201. *Rushworth*, 413 Mass. at 273, 596 N.E.2d at 354.

202. *Halper*, 490 U.S. at 448-49.

203. *Id.*

204. *Id.* at 449.

statutorily authorized criminal penalties" if they are imposed in the same criminal proceeding.[205] When civil penalties, such as the *Rushworth* license suspensions, are "actually . . . *incorporated* into the criminal sentence . . . [then] the punishments may, in some fashion, be 'excessive' but they are not multiple in the double jeopardy sense."[206] In that situation, a reviewing court's analysis of the "multiple punishment issue would be limited to ensuring that the total punishment [received by the defendant] did not exceed that authorized by the legislature."[207]

In *Rushworth*, the Supreme Judicial Court distinguished section 22(f) from the federal statute overturned in *Halper* by determining that the license suspensions mandated by the Massachusetts law are not imposed in a distinct civil action, but follow "automatically from a conviction on an underlying drug offense as an ancillary part of the criminal proceedings."[208] In the absence of a separate noncriminal proceeding, the court stated that, "[o]nce the Legislature has specifically authorized two punishments, double jeopardy principles are not implicated, and the direction of the Legislature is to be enforced."[209]

By summarily declaring that the mandatory license suspensions at issue in *Rushworth* are imposed as an automatic and organic part of the underlying criminal trial, the court substantially misinterpreted the independent and discretionary nature of the Registrar's role in executing section 22(f). The court indicated that because "[t]he Registrar has no discretion on whether to suspend" an offender's license, he is merely following the legislature's express direction to punish the offender.[210] The court adopted the position of the Registrar in characterizing the suspension of a drug offender's license pursuant to section 22(f) as a "'purely ministerial action' that follows automatically from the criminal conviction."[211]

Black's Law Dictionary defines a "ministerial act" as "[o]ne which a person or board performs under a given state of facts in a prescribed manner in obedience to the mandate of legal authority *without regard to or the exercise of his or their own judgment* upon the propriety of the act

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205. *Id.* at 450. "'Where . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.'" (quoting Missouri v. Hunter, 459 U.S. 359, 368-69 (1983)).

206. Mary M. Cheh, *Constitutional Limits On Using Civil Remedies To Achieve Criminal Law Objectives: Understanding And Transcending The Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1377 (1991).

207. *Halper*, 490 U.S. at 450.

208. Rushworth v. Registrar of Motor Vehicles, 413 Mass 265, 273, 596 N.E.2d 340, 345-46 (1992).

209. *Id.* at 346.

210. *Id.* at 173, 596 N.E.2d at 345.

211. Appellee's Brief at 41, *Rushworth* (No. SJC-05907).

being done."[212] A duty is "ministerial" in nature "when it is absolute, certain and imperative, involving merely [the] execution of a specific duty arising from fixed and designated facts."[213] The Massachusetts legislature, by enacting section 22(f), has authorized the Registrar of Motor Vehicles to exercise a level of discretion in the suspension of the licenses of convicted drug offenders that is wholly inconsistent with this definition. Once an individual is convicted of a violation of the Controlled Substances Act, under section 22(f), the Registrar is obligated to suspend the offender's license to drive for a maximum period of five years.[214] Except for these loose parameters, however, the Registrar has been granted the right to exercise extensive discretion in imposing license suspensions on drug offenders. Although the Registrar did develop a Suspension Schedule to insure that the license suspensions mandated under section 22(f) were fairly and consistently applied, the Registrar is under no statutory obligation to continue being so. As the plaintiffs argued, "[b]oth the length and the conditions of the suspension . . . [are] determined by the Registrar . . . independently from the court proceedings, and the Registrar has retained . . . broad discretionary authority to reinstate the [suspended] license . . . . "[215] The ability of the Registrar to return a license suspended under section 22(f) to the offender at any time, with no consultation or contact with any agency or court, conflicts severely with the court's finding that the suspensions are merely "an ancillary part of the [underlying] criminal proceedings." [216] In addition to the Registrar's authority to reinstate, prior Massachusetts case law suggests that the license suspensions under section 22(f) may be subject to the review of the independent Board of Appeal of Motor Vehicle Liability Policies and Bonds.[217] Chapter 90, section 24(2)(b) of the Massachusetts General Laws requires the Registrar to revoke immediately the license of any minor adjudged a delinquent child for being convicted of the unauthorized use of an automobile.[218] In

212. BLACK'S LAW DICTIONARY 996 (6th ed. 1990).

213. *Id.*

214. MASS. GEN. L. ch. 90, § 22(f) (1990). The only provision for judicial discretion regarding the license suspensions is in the case of a juvenile who is adjudged delinquent for violating the Controlled Substances Act. *Id.*

215. Plaintiffs' Reply Brief at 8, *Rushworth* (SJC-05907).

216. Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 275, 596 N.E.2d 340, 346 (1992).

217. Plaintiffs' Reply Brief at 9, *Rushworth* (SJC-05907).

218. The statute, like section 22(f), on its face provides the licensee with no right of appeal of the suspension and the Registrar with no discretionary authority to prevent the suspension. "[T]he Registrar shall unless the court . . . recommends otherwise, revoke immediately the license . . . of the person so convicted, and no appeal, motion for new trial or exceptions shall stay the revocation . . . . " MASS. GEN. L. ch. 90, § 24(2)(b) (1990).

Registrar of Motor Vehicles v. Board of Appeal,[219] the Supreme Judicial Court held that offenders who lost their licenses under the mandatory revocation provision of section 24(2)(b) have a right, regardless of the statutory prohibition, to appeal the revocation to the Board of Appeal on Motor Vehicle Liability Policies and Bonds.[220] The court held that the appeal provisions of Chapter 90, section 28 of the Massachusetts General Laws[221] "appl[y] to mandatory as well as discretionary revocations by the registrar."[222] The right of an offender to appeal to an administrative agency board of appeal is additional evidence that the mandatory suspensions by the Registrar under section 22(f) are imposed in a second and independent civil proceeding rather than as a part of the offender's criminal trial.

Under *Halper*, a civil penalty following criminal punishment will constitute double jeopardy if it "cannot fairly be said solely to serve a remedial purpose, but . . . can only be explained as also serving either retributive or deterrent purposes . . . ."[223] The *Rushworth* Court refused to apply this prong of the *Halper* analysis to section 22(f), finding that the suspension of the plaintiffs' licenses were a part of their criminal trials and not the result of separate civil actions.[224] Had the court continued its analysis of section 22(f) to the second prong, it would have had difficulty characterizing the post-conviction license suspensions as serving any purpose other than punishment or retribution. The Registrar argued that *Halper* would invalidate a statute only if the court found that the civil sanction imposed is "at least partially remedial [in nature]."[225] Under the Registrar's reasoning, as long as a court is able to discern some remedial aspect to the suspension of a driver's license for a drug conviction, then it does not "constitute 'punishment' for double jeopardy purposes."[226] The Registrar argued that because a section 22(f) suspension has the "remedial benefit[] of removing proven criminals from the Commonwealth's roads," it does not violate double jeopardy.[227] *Halper*, however, characterizes a civil penalty as "punishment" if it serves as either retribution or as a deterrent and is not "solely" remedial in nature.[228] The primary purpose for section 22(f),

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219. 382 Mass. 580, 416 N.E.2d 1373 (1981).
220. *Id.* at 584, 416 N.E.2d at 1376.
221. The statute allows "[a]ny person aggrieved by a ruling or decision of the registrar [to] . . . appeal from such a ruling . . . . " MASS. GEN. L. ch. 90, § 28 (1990).
222. *Id.*
223. United States v. Halper, 490 U.S. 435, 448-49 (1989).
224. Rushworth v. Registrar of Motor Vehicles, 413 Mass. 265, 273, 596 N.E.2d 340, 345 (1992).
225. Appellee's Brief at 45, *Rushworth* (No. SJC-05907).
226. *Id.* at 40.
227. *Id.* at 41.
228. *Halper*, 490 U.S. at 448.

and indeed all "user accountability" statutes, is clearly to punish and deter the large number of casual drug abusers who often escape serious criminal penalty. The *Rushworth* Court itself identified the obvious goal of the license suspensions as "a deterrent to illegal drug distribution and use . . . ."[229] In addition, the only remedial aspect of section 22(f) identified is so "infinitely elastic . . . [that it] could . . . be used to justify virtually any government sanction."[230] It seems clear that the license suspensions mandated under section 22(f) meet the *Halper* test and violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The court's decision that *Halper* was inapplicable and that the section 22(f) imposes mere cumulative punishment authorized by the legislature are unsupported by the facts and previous case law and represent a serious mischaracterization of the Massachusetts mandatory license suspension program.

V. CONCLUSION

The widespread abuse of illegal drugs in the United States constitutes an enormous problem the control of which will undoubtedly require a vast range of social, educational, and criminal solutions. Holding recreational or casual drug users "accountable" for their role in the illicit drug trade may well be an effective means of diminishing the demand for these drugs. However, notwithstanding the *Rushworth* decision, section 22(f) is flawed legislation that is not only of questionable constitutionality, but promises to exacerbate the problem it purports to address. Under the Massachusetts License Suspension Law, an individual who makes a single mistake of possessing a small amount of marijuana or a single prescription pill risks losing his or her job for that one mistake. The law contains no provision for discretion by a presiding judge who is aware of the myriad of underlying factors regarding the offender's case. Additionally, section 22(f) provides no mechanism, such as an occupational license, to mitigate any unfair or harsh economic consequences of the mandatory license suspensions. Therefore, a minor drug offender may suddenly find himself unemployed and immobilized, a condition that is hardly conducive to the state's interest in reintegrating offenders back into law-abiding society.

The Massachusetts legislature should reconsider the wisdom of imposing mandatory driver's license suspensions as a means of deterring non-driving related behavior. In lieu of repealing section 22(f), the legislature should amend the statute to provide a means of tempering the harshness of the license suspensions by authorizing limited driving privileges for offenders who commute to work or have some other

229. *Rushworth*, 413 Mass. at 270-71, 596 N.E.2d at 344.
230. Plaintiff's Brief at 22, *Rushworth* (No. SJC-05907).

The court addressed situations, similar to *Raposo*, where the defendant had prior knowledge of the commission of a crime and did not report the completed crime to the authorities.[72] Citing *Commonwealth v. Perry*,[73] the court held that a defendant could not be convicted as an accessory before the fact solely on the grounds that the defendant knew the crime was going to be committed, even if that knowledge is coupled with subsequent concealment of the crime.[74] Justice Rose stated that even a person's presence at the commission of the crime, together with inaction on the part of that person to stop the crime, will not render a person liable as a principal.[75] The court then went on to discuss the Commonwealth's primary argument in support of the defendant's conviction.[76] The Commonwealth argued that a mother has "a common law duty to protect her child from harm, and that her failure to take reasonable steps to fulfill this duty is an omission sufficient to make her liable as an accessory."[77] The court interpreted the state's theory to mean that the defendant's failure to perform her parental duty was tantamount to aiding the principal, thereby making the defendant a participant in the principal's actions.[78] The Commonwealth also argued that the defendant had shared intent with the principal, based on an inference from the fact that the defendant knew of the principal's proposed action, and intentionally failed to act.[79]

The majority then recited the main case relied upon by the Commonwealth in support of its theories of the defendant's liability.[80] This case was *State v. Walden*.[81] In *Walden*, the Supreme Court of North Carolina affirmed a parent's conviction of aiding and abetting an assault with a deadly weapon on the parent's child by a third party.[82] The mother in *Walden* was convicted under a statute similar to the Massachusetts Accessory Before the Fact Statute.[83] The court in *Raposo*

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72. *Id.*

73. 357 Mass. 149, 256 N.E.2d 745 (1970).

74. *Id.* at 151, 256 N.E.2d at 747 (citing Commonwealth v. DiStasio, 297 Mass. 347, 360, 364-65, 8 N.E.2d 923, 930, 932-33, *cert. denied*, 302 U.S. 683 (1937)).

75. Commonwealth v. Murphy, 1 Mass. App. Ct. 71, 76, 294 N.E.2d 558, 561 (1973).

76. *Raposo*, 413 Mass. at 185, 595 N.E.2d at 776.

77. *Id.* at 185-86, 595 N.E.2d at 776.

78. *Id.*

79. *Id.* at 186, 595 N.E.2d at 776.

80. *Id.*

81. 293 S.E.2d 780 (N.C. 1982).

82. *Raposo*, 413 Mass. at 186, 595 N.E.2d at 776 (citing State v. Walden, 293 S.E.2d 780 (N.C. 1982)). In *Walden*, the victim's mother witnessed, but made no attempt to stop the severe beating of her child. *Walden*, 293 S.E.2d at 783.

83. *Raposo*, 413 Mass. at 186, 595 N.E.2d at 776 (citing State v. Walden, 293 S.E.2d 780 (N.C. 1982)). The North Carolina statute, N.C. GEN. STAT. § 14-5.2, removes all distinctions between accessories before the fact and principals. The

pointed out that North Carolina law, like Massachusetts law, "requires that a person must say or do something that demonstrates consent to the felonious purpose and contributes to the execution of the crime."[84]

The main holding of the *Walden* case was then stated by the *Raposo* Court:

> The *Walden* Court created an exception to the general aiding and abetting rule when a parent, who is present, neglects his or her affirmative legal duty to "take all steps reasonably possible to protect the parent's child from an attack by another person" and that such an omission shows the parent's "consent and contribution to the crime being committed."[85]

The Massachusetts Supreme Judicial Court declined to follow the North Carolina Supreme Court and instead ruled that a parent's failure to fulfill a duty to provide for the safety of a child will not rise to the level of intentionally aiding in the commission of a felony against a minor.[86]

The court nevertheless recognized that under Massachusetts common law parents have a duty to protect their children.[87] The court recognized that a failure to perform this duty "was a type of intentional conduct which 'involves a high degree of likelihood that substantial harm will result' and thus constituted 'wanton or reckless' conduct for the purposes of manslaughter."[88]

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elements of accessory before the fact as a separate statute were: (1) that the defendant counseled, procured, or commanded the principal to commit the offense; (2) that the defendant was not present when the principal committed the offense; and (3) that the principal committed the offense. State v. Hunter, 227 S.E.2d 535, 547 (N.C. 1976), *cert. denied*, 429 U.S. 1093 (1977).

84. *Raposo*, 413 Mass. at 186, 595 N.E.2d at 776 (citing State v. Walden, 293 S.E.2d 780, 787 (N.C. 1982)).

85. *Id.* at 186, 595 N.E.2d at 776 (citing *Walden*, 293 S.E.2d at 787).

86. *Id.* at 188, 595 N.E.2d at 777. The court stated that "in order to be punished as an accessory before the fact, the defendant must have actually aided in the commission of the felony, or counselled, hired, or otherwise procured someone to commit it." *Id.*

87. *Id.* at 187, 595 N.E.2d at 777 (citing Commonwealth v. Gallison, 383 Mass. 659, 421 N.E.2d 757 (1981)). The court cited *Gallison* as an illustration of breach of a parental duty of care. *Id.* at 187. In *Gallison*, a mother made no attempt to obtain medical attention for her child who had a very high fever. *Id.* The child also fell striking her head which rendered her unconscious. *Gallison*, 383 Mass. at 663, 421 N.E.2d at 758. The child's mother did not summon assistance, but instead put the child on a cot. *Id.* The next morning the child was dead. *Id.* The mother was convicted of manslaughter. *Gallison*, 383 Mass. at 663, 421 N.E.2d at 758, 760.

88. *Raposo*, 413 Mass. at 187, 595 N.E.2d at 777 (quoting *Gallison*, 383 Mass. at 665, 421 N.E.2d at 761). The court in *Raposo* also identified case law in other jurisdictions that had reached similar conclusions resulting in manslaughter convictions, including State v. Zobel, 134 N.W.2d 101 (S.D. 1965), State v. Austin, 172 N.W.2d 284 (S.D. 1969), and Palmer v. State, 164 A.2d 467 (Md. 1960). *Raposo*, 413 Mass. at 187-88, 595 N.E.2d at 777.

Thus, the court in *Raposo* did not create an exception to the Massachusetts aiding and abetting law as the North Carolina Supreme Court had in *State v. Walden*.[89] An exception would have allowed a parent to be found guilty as an accessory before the fact if the state could prove that the parent neglected his or her parental duty of care.[90] The breach of the parental duty of care could then be used to show consent and contribution to the crime committed against the minor child.[91] Instead the Massachusetts Supreme Judicial Court decided that a parental failure to protect the child will not rise to the level of conduct required for accessory liability under Massachusetts law.[92]

C. *The Concurring Opinion*

In a short concurring opinion, Justice Abrams agreed that the defendant could not be convicted as an accessory before the fact.[93] Justice Abrams cited a number of cases dealing with statutory construction,[94] stating that the ordinary rules of statutory interpretation require that the court construe criminal statutes strictly against the Commonwealth.[95] Justice Abrams's main contention is that other jurisdictions in the United States have specific statutes addressing "acts of omission as well as affirmative infliction of harm to a child" in the context of child abuse.[96] Justice Abrams listed the states which "identify the crime as the violation of a duty of care or protection."[97]

The concurring opinion recognized that strong arguments could be made in support of criminalizing the type of conduct the defendant displayed in *Raposo*, and equally strong arguments could be made in

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89. *Raposo*, 413 Mass. at 188, 595 N.E.2d at 777.

90. State v. Walden, 293 S.E.2d 780, 786 (N.C. 1982).

91. *Raposo*, 413 Mass. at 186, 595 N.E.2d at 776.

92. *Id.* at 188, 595 N.E.2d at 777 ("By its very terms, ch. 274, § 2, requires more than an omission to act.").

93. *Id.* at 189, 595 N.E.2d at 778 (Abrams, J., concurring).

94. *Id.* (Abrams, J., concurring).

95. *Id.* (Abrams, J., concurring) (citing Aldoupolis v. Commonwealth, 386 Mass. 260, 435 N.E.2d 330, *cert. denied*, 459 U.S. 864 (1982)).

96. *Raposo*, 413 Mass. at 189-90, 595 N.E.2d at 778 (Abrams, J., concurring). *See id.* (citing ALA. CODE § 26-15-3; CAL. PENAL CODE § 273a (West 1988); COLO. REV. STAT. ANN. § 18-6-401(1) (West 1990 & Supp. 1991); FLA. STAT. ANN. § 827.04(1) (West 1991); IOWA CODE ANN. § 726.6.1e (West 1979 & 1992 Supp.); LA. REV. STAT. § 14:93 year; MINN. STAT. ANN. § 609.378(2) (1990); MO. ANN. STAT. § 568.050(3) (Vt. 1986 & Supp. 1991); NEV. REV. STAT. § 200.508 (1992); N.M. STAT. ANN. § 30-6-1(c) (Michie. 1978 & Supp. 1991); W. VA. CODE § 61-8D-1 (1989)).

97. *Raposo*, 413 Mass. at 190-91, 595 N.E.2d at 779. Examples of such statutes include: HAW. REV. STAT. § 709-904(2) (1991); ME. REV. STAT. ANN. tit. 17-A, § 554 (West 1983 & Supp. 1990); MISS. CODE ANN. § 97-5-39 (1973 & Supp. 1991); MONT. CODE ANN. § 45-5-622 (1990); N.H. REV. STAT. ANN. § 639:3 (1986); OHIO REV. CODE ANN. § 2919.22 (Baldwin 1986 & Supp. 1991); WYO. STAT. § 6-4-403 (Mich. 1987 & Supp. 1991). *Raposo*, 413 Mass. at 191 n.2, 595 N.E.2d at 779 n.2.

opposition to this notion.[98] Justice Abrams felt that the final determination was for the legislature.[99] While recognizing that the parental duty of care and protection was recognized in Massachusetts in the case of *Commonwealth v. Gallison*,[100] the decision of whether to expand the duty by criminal acts of omission should be made by the legislature, not the courts.[101]

D. *Analysis*

When the Massachusetts Supreme Judicial Court ruled that a parent's failure to protect a child does not give rise to criminal liability under the Massachusetts Accessory Before the Fact Statute,[102] the court limited the scope of protection offered to children in this state. This limitation is at odds with the current trend of courts in the United States to broaden the protection of children from abuse.[103] Many courts appear sensitive to the dilemma presented in attempting to protect parents' rights to raise their children without state intervention, yet expanded the rights of children in order to protect them from danger.[104]

Massachusetts has recognized that a parental failure to act in a situation where there is a common-law duty to protect the child, which results in the death of the child, will constitute wanton or reckless conduct for the purposes of a manslaughter conviction.[105]

The conduct necessary to support a manslaughter conviction was set out in *Commonwealth v. Welansky*.[106] The court stated, "if grave danger was in fact realized by the defendant, his subsequent voluntary act or

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98. Raposo, 413 Mass. at 191-92, 595 N.E.2d at 779.

99. *Id.*

100. 383 Mass. 659, 421 N.E.2d 757 (1981). *See supra* note 30 and accompanying text.

101. *Raposo*, 413 Mass. at 192, 595 N.E.2d at 779.

102. *Id.* at 188-89, 595 N.E.2d at 778.

103. State v. Walden, 293 S.E.2d 780, 785 (N.C. 1982). "[T]he trend of Anglo-American law has been toward enlarging the scope of criminal liability for failure to act in those situations in which the common law or statutes impose a responsibility for the safety and well-being of others." *Id.* at 785. *See also* S. Randall Humm, *Symposium: The Critique of Normativity: Comment: Criminalizing Poor Parenting Skills as a Means to Contain Violence by and Against Children*, 139 U. PA. L. REV. 1123, 1124 (1991) ("[T]here is a growing trend toward holding parents criminally liable for failing to supervise their children adequately . . . . Parents who fail to protect their children from violence similarly are facing harsher laws and sanctions from the courts.").

104. *See* Johnson, *supra* note 8, at 375.

105. Commonwealth v. Gallison, 386 Mass. 659, 421 N.E.2d 757 (1981); *see also supra* note 30 and accompanying text. The *Gallison* Court stated that a mothers inaction, in light of the child's obvious illness, was a type of intentional conduct which "involves a high degree of likelihood that substantial harm would result." *Gallison*, 386 Mass. at 663, 421 N.E.2d at 761.

106. 316 Mass. 383, 55 N.E.2d 902 (1944).

omission which caused the harm amounts to wanton or reckless conduct."[107] The essence of wanton or reckless conduct is that it is intentional conduct, either as a commission or omission, in situations where there is a duty to act.[108]

The Supreme Judicial Court in *Raposo* admitted the following:

> While it is clear . . . that a parent's failure to fulfil his or her duty to provide for the safety and welfare of a child may rise to the level of wanton or reckless conduct sufficient to support a manslaughter conviction we decline to follow the Supreme Court of North Carolina and read into our accessory before the fact law the principle that a mere omission by a parent to take action to protect a child, without more, is the equivalent of intentionally aiding in the commission of a felony against the child.[109]

The Massachusetts court refused to characterize the failure of a parent to protect his or her child, without more, as "an act of omission by the parent showing the parent's consent and contribution to the crime being committed."[110] While the *Walden* Court found the breach of the parental duty of care to be consent and encouragement to the crime and thus constituted aiding and abetting the principal, the SJC declined to impose such liability.[111] This departure is interesting in light of the fact that the language used by the North Carolina Supreme Court tracks the language of the Massachusetts Accessory Before the Fact Statute and accompanying comments on that statute,[112] requiring that the accessory aid in the commission of the felony.[113]

The basis for this departure from the *Walden* Court decision was not made clear in the *Raposo* case. The court simply stated that in order to be liable under Massachusetts law, the parent must actually aid, counsel, hire, or otherwise procure a person to commit the felony.[114]

Other state courts have been willing to impose accessory liability on the same grounds as *Walden*.[115] In *State v. Orosco*,[116] the defendant was convicted of attempted sexual penetration of a minor as an accessory, and criminal sexual contact of a minor under a New Mexico accessory statute.[117] The majority in *Orosco* held that the defendant, as

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107. *Id.* at 398, 55 N.E.2d at 910.
108. *Id.* (citations omitted)
109. *Raposo*, 413 Mass. at 188, 595 N.E.2d at 777.
110. State v. Walden, 293 S.E.2d 780, 787 (N.C. 1982).
111. *Raposo*, 413 Mass. at 188-89, 595 N.E.2d at 778.
112. *See supra* note 3 and accompanying text.
113. *Walden*, 293 S.E.2d at 787.
114. *Raposo*, 413 Mass. at 188, 595 N.E.2d at 777.
115. *See, e.g.*, 293 S.E.2d 780 (N.C. 1982).
116. 833 P.2d 1155 (N.M. Ct. App. 1991).
117. *Id.* at 1157. See *infra* note 121 for the text of the New Mexico statute. In *Orosco*, the defendant, who was the boyfriend of the victim's mother, took the six-year-old male victim to a barroom where the victim was sexually assaulted by a friend

the child's caretaker, owed a duty of protection to the child.[118] The court's ruling on the issue of accessory liability without active participation was dicta since neither party briefed nor argued that the defendant could be an accessory without active participation.[119]

The New Mexico statute discussed in *Orosco* is similar to the Massachusetts Accessory Before the Fact Statute.[120] The New Mexico statute provides that a person may be charged as an accessory to a crime if he or she "procures, counsels, aids or abets in its commission."[121] This statute is also very similar to the North Carolina accessory statute.[122]

The jury instructions given in *Orosco* have similar requirements to the elements of the Massachusetts Accessory Before the Fact Statute.[123] New Mexico also has case law similar to Massachusetts, requiring that the mere presence at the commission of the crime, even if coupled with mental approbation, is insufficient to render the defendant guilty as an aider or abettor if not accompanied by an outward manifestation or expression of approval.[124] The New Mexico court then cited *Walden*, and stated that the rule set forth in *Orosco* was consistent with existing case law in New Mexico with respect to parental duties and aiding and abetting.[125] The court proposed the rule that the "defendant's failure to act to protect the victim against harm by . . . defendant's friend, could be viewed by the jury as encouraging the commission of the offense."[126]

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of the defendant. *Orosco*, 833 P.2d at 1158. The victim's testimony and statements given to the police were conflicting, at one point saying that the defendant assisted the principal in committing the offense by holding the victim, and later saying that the defendant tried to stop the attack. *Id.*

118. *Id.* at 1162.

119. *Id.* at 1160.

120. See *supra* note 3 for the text of the Massachusetts statute.

121. N.M. STAT. ANN. § 30-1-13 (Michie.). The statute reads as follows:

> A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted, or is under the Children's Code.

Id.

122. *See supra* note 83 and accompanying text.

123. *Orosco*, 833 P.2d at 1161. The state must prove that the defendant intended that the crime be committed, that the crime was committed, and that the defendant helped, encouraged, or caused the crime to be committed. *Id.*

124. *Id.* (citing New Mexico Supreme Court Rules Annotated 1986, 14-2823 (1986 Recomp.) (jury instructions for aiding and abetting).

125. *Id.* at 1162.

126. *Id.* at 1163.

In a similar case, *People v. Peters*,[127] a mother was found guilty of murder, aggravated battery of a child, cruelty to a child, and endangering the life of a child under a theory of accountability.[128] The Illinois accountability statute states that: "[a] person is legally accountable for the conduct of another when . . . (c) Either before or during commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."[129]

The Illinois statute and case law mandate that the intent required of the defendant be garnered from the defendant's knowledge.[130] The court held that "[a] person who knows that his or her child is in a dangerous situation and fails to take action to protect the child, presumably intends the consequence of the inaction."[131] The court held that the defendant aided her boyfriend, who continued to beat the defendant's son until the son died, by failing to protect her son during the many occasions she could have done so.[132]

The Illinois Supreme Court affirmed the decision of the court of appeals in *People v. Peters*.[133] In its ruling the court found that Mrs. Peters was aware of the physical abuse being committed against her son,[134] similar to the finding made by the Massachusetts Supreme Judicial Court in *Raposo*.[135] The court framed the issue of the case as "whether the mother's knowledge of this on-going abuse, coupled with the continued, sanctioned exposure of the child to this abuse, is sufficient to hold the mother accountable . . . ."[136] The court ruled that Mrs. Peters had an affirmative duty to protect her son, and rather than fulfill her parental duty, she aided her boyfriend in the commission of the crime against her son.[137]

The *Raposo* Court could have imposed liability on either of the above grounds but did not. The majority in *Raposo* also misconstrued a case that was cited in the Commonwealth's brief to support the finding of

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127. 586 N.E.2d 469 (Ill. App. Ct. 1991).

128. *Id.* at 470. The defendant's boyfriend was beating the defendant's son over a long period of time, and the child eventually died from these beatings. *Id.* at 476.

129. ILL. REV. STAT. ch. 38, ¶ 5-2(c) (1985).

130. *Peters*, 586 N.E.2d at 476.

131. *Id.*

132. *Id.*

133. 606 N.E.2d 1201 (Ill. 1992).

134. *Id.* at 1208.

135. Commonwealth v. Raposo, 413 Mass. 182, 183-84, 595 N.E.2d 773, 775 (1992).

136. *Peters*, 586 N.E. 2d at 1209 (citing *People v. Stanciel*, 606 N.E.2d 1201, 1209 (Ill. 1992)).

137. *Id.* at 1211.

guilt.[138] Justice O'Connor claimed that *State v. Williquette* was not analogous to *Raposo*, due to the fact that the Supreme Court of Wisconsin held that the mother could be prosecuted as a direct principal under the state's child abuse laws.[139] Though the Wisconsin Supreme Court did not consider the issue of whether the defendant was an aider or abettor to her husband's abuse of the children, the issue was considered by the Wisconsin Court of Appeals.[140] The court of appeals ruled that the mother's omission in not protecting her children, though under a duty to do so, "may aid [in] the execution of a crime."[141] The court held that probable cause existed for this charge and overruled the lower court's decision to dismiss the charge.[142] It appears that the *Raposo* Court could have considered the Wisconsin Court of Appeals decision to assist them in the contemplation of *Raposo*.

There are also arguments supporting the proposition that parental omissions to act should not be criminalized since the standards are insufficient to allow parents to conform their conduct to prevent criminal prosecution.[143] Justice Abrams suggests in her concurring opinion that the Massachusetts legislature should act in this area, noting, "[i]t is for the Legislature to determine whether expanding that duty by criminalizing acts of omission would better protect the Commonwealth's children."[144]

If the legislature accepts Justice Abrams's invitation, it may decide to act in a number of ways. It may enact a criminal child abuse statute which will proscribe affirmative infliction of harm to a child, and also proscribe acts of omission by persons held to a duty to act on behalf of children.[145] For example, the Iowa Criminal Code provides that a parent of a child under the age of eighteen is guilty of child endangerment if the parent permits physical or sexual abuse.[146] The statute also

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138. *Raposo*, 413 Mass. at 186 n.2, 595 N.E.2d at 776 n.2. In State v. Williquette, 385 N.W.2d 145 (Wis. 1986), a mother was convicted of two counts of child abuse when the facts showed that she was aware that her husband was severely beating their two children, but she did not take any steps to prevent the abuse. *Id.* at 155.

139. *Raposo*, 413 Mass. at 186, 595 N.E.2d at 776.

140. State v. Williquette, 370 N.W.2d 282, 283 (Wisc. Ct. App. 1985).

141. *Id.* at 284-85.

142. *Id.* at 283, 285.

143. Johnson, *supra* note 8, at 371-72. "Defendants have challenged the 'omission' statutes claiming that the language is so vague it does not provide sufficient notice of what constitutes the crime or requisite intent." *Id.* However, courts have decided that terms such as "duty of care" are sufficiently definite to be understood by a person of ordinary intelligence. *See, e.g.*, State v. Sammons, 391 N.E.2d 713, 715 (Ohio 1979).

144. *Raposo*, 413 Mass. at 192, 595 N.E.2d at 779 (Abrams, J., concurring).

145. *Id.* at 189-90, 595 N.E.2d at 778 (Abrams, J., concurring). *See generally id.* at n.1, 595 N.E.2d at 778 n.1.

146. IOWA CODE § 726.6 (1991).

has a provision providing for an affirmative defense if the parent would have to place him or herself in danger to stop the abuse.[147] Minnesota has a similar criminal statute proscribing acts of omission.[148] This statute also contains an affirmative defense provision to protect the parent from liability for inaction if he or she is in danger.[149]

Some state statutes criminalize the violation of a parent's duty of care or protection.[150] For example, Maine has a criminal statute prohibiting a parent from endangering the child by violating a parental duty of care.[151] Clearly Justice Abrams sounded the call to enact this type of legislation in Massachusetts.

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147. IOWA CODE § 726.6 (1991) provides:

> 1. A person who is the parent, guardian, or person having custody or control over a child or a mentally or physically handicapped minor under the age of eighteen, commits child endangerment when the person does any of the following: . . .
>
> > e. Knowingly permits the continuing physical or sexual abuse of a child or minor. However, it is an affirmative defense to this subsection if the person had a reasonable apprehension that any action to stop the continuing abuse would result in substantial bodily harm to the person or the child or minor . . . .

Id.

148. MINN. STAT. § 609.378 (1991).

149. *Id.* The pertinent section reads:

> Subdivision 1. Persons guilty of neglect or endangerment. The following people are guilty of neglect or endangerment . . . (2) [a] parent, legal guardian, or caretaker who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child . . . .
>
> Subdivision 2. Defenses. It is a defense to a prosecution under subsection 1 . . . that at the time of the neglect or endangerment there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the neglect or endangerment would result in substantial bodily harm to the defendant or child in retaliation.

Id.

150. Commonwealth v. Raposo, 413 Mass. 182, 189-91, 595 N.E.2d 773, 778-79 (1992).

151. ME. REV. STAT. ANN. tit. 17-A, § 554 (West 1983). "1. A person is guilty of endangering the welfare of a child if he: . . . otherwise knowingly endangers the child's health, safety or mental welfare by violating a duty of care or protection . . . ." *Id.*

The State of New Hampshire has a similar statute, N.H. REV. STAT. ANN. § 639:3 (1986). "I. A person is guilty of endangering the welfare of a child or incompetent if he knowingly endangers the welfare of a child under the age of 18 years of age or of an incompetent person by purposely violating a duty of care, protection or support . . . ." *Id.* This offense is a misdemeanor. *Id.*

V. CONCLUSION

The Supreme Judicial Court in *Raposo* reached the ultimate conclusion that Maria Raposo could not be convicted as an accessory before the fact.[152] She was not convicted despite having an advance knowledge of her boyfriend's intention to rape her daughter and her failure to report the crime.[153] The court rejected the Commonwealth's argument that the parental duty owed by the defendant to her minor daughter, when breached, "aids" the principal.[154]

The Commonwealth asked the court to infer the defendant's intent that the crimes be committed from her knowledge of the crimes and her intentional acts of omission.[155] While the Massachusetts Supreme Judicial Court refused to make this inference, other state courts in the United States have been willing to do so. The *Walden* Court in North Carolina found the parental intentional omission to be "consent and encouragement," sufficient to impose criminal liability as an accessory.[156]

Similarly, courts in New Mexico and Illinois have also found liability for parental omissions sufficient for accessory liability. These decisions have been made in the context of an increased willingness by other courts to decree criminal convictions in *Raposo*-type fact patterns.[157]

The concurring opinion by Justice Abrams raised a dilemma not considered in the majority opinion: Massachusetts is one of the few remaining states without a specific statute proscribing parental omissions in the criminal arena.[158] Justice Abrams delineates two types of statutes that may be considered for implementation.[159] A parental-omission statute may prohibit "acts of omission as well as affirmative infliction of harm to a child."[160] The other type of statute "expressly identif[ies] the crime as the violation of a duty of care."[161]

The necessity of a statute that fits into one of the two groups is twofold. The first reason is to allow Massachusetts to take affirmative actions to protect its children by prosecuting parents, or others in parental roles, who intentionally fail to protect their children from harm, though capable of safely doing so. The second rationale is to put

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152. *Raposo*, 413 Mass. at 189, 595 N.E.2d at 778.
153. *Id.*
154. *Id.* at 185-86, 595 N.E.2d at 776.
155. *Id.*
156. State v. Walden, 293 S.E.2d 780, 787 (N.C. 1982).
157. *See supra* notes 117-38 and accompanying text.
158. *Raposo*, 413 Mass. at 189, 595 N.E.2d at 778 (Abrams, J., concurring).
159. *Id.* at 189-91, 595 N.E.2d at 778-79 (Abrams, J., concurring).
160. *Id.* (Abrams, J., concurring).
161. *Id.* at 191, 595 N.E.2d at 779 (Abrams, J., concurring).

parents on notice that they have an affirmative duty to take reasonable steps to protect their children.

The legislature is now in the position to do its part to help eradicate the quandary in which the Commonwealth was placed in *Raposo*. A clear statute defining the duties of all parties involved, together with concrete punishment standards, is mandated.

APPENDIX

On December 28, 1993 Massachusetts Governor William Weld signed Chapter 340 of the Acts and Resolves of 1993 to amend Chapter 265 of the Massachusetts General Laws. The pertinent part of this amendment states: "[w]hoever, having care and custody of a child, wantonly or recklessly permits bodily injury to such child or wantonly or recklessly permits another to commit an assault and battery upon such child, which assault and battery causes bodily injury, shall be punished . . . ."[162] This amendment would not have assisted the prosecution in *Raposo* since a child is defined as a person under the age of fourteen.[163]

Raymond Mello

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162. 1993 Mass. Adv. Serv. ch. 340 (West), *to be codified at* MASS. GEN. LAWS ANN. ch. 265, § 13J(b) (West Supp. 1994). Bodily injury is described in the same statute as:

> substantial impairment of the physical condition including any burn, fracture of the bone, subdural hematoma, injury to any internal organ, any injury which occurs as the result of repeated harm to any bodily function or organ including human skin or any physical condition which substantially imperils a child's health or welfare.

Id. § 13J(a).

163. *Id.* § 13J(a).

NOTES

Regulation of Zoning Nonconformities in Massachusetts: The "Difficult and Infelicitous" Language of Section 6, Chapter 40A, Massachusetts Zoning Act

I. INTRODUCTION

The Massachusetts Court of Appeals used the words "difficult and infelicitous" to describe the language found in the first two sentences of Massachusetts General Laws Chapter 40A, section 6, the Zoning Act provision governing nonconforming structures and nonconforming uses.[1] This Note presents an examination of the interpretational problems presented by the first paragraph of section 6 of the Massachusetts Zoning Act. A review of the legislative history, culminating in the 1975 enactment of the Zoning Act, is followed by an analysis of the case law interpreting this section. Particular emphasis will be given to the effect of this section of the Zoning Act on the independent zoning authority of Massachusetts municipalities.[2]

From the inception of zoning legislation in Massachusetts, provision for existing structures and uses has been necessary in order to implement the legislation.[3] Existing uses and structures were exempt from

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1. Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 55, 484 N.E.2d 113, 115 (1985). Another appeals court wrote of this language, "[t]he first paragraph . . . contains an obscurity of the type which has come to be recognized as one of the hallmarks of the chapter." Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 20, 415 N.E.2d 369, 372 (1987).

2. Massachusetts is a "Home Rule" state; its local municipal police powers are exercised independent of express delegation from the state. *See infra* notes 32-35 and accompanying text.

3. This is necessarily so because "schemes for municipal improvement [may] not violate the rights of private property secured by the State and Federal Constitutions against public interference through the police power." Opinion of the Justices to the House of Representatives, 234 Mass. 597, 604, 127 N.E. 525, 528 (1920).

the first Massachusetts statute enacted to address municipal zoning.[4] Building structures and uses of property already in existence were given "lawful nonconforming status."[5] Historically, the statutory protection extended to nonconforming uses and structures was only applicable if they remained unaltered; any changes or alterations were subject to municipal regulation.[6] Structures and uses acquire the status of lawful "nonconformity" in various ways.[7] This Note focuses on when and under what procedures Massachusetts municipalities[8] are entitled to regulate nonconforming structures and uses. The regulation of nonconforming lots[9] will not be discussed, except in relation to nonconforming uses and structures. The present law governing municipal regulation of nonconforming structures and uses in Massachusetts was enacted in 1975 and is found in section 6 of Chapter 40A in the Massachusetts General Laws [hereinafter section 6].[10]

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4. An Act To Authorize Cities And Towns To Limit Buildings According To Their Use Or Construction To Specified Districts, ch. 601, § 7, 1920 Mass. Acts 665, 667 (codified at Mass. Gen. L. ch. 40, § 29 (1920)). Section 7 states: "This act shall not apply to existing structures nor to the existing use of any building . . . ." *Id.*

5. Martin R. Healy & Christine D. Hubbard, *Historical Development of Massachusetts Zoning Law, in* 1 MASSACHUSETTS ZONING MANUAL 1-1, 1-5 (Martin R. Healy & Robert W. Mack eds., 1989) [hereinafter Healy & Hubbard].

6. *See id.* at 1-5, 1-6. *See also infra* text accompanying note 18, the first Massachusetts statute addressing nonconforming uses and structures, and its progeny discussed *infra* Part II. For a discussion of the history of zoning legislation in Massachusetts, see Healy & Hubbard, *supra* note 5, 1-1 through 1-21 inclusive, and references cited therein.

7. *See* discussion *infra* Part III.

8. This Note deals with Massachusetts municipalities exclusive of Boston. Boston's zoning authority has been the subject of separate legislation since 1924. Healy & Hubbard, *supra* note 5, at 1-6. Boston's authority to regulate nonconforming uses and structures is provided for under §§ 4 and 5 of 1956 Mass. Acts, ch. 665 and specific regulations set forth in the "Boston Zoning Code." Robert A. Fishman & Marisa Lago, *Nonconforming Uses and Structures, in* 1 MASSACHUSETTS ZONING MANUAL 6-1 (Martin R. Healy & Robert W. Mack eds., 1989) (*revised* 1992) [hereinafter Fishman & Lago]. *See also* Kathy A. Faulk et al., *Special Zoning Acts: Boston, in* 2 MASSACHUSETTS ZONING MANUAL 16-1 (Martin R. Healy & Robert W. Mack eds., 1989) (*revised* 1992).

9. Nonconforming lots are parcels of property that do not conform to applicable zoning laws because they pre-existed such zoning. Examples include lots with deficient frontage requirements and lots with deficient area (i.e., 3500 square foot lot located in a district with a minimum lot size requirement of 4000 square feet). *See* MASS. GEN. L. ch. 40A, § 6 (1992) (fourth paragraph).

10. The Zoning Act, ch. 808, § 6, 1975 Mass. Acts 1112, 1119 (codified at MASS. GEN. L. ch. 40, § 6 (1992)). The portion of § 6 with which this Note is concerned is the first two sentences of the first paragraph, defining, and governing municipal regulation of, nonconforming uses and nonconforming structures. This portion is set out below.

Part II reviews the legislative history of section 6. Part III discusses the definitional and procedural problems under section 6 that are common to the regulation of both nonconforming uses and nonconforming structures. Nonconforming uses are discussed in Part IV, while nonconforming structures are addressed in Part V. Single and two-family residential structures, discussed in Part VI, are distinguished from other nonconforming structures.[11] Emphasis is given to recent developments in the law and their practical implications on local municipal authorities in Massachusetts.

II. LEGISLATIVE HISTORY

Article 60, Amendments to the Constitution of Massachusetts, gave the general court the "power to limit buildings according to their use or construction to specified districts of cities and towns."[12] Amendment 60 provided a "clear mandate . . . for comprehensive zoning controls on a statewide basis."[13] By enacting zoning enabling legislation, the general court expressly delegated the "state's police power[14] to

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> Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.

MASS. GEN. L. ch. 40A, § 6 (1992).

11. Single and two-family residential structures are afforded separate treatment by the second "except" clause of the first sentence in § 6. *See supra* note 10 and discussion on single and two family residential structures *infra* Part VI.

12. Opinion of the Justices to the House of Representatives, 234 Mass. 597, 601, 127 N.E. 525, 527 (1920) (quoting MASS. CONST. art. 60 (1918)). "Amendment 60 declares a principle, not a specification of details. It is brief, plain and ample in its grant of power." *Id.* at 601, 127 N.E. at 527.

13. Healy & Hubbard, *supra* note 5, at 1-5.

14. "Police Power" is defined as "[t]he power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity." BLACK'S LAW DICTIONARY 801 (6th ed. 1990).

Massachusetts municipalities for zoning purposes."[15] Pursuant to this delegation of authority, zoning regulations were eventually adopted by each municipality.[16]

The first zoning enabling legislation was adopted in 1920.[17] Existing uses and structures were exempted from compliance with the new zoning laws in section seven of this Act, which provided:

> This act shall not apply to existing structures nor to the existing use of any building, but it shall apply to any alteration of a building to provide for its use for a purpose, or in a manner, substantially different from the use to which it was put before the alteration.[18]

The Supreme Judicial Court clarified that section 7 recognized "rights already acquired by existing use or construction of buildings in general ought not to be interfered with."[19]

In 1927 the class of structures and uses entitled to protection from new zoning regulations was enlarged by adding an amendment to the 1920 Act allowing those structures and uses of property subject to a building permit the benefit of a "zoning freeze."[20] By freezing the current zoning regulations, the subject matter of the building permit was protected from subsequently adopted zoning regulations which would otherwise apply.[21]

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15. Healy & Hubbard, *supra* note 5, at 1-1. "[M]unicipalities were treated as subordinate instrumentalities of state government without inherent powers of self-government and devoid of any authority absent an express delegation of power from the state." *Id.* (citations omitted).

16. Healy & Hubbard, *supra* note 5, at 1-5. Every municipality in Massachusetts has adopted either Town Zoning By-Laws or City Zoning Ordinances, depending on their form of government. *Id.* "[T]he two systems of government for municipalities . . . have prevailed for a century in this Commonwealth." *Opinion of the Justices*, 234 Mass. at 606, 127 N.E. at 529.

17. An Act To Authorize Cities And Towns To Limit Buildings According To Their Use Or Construction To Specified Districts, ch. 601, 1920 Mass. Acts 665 (codified at MASS. GEN. L. ch. 40, §§ 25-30A (1920)).

18. An Act To Authorize Cities and Towns To Limit Buildings According To Their Use Or Construction To Specified Districts, ch. 601, § 7, 1920 Mass. Acts 665, 667 (codified at MASS. GEN. L. ch. 40, § 29 (1920)).

19. *Opinion of the Justices*, 234 Mass. at 606, 127 N.E. at 529 (citation omitted).

20. A "zoning freeze" effectuates just what it implies–it freezes the applicable zoning regulations and insulates the subject of the building permit, thereafter entitled to "nonconforming" status, from compliance with any subsequently adopted zoning regulations. *See generally*, Bart J. Gordon, *Zoning Freezes*, 1 MASSACHUSETTS ZONING MANUAL 7-1 (Martin R. Healy & Robert W. Mack eds., 1989) (*revised* 1992).

21. Healy & Hubbard, *supra* note 5, at 1-7. Building permits were entitled to a zoning freeze if "(a) notice of the proposed amendment had not been given before issuance of the permit, and (b) construction work under the permit commenced within six months after issuance of the permit." *Id.* (citation omitted). *See* An Act Relative To The Effect On Prior Permits Of The Adoption Or Modification Of Zoning Ordinances And By-Laws, ch. 247, 1927 Mass. Acts 252 (codified at MASS.

The 1920 zoning legislation was completely recodified in 1933.[22] The provision governing nonconforming uses and structures was revised as follows:

> Such an ordinance or by-law or any amendment thereof shall not apply to existing buildings or structures, nor to the existing use of any building or structure, or of land to the extent to which it is used at the time of adoption of the ordinance or by-law, but it shall apply to any change of use thereof and to any alteration of a building or structure when the same would amount to reconstruction, extension or structural change, and to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent.[23]

The 1933 enactment was a major revision of the initial 1920 provision.[24] The 1933 provision has remained substantively intact and is very similar to the modern provision governing nonconforming uses and structures today.[25] The 1927 amendment which gave zoning freeze protection to building permits issued before notification of a proposed change in zoning, was retained in the 1933 recodification.[26]

In 1954 the zoning legislation was again recodified and placed in a new, separate chapter of Massachusetts General Laws entitled the Zoning Enabling Act.[27] The Zoning Enabling Act clarified the 1933 Act, "but discarded little of the earlier law."[28] In fact, the 1933 provision for nonconforming uses and structures was inserted into the 1954 Act, nearly verbatim.[29] Section five of the 1954 Act, which governed

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GEN. L. ch. 40, § 30 (1927)).

22. An Act Revising The Municipal Zoning Laws, ch. 269, 1933 Mass. Acts 419 (codified at MASS. GEN. L. ch. 40, §§ 25-30 (1933)) (later amendments added §§ 30A and 30B).

23. An Act Revising The Municipal Zoning Laws, ch. 269, § 26, 1933 Mass. Acts 419, 420 (codified at MASS. GEN. L. ch. 40, § 26 (1933)).

24. *See supra* text accompanying note 18 for comparison.

25. *Compare* the 1933 version, *supra* text accompanying note 23, *with* the 1975 version, *supra* note 10.

26. *See* An Act Revising The Municipal Zoning Laws, ch. 269, § 28, 1933 Mass. Acts 419, 421 (codified at MASS. GEN. L. ch. 40, § 28 (1933)).

27. The Zoning Enabling Act, ch. 368, 1954 Mass. Acts 244 (codified at MASS. GEN. L. ch. 40A, §§ 1-22 (1954)).

28. Healy & Hubbard, *supra* note 5, at 1-10. "The legislation apparently proceeds upon the premise that the subject of zoning is of such importance that it should be treated in a separate chapter of the General Laws." *Id.* (quoting Op. Att'y Gen. 62 (1954)).

29. *Compare supra* text accompanying note 23 *with* the 1954 provision for nonconforming uses and structures:

> Except as provided in section eleven, a zoning ordinance or by-law or any amendment thereof shall not apply to existing buildings or structures, nor to the existing use of any building or structure, or of land to the extent to which it is used at the time of adoption of the ordinance or by-law, but it

nonconforming uses and structures is the immediate predecessor of section 6 in the 1975 Act, the provision currently in force. Although these two provisions are substantially similar in many respects,[30] the 1975 provision did incorporate some important changes.[31] Before examining these changes, a brief review of events leading to the adoption of the 1975 zoning legislation follows.

In the intervening period between 1954 and 1975, an important event occurred that sets the 1975 enactment apart from all previous Massachusetts zoning legislation. In 1966, the Massachusetts voters adopted Article 89 of the Amendments to the Constitution of Massachusetts, commonly referred to as the "Home Rule Amendment."[32] Prior to the adoption of the Home Rule Amendment, "municipalities had no authority to impose zoning controls without a specific delegation of authority from the state."[33] The Home Rule Amendment gave municipalities authority to exercise the police powers of the state absent a specific delegation of that authority; limited only by inconsistent state law or the state's preemptory exercise of that authority.[34] Recognition

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> shall apply to any change of use thereof and to any alteration of a building or structure when the same would amount to reconstruction, extension or structural change, and to any alteration of a building or structure to provide for its use for a purpose or in a manner substantially different from the use to which it was put before alteration, or for its use for the same purpose to a substantially greater extent.

The Zoning Enabling Act, ch. 368, § 5, 1954 Mass. Acts 244, 245 (codified at MASS. GEN. L. ch. 40A, § 5 (1954)). The only difference between the 1933 and 1954 versions is the reference to "section eleven" in the 1954 version. Section 11 incorporated the prior provisions giving building permits, issued before notice of proposed zoning changes, the benefit of a zoning freeze. *See* The Zoning Enabling Act, ch. 368, § 11, 1954 Mass. Acts 244, 247.

30. *Compare supra* note 29, old chapter 40A, § 5, *with supra* note 10, present chapter 40A, § 6.

31. *See infra* notes 45-67 and accompanying text.

32. Healy & Hubbard, *supra* note 5, at 1-2. *See also* MASS. CONST. amend. art. 2, *amended by* MASS. CONST. amend. art. 89 (1966).

33. Martin R. Healy, *Massachusetts Zoning Practice Under the Amended Zoning Enabling Act*, 64 MASS. L. REV. 157, 157 (1979) [hereinafter Healy, *Massachusetts Zoning Practice*]. *See also supra* note 15.

34. Healy, *Massachusetts Zoning Practice*, *supra*, note 33, at 157. Section 6 of the Home Rule Amendment states:

> Governmental Powers of Cities and Towns. Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter.

MASS. CONST. amend. art. 2, § 6.

of independent municipal authority under the Home Rule Amendment was reflected in the 1975 Zoning Act, so entitled because it was no longer viewed as "enabling" legislation.[35]

In 1967, the year following the adoption of the Home Rule Amendment, the general court directed the Massachusetts Department of Commerce and Development, Division of Planning, with the assistance of an advisory committee, to investigate and draft new legislation for a revision of the Zoning Enabling Act.[36] The Department of Community Affairs (DCA) succeeded to the Division's responsibilities and pursuant to the mandate of the general court, promulgated a report on Massachusetts zoning practices with proposed new legislation (DCA 1972 Report).[37] The DCA 1972 Report "comprehensively revised and reorganized . . . [Chapter 40A of the General Laws] to provide the cornerstone of present Massachusetts zoning practice."[38] The DCA 1972 Report, along with other zoning related reports and petitions, was referred to the Joint Committee on Urban Affairs of the General Court with instructions to "investigate and study" the documents and propose new legislation by the end of 1972.[39] The Joint Committee retained charge of the project until eventual passage of the new legislation in 1975.[40] The Governor signed the final bill[41] on December 22, 1975, declaring the act "emergency law," effective immediately.[42]

The DCA 1972 Report is the starting point of the legislative history of the 1975 Zoning Act, and is often relied upon by courts as an

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35. Healy, *Massachusetts Zoning Practice, supra* note 33, at 157. Section 2A of Chapter 808, 1975 Mass. Acts states:

> The purposes of this act are to facilitate, encourage, and foster the adoption and modernization of zoning ordinances and by-laws by municipal governments in accordance with the provisions of Article 89 of the Amendments to the Constitution and to achieve greater implementation of the powers granted to municipalities thereunder.

The Zoning Act, ch. 808, § 2A, 1975 Mass. Acts 1112, 1114.

36. Healy & Hubbard, *supra* note 5, at 1-15. *See also* Hunters Brook Realty Corp. v. Zoning Board of Appeals of Bourne, 14 Mass. App. Ct. 76, 81 n.8, 436 N.E.2d 978, 982 n.8 (1982).

37. Healy & Hubbard, *supra* note 5, at 1-15. The Department of Community Affairs submitted a formal report to the legislature. *See* 1972 House Doc. No. 5009 (The Report of the Department of Community Affairs Relative to Proposed Zoning Changes and Additions to the Zoning Enabling Act) [hereinafter DCA 1972 Report].

38. Healy & Hubbard, *supra* note 5, at 1-16.

39. *Id. See also* 1972 House Doc. No. 6001.

40. See Healy & Hubbard, *supra* note 5, at 1-16, 1-17 for a complete overview of the legislative history and all intervening events between 1972 and 1975 when the final act was passed.

41. *See* 1975 House Doc. No. 5600.

42. Healy & Hubbard, *supra* note 5, at 1-17.

interpretational aid to the statute.[43] Additionally, courts rely on case law under the old Zoning Enabling Act, because the 1975 Zoning Act, "[i]n many instances . . . codifies judicial interpretation of the old law."[44]

The remainder of this Part is devoted to a brief overview of the changes in section 6 effected by the 1975 enactment. There were two major additions to the 1975 provision for nonconforming uses and structures.[45] The first addition was the second "except" clause, which specifically addresses single and two-family residential structures.[46] There was no identifiable equivalent to this clause in the 1954 provision.[47] This clause appears to afford greater leniency to nonconforming single and two-family residential structures; a proposition closely scrutinized in Part VI of this Note.

The second addition was the provision found in the second sentence of section 6, allowing for change, extension, or alteration of nonconforming uses or structures upon a "finding" by the permit (or special permit) granting authority.[48] Provision for "change, extension or alteration" was not present in any predecessors of section 6. Instead, the earlier provisions prescribed the "minimum tolerance" to be afforded nonconforming uses and structures, the goal being their eventual elimination.[49] The "finding" provision originated in the 1972 Depart-

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43. *See, e.g.*, Shrewsbury Edgemere Assoc. v. Board of Appeals of Shrewsbury, 409 Mass. 317, 320, 565 N.E.2d 1214, 1216 (1991); Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32, 37, 574 N.E.2d 424, 428 (1991); Hunters Brook Realty Corp. v. Zoning Board of Appeals of Bourne, 14 Mass. App. Ct. 76, 81, 436 N.E.2d 978, 982 (1982).

44. *Massachusetts Zoning Practice, supra* note 33, at 157. Healy also includes this caveat, "[T]he new zoning act departs from the old act in some particulars, and the continuing value of the case law under the old act must be carefully considered in its specific context." *Id.*

45. The Zoning Act, ch. 808, § 6, 1975 Mass. Acts 1112, 1119.

46. *See* § 6, *supra* note 10, "[E]xcept where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure." MASS. GEN. L. ch. 40A, § 6 (1992).

47. *See supra* note 29. *See also* Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 18, 514 N.E.2d 369, 371 (1987).

48.

> Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or special permit granting authority . . . that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.

MASS. GEN. L. ch. 40A, § 6 (1992).

49. *See, e.g.*, Chilson v. Zoning Board of Appeal of Attleborough, 344 Mass. 406, 411, 182 N.E.2d 535, 539 (1962); Inspector of Buildings of Burlington v. Murphy, 320 Mass. 207, 209, 68 N.E.2d 918, 919 (1946). *See also* DCA 1972 Report, *supra*

ment of Community Affairs Report to the House of Representatives.[50] The Department of Community Affairs acknowledged in their 1972 Report, "the assumption [that] it is desirable to eliminate non-conforming uses may not always be valid."[51] The Department of Community Affairs recommended that "the enabling act explicitly recognize the validity of regulations which authorize . . . a change of use upon application to the board of appeals, after a showing that the proposed change of use will be less detrimental to the neighborhood than the existing use."[52] The finding requirement in the second sentence of section 6, adopted language similar to the DCA recommendation.[53] This recommendation resulted from the Department's conclusion that eventual elimination of nonconforming uses may not always be desirable.[54] The Department gave the example of a neighborhood grocery store, which if located in a residential district would be a nonconforming use, and which "may serve a highly useful function and in many cases would probably be located by special permit if it did not already exist as a non-conforming use."[55] The "finding" provision will be discussed in more detail in Part III.[56]

Apart from the additions discussed above, there were less conspicuous changes effected by section 6 of the 1975 Zoning Act. In the 1954 version (old Chapter 40A), building permits were not covered in the section addressed to nonconforming uses and nonconforming structures.[57] In the 1975 Act, building permits were not treated separately, they were incorporated into section 6.[58] In old Chapter 40A, both

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note 37, at 39 ("There is unanimity of opinion among zoning and planning authorities that the ultimate objectives of zoning would be furthered by the eventual elimination of nonconformities in most cases.")

50. DCA 1972 Report, *supra* note 37. Section IV of the DCA 1972 Report, entitled "Non-Conforming Uses," is found at pages 35-47 inclusive. Corresponding proposed new legislation is found in the Appendix of the Report at pages 88-92.

51. DCA 1972 Report, *supra* note 37, at 43.

52. *Id.* at 44. *See also* Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32, 38, 574 N.E.2d 424, 428 (1991) (quoting from the DCA 1972 Report).

53. *Compare* note 48 *with* text accompanying note 52.

54. DCA 1972 Report, *supra* note 37, at 43.

55. *Id.*

56. *See infra* notes 97-130 and accompanying text.

57. *See supra* note 29 and *infra* note 59. In the Zoning Enabling Act, § 5 addressed nonconforming uses and nonconforming structures, with reference to § 11. Section 11 dealt specifically with permits. *See* The Zoning Enabling Act, ch. 368, § 11, 1954 Mass. Acts 244, 247.

58. Section 6 states:

> Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures and uses lawfully in existence or lawfully begun, or to a *building or special permit* issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply . . . .

sections 5 and 11 clearly stated that the exemption or protection afforded was from zoning ordinances or by-laws, and *amendments* thereof.[59] In the 1975 Act, section 6 deleted any reference to amendments.[60] However, new section 6 makes reference to section 5,[61] prescribing the procedure to be used for adopting or amending zoning ordinances or by-laws.[62] Thus, although an argument could be made that nonconforming uses and structures and issued permits should comply with new zoning amendments,[63] the courts have interpreted the reference to section 5 as a legislative intention to extend protection to zoning amendments, as well as adoption of new zoning by-laws and ordinances in their entirety.[64]

In section 5 of old Chapter 40A, the time at which a use or structure must have been in existence was prior to the "adoption of the ordinance or by-law."[65] In new section 6, the operative time before which a use or structure must have been in existence became prior to "the first publication of notice of the public hearing" on any proposed change in zoning.[66] Thus, the section 6 reference to "structures or uses lawfully in existence or lawfully begun"[67] refers only to those in existence or begun before "the first publication of notice," which may exclude

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MASS. GEN. L. ch. 40A, § 6 (1992) (emphasis added). Old § 11 dealt with "any permit issued," therefore, it included special permits, the same as section 6. *See infra* note 59.

59. Sections 5 and 11 of old Chapter 40A state:

> Section 5. Except as provided in section eleven, a zoning ordinance or by-law or any amendment thereof shall not apply to existing buildings or structures, nor to the existing use of any building or structure . . . at the time of adoption of the ordinance or by-law . . . .

The Zoning Enabling Act, ch. 368, § 5, 1954 Mass. Acts 244, 245.

> Section 11. In a city, no zoning ordinance or amendment thereof shall affect any permit issued . . . before notice of hearing . . . and, in a town, no zoning by-law or amendment thereof shall affect any permit issued . . . before notice of hearing . . . .

The Zoning Enabling Act, ch. 368, § 11, 1954 Mass. Acts 244, 247.

60. *See infra* text accompanying note 69. *See also* William C. Hays, *Application of Chapter 808 to Existing Structures, Uses, Plan [sic] Variances and Permits*, 22 B.B.J. 4, 17, 17-18 No. 4 (1978) [hereinafter Hays].

61. *See infra* text accompanying note 69.

62. *See* MASS. GEN. L. ch. 40A, § 5 (1992).

63. Hays, *supra* note 60, at 18.

64. *See, e.g.*, Mendes v. Board of Appeals of Barnstable, 28 Mass. App. Ct. 527, 529 n.6, 552 N.E.2d 604, 605 n.6 (1990).

65. *See* § 5 of old Chapter 40A, *supra* note 29.

66. *See infra* text accompanying note 69. *See also* Hays, *supra* note 60, at 18 (Hays notes this change but does not attach any significance to it.).

67. *See infra* text accompanying note 69. *See also* Hays, *supra* note 60, at 18. Hays notes that old § 5 did not contain the term "lawfully," but states that courts had previously tacked on a requirement of "lawfulness" anyway.

structures and uses which predate the actual adoption of the new ordinance or by-law. The practical implications of this change are probably insignificant. The more significant changes effected by section 6 have had a myriad impact on regulatory procedure.

III. DEFINITIONS AND PROCEDURES UNDER CHAPTER 40A, SECTION 6

Section 6 of the Zoning Act[68] consists of several paragraphs; this Note is specifically addressed to the first two sentences of the first paragraph, set out below.

> Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses *lawfully* in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent *except* where alteration, reconstruction, extension or structural change to a *single or two family residential* structure *does not increase the nonconforming nature of said structure.* Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a *finding* by the permit granting authority or the special permit granting authority designated by ordinance or by-law that such change, extension or alteration *shall not be substantially more detrimental* than the existing nonconforming use to the neighborhood.[69]

Section 6 protects nonconforming uses and structures by exempting them from compliance with applicable zoning requirements.[70] "Under Massachusetts law, the right to continue a nonconforming use [or structure] is not confined to the existing user, but runs with the land."[71]

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68. MASS. GEN. L. ch. 40A, § 6 (1992).

69. MASS. GEN. L. ch. 40A, § 6 (1992) (emphasis added).

70. Fishman & Lago, *supra* note 8, at 6-4.

71. Derby Refining Company v. City of Chelsea, 407 Mass. 703, 708, 555 N.E.2d 534, 538 (1990). *See also* Sullivan v. Board of Appeals of Harwich, 15 Mass. App. Ct. 286, 290, 445 N.E.2d 174, 177 (1983) ("[A] nonconforming use is not extinguished by a transfer of property.") (citation omitted); City of Revere v. Rowe Contracting Co., 362 Mass. 884, 885, 289 N.E.2d 830, 831 (1972) ("The right to continue such a nonconforming use after adoption of zoning regulations is not personal to the particular owner or occupant on the effective date of the regulation.")

A. *Nonconforming Uses and Nonconforming Structures Defined*

In general, nonconforming structures and uses[72] evolve in one of two ways. First, any use or structure which was lawfully in existence or lawfully begun prior to the existence of a zoning ordinance or by-law, with which the use or structure does not comply, will be given lawful "nonconforming" status.[73] A simple working definition was given by the Massachusetts Court of Appeals in *Mendes v. Board of Appeals of Barnstable.*[74] The *Mendes* Court stated "a use [or structure] achieves the status of nonconformity for statutory purposes if it precedes the coming into being of the zoning regulation which prohibits it."[75] In another instance, the Massachusetts Court of Appeals clarified further, "[t]he existence of a nonconforming use [or structure] is determined as of the date of the 'first publication of notice of the public hearing on [the] law.'"[76] To determine whether a structure or use, not in compliance with current zoning requirements, is either lawfully noncomplying (nonconforming status) or illegally noncomplying, one must examine all successively applicable zoning requirements since the structure or use

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72. The term "nonconforming" refers to structures or uses not in compliance with current zoning requirements; however, this noncompliance is lawful. In contrast, a structure or use may be illegally noncomplying with current zoning requirements because it is not entitled to the protection under "nonconforming" status. Fishman & Lago, *supra* note 8, at 6-4.

73. *Id.* at 6-1, 6-2. *See also* 1972 DCA Report, *supra* note 37, at 35, suggesting that "nonconforming" is a generic term used to describe a variety of situations.

1) Nonconforming buildings—*e.g.*, a preexisting structure which does not meet setback or other dimensional regulations of the ordinance.
2) Nonconforming use of conforming buildings—*e.g.*, commercial use of conforming dwelling in residential zone.
3) Nonconforming use of nonconforming buildings—*e.g.*, neighborhood grocery store in residential zone.
4) Nonconforming use of land—*e.g.*, non-accessory parking lot in residential zone.
5) Conforming structure on nonconforming lot, the boundaries of which were created prior to the adoption of the ordinance or amendment—*e.g.*, a residence located on a 4,000 square foot lot where the minimum lot size for residential use is 5,000 square feet.

1972 DCA Report, *supra* note 37, at 35.

74. 28 Mass. App. Ct. 527, 552 N.E.2d 604 (1990).

75. *Id.* at 529-30, 552 N.E.2d at 605-06.

76. Tamerlane Realty Trust v. Board of Appeals of Provincetown, 23 Mass. App. Ct. 450, 454, 503 N.E.2d 464, 467 (1987) (quoting MASS. GEN. L. ch. 40A, § 6). The *intention* to commence a use, even as evidenced by a license for such use, is insufficient; there must be actual use before notice of the restrictive zoning regulation in order to qualify for the protections accompanying nonconforming status. *Id.* at 455, 503 N.E.2d at 467 (and cases cited therein). *See also* Fishman & Lago, *supra* note 8, at 6-3.

was first established.[77] If at any time after the structure or use was established it complied with applicable zoning requirements, and was thereafter rendered nonconforming by a zoning enactment, from that point forward the structure or use has lawful nonconforming status, as long as it is not abandoned,[78] or impermissibly altered.[79]

Second, a structure or use may obtain lawful "nonconforming" status if subject to one of several types of zoning freezes provided for in section 6.[80] This category includes structures and uses made of property under a building permit or special permit.[81] A nonconforming use or nonconforming structure thus created may exist in perpetuity, provided there is no change, alteration or extension to the nonconformity without the appropriate "finding" requirement as contemplated by the first paragraph of section 6.[82]

Thus, nonconforming uses and nonconforming structures, practically speaking, evolve in one of two ways. The use or structure either preexists the regulation with which it does not comply, or the use or structure is the subject of a zoning freeze which entitles it to noncon-

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77. *Massachusetts Zoning Practice, supra* note 33, at 160.

78. The third paragraph of section 6 states: "A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more." MASS. GEN. L. ch. 40A, § 6 (1992) (third paragraph).

79. *Massachusetts Zoning Practice, supra* note 33, at 160. Whether a use has been "impermissibly altered" is determined by the "Powers Tests." *See infra* Part IV, "Regulation of Nonconforming Uses."

80. The fourth paragraph of § 6 contemplates a five-year freeze applicable to lots for single- and two-family residential use which become subject to increases in area, frontage, width, yard or depth requirements by new zoning. MASS. GEN. L. ch. 40A, § 6 (1992).

The fifth paragraph of § 6 provides an eight-year freeze on zoning regulations applicable to preliminary and definitive subdivision plans submitted under Mass. Gen. L. ch. 41, §§ 81K-81GG, known as the Subdivision Control Law. MASS. GEN. L. ch. 40A, § 6 (1992), *amended by* Act of June 28, 1982, ch. 185, 1982 Mass. Acts 416.

The sixth paragraph of § 6 applies to "approval not required" (ANR) plans, submitted under MASS. GEN. L. ch. 41, § 81P, and provides a three-year zoning freeze only on those regulations affecting "use" of the land shown on the proposed plan. MASS. GEN. L. ch. 40A, § 6 (1992). *See generally* Gordon *Zoning Freezes, in* 1 MASSACHUSETTS ZONING MANUAL, *supra* note 20.

81. MASS. GEN. L. ch. 40A, § 6 (1992). See the first sentence of the first paragraph, and the second paragraph of § 6, requiring that construction under the building or special permit commence within six months and "continue[] through to completion as continuously and expeditiously as is reasonable." *Id.*

82. This statement requires further qualification. *See* "The Section 6 Finding Requirement," *infra* text accompanying notes 97-130. The Department of Community Affairs recommended that the new zoning act recognize the validity of local regulations providing for amortization of nonconforming uses and structures, recognizing that other jurisdictions had successfully provided for "the termination of nonconforming uses at the end of the economic life of the use." DCA 1972 Report, *supra* note 37, at 45-46. *See also* the DCA's draft of § 6 in the appendix of the report at 88-92. The legislature declined to adopt this recommendation.

forming status. Nevertheless, there has been confusion concerning the genesis of nonconformities; enough to incite litigation and compel the attention of Massachusetts courts.

In *Shrewsbury Edgemere Assoc. v. Board of Appeals of Shrewsbury*,[83] the Supreme Judicial Court clarified whether a use is entitled to "nonconforming" status when that use is currently permitted by special permit. The court agreed with the Land Court judge's ruling that "a use permitted as of right prior to the adoption or subsequent amendment of a by-law and thereafter only by a special permit constitutes a nonconforming use."[84] The relevance of the classification is clear; if the use in this case were not entitled to nonconforming status, the owner would be coerced into applying for a special permit to continue the same use of his property legally.

A use or structure may be in lawful noncompliance with current zoning regulations without being classified as "nonconforming."[85] Such uses and structures are legal because they are the subject of a special permit or variance. This category created additional confusion as evidenced by the following case.

The Appeals Court in *Mendes v. Board of Appeals of Barnstable*[86] ruled that a use that commences pursuant to a "use variance" is *not* considered a lawful nonconforming use.[87] The court stated, "the question is not merely whether the use is lawful but how and when it became lawful."[88] A use which is located subject to a use variance is lawful, but it is not classified as nonconforming.[89] This distinction was pivotal in the *Mendes* case. The owners of the locus wanted to add an addition onto their building (a construction business located in a residential district)

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83. 409 Mass. 317, 565 N.E.2d 1214 (1991).

84. *Id.* at 319, 565 N.E.2d at 1216 (quoting the Land Court judge's ruling).

85. *See supra* note 72. Three situations have now been identified: (1) nonconforming structures and uses, which are legally noncomplying with current zoning requirements; (2) structures and uses in illegal noncompliance with current zoning requirements; and (3) structures and uses which although not entitled to "nonconforming" status, are nonetheless legally noncomplying with current zoning requirements. The latter structures and uses are the subject of a special permit or variance.

86. 28 Mass. App. Ct. 527, 552 N.E.2d 604 (1990).

87. *Id.* at 530-31, 552 N.E.2d at 606. The court noted that since the time the owners had first begun the use on the locus, the town had not adopted any by-law amendments that further restricted or altered the use restrictions which had "at all times been impressed on the locus." *Id.* at 530, 552 N.E.2d at 606. The court neglected to address the issue they opened if there had been a change in the use restrictions affecting the locus, would the use have obtained nonconforming status at that point?

88. *Id.* at 531, 552 N.E.2d at 606.

89. *Id.* at 527, 552 N.E.2d at 604 (statement of the broad holding of the case).

and were foreclosed from doing so by obtaining another variance.[90] The only other avenue was to pursue a special permit under the zoning by-law addressed to extensions of a nonconforming use.[91] Not qualifying as a nonconforming use, the owners were left with no alternatives. Perhaps because the court's decision worked such a hardship in this case, it felt compelled to give further explanation. The court of appeals stated that "[v]ariance procedures presuppose the prohibition of the use sought and operate as a safety valve to relieve an owner . . . from the hardship of compliance with a zoning regulation . . . ."[92] Given this, the court deduced that "it would be anomalous if a variance . . . functioned as a launching pad for expansion of a nonconforming use."[93] The court noted that the variance procedure is demanding (variances are difficult to obtain), whereas by comparison, the special permit procedure presupposes the allowance of certain uses in accordance with fairly flexible criterion.[94] Finally the court reasoned that the legislature would not have intended section 6 "to authorize the expansion of uses having their genesis in a variance pursuant to the more generous standard applicable to a special permit."[95]

This case suggests that if the local law designates a special permit procedure for change, extension, or alternation of a nonconforming structure or use, then the appropriate procedure for making the statutory finding is the same as any other special permit. This possibility will be further explored in the next section.[96] The appropriate procedure for making the required finding under section 6 was not clearly dictated by the legislature. The "finding provision" has given rise to several interpretive issues.

B. *The Section 6 "Finding" Requirement*

The first sentence of section 6 prescribes the minimum tolerance to be afforded nonconforming uses and structures.[97] The second sentence

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90. *Id.* at 527-28, 552 N.E.2d at 604. The owners could not obtain another variance in 1985 because in 1983 the town amended their by-laws to provide that no use variances could be granted in a particular area which included the owners' locus. *Id.* Arguably, this fact contradicted what the court later referred to when it spoke of a "by-law amendment which further restricts or alters the use restrictions . . . on the locus." *Id.* at 530, 552 N.E.2d at 606. *See supra* note 87.

91. *Mendes*, 28 Mass. App. Ct. at 528, 552 N.E.2d at 605.

92. *Id.* at 531, 552 N.E.2d at 606.

93. *Id.*

94. *Id.*

95. *Id.* at 531-32, 552 N.E.2d at 606-07.

96. *See infra* text accompanying notes 121-31 and 134-42.

97. *See supra* text accompanying note 69. According to the first sentence of § 6, the minimum tolerance afforded is to allow the existence of preexisting structures and uses indefinitely, without change, extension or alteration. *See supra* note 49 and accompanying text.

adds a new component, explicitly recognizing the authority of municipalities to allow change, extension or alteration to preexisting nonconformities.[98] The second sentence describes a procedure whereby a nonconforming use or structure may be extended or altered upon a "finding" by the permit granting authority (PGA) or the special permit granting authority (SPGA) designated by the ordinance or by-law, that the change, extension, or alteration will not result in substantially more detriment to the neighborhood.[99]

The language in the second sentence creates various problems of statutory construction. An ambiguity in the language is illustrated below.

> Pre-existing *nonconforming structures or uses* may be extended or altered, provided, that no such extension or alteration should be permitted unless there is a finding by the permit granting authority . . . that such change, extension or alteration shall not be substantially more detrimental than the existing *nonconforming use* to the neighborhood.[100]

If the granting authority is required to make a finding regarding a nonconforming structure, the difficulty is obvious. The granting authority would be required to compare a structure to a use, or as one commentator put it, "there is an apples-compared-to-oranges problem."[101] This ambiguity was resolved by the appeals court in *Willard v. Board of Appeals of Orleans*.[102] The *Willard* Court concluded, "in order to render [the] statute intelligible and so effectuate its obvious intent [the above quoted portion must read] as follows: 'shall not be substantially more detrimental than the existing nonconforming *structure or* use to the neighborhood.'"[103]

Another ambiguity presented by this provision is whether municipalities are required to provide a mechanism for allowing changes in nonconforming structures and uses, (i.e., adoption of an appropriate by-law or ordinance) because the provision mandates it upon the requisite "finding," or whether they are free to forbid changes.[104] This question was answered by the appeals court in *Blasco v. Board of Appeals of Winchendon*.[105] In this case, Mabardy Washed Sand and Gravel, Inc.

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98. *See supra* notes 51-55 and accompanying text.
99. *See supra* text accompanying note 69.
100. MASS. GEN. L. ch. 40A, § 6 (1992) (emphasis added).
101. *See* Hayes, *supra* note 60, at 19.
102. 25 Mass. App. Ct. 15, 514 N.E.2d 369 (1987).
103. *Id.* at 21, 514 N.E.2d at 373 (quoting MASS. GEN. L. ch. 40A, § 6).
104. Fishman & Lago, *supra* note 8, at 6-18.
105. 31 Mass. App. Ct. 32, 574 N.E.2d 424 (1991). Prior to this case, two previous appeals court decisions had recognized this issue but did not resolve it. *See* Murray v. Board of Appeals of Barnstable, 22 Mass. App. Ct. 473, 477 n.9, 494 N.E.2d 1364, 1367 n.9 (1986); Sullivan v. Board of Appeals of Harwich, 15 Mass. App. Ct. 286, 290 n.2, 445 N.E.2d 174, 177 n.2 (1983).

(Mabardy) applied to the Winchendon Board of Appeals (Board) for a special permit to "change its nonconforming use from a gravel removal operation to a demolition landfill."[106] The Board determined that the "proposed use would not be more detrimental to the neighborhood than the preexisting use" (the required statutory "finding") and therefore issued the special permit.[107] The *Blasco* Court first determined that the Winchendon by-law did not authorize the Board to grant the special permit, because a landfill was not on the schedule of permitted uses and the by-law did not authorize a "change" from one nonconforming use to another nonconforming use; it only authorized "alteration" of an existing nonconforming use.[108] The court next determined the impact of section 6. The court set out the language of the statute as follows:

> Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence . . . but shall apply to any change or substantial extension of such use . . . . Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding . . . that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.[109]

The appeals court opined that the language seems to suggest that local laws will govern the extent to which changes in nonconforming uses may be made, while at the same time suggesting that the property owner has a right to change a nonconforming use, so long as the required finding is made by the appropriate granting authority.[110] The court concluded that the language, with respect to this issue, is ambiguous.[111] After reviewing the legislative history of section 6, specifically the DCA recommendations from the 1972 Report,[112] the court determined that the Department of Community Affairs' recommendations were directed toward the recognition of local regulations which authorize a change of use, not toward the recognition of the rights of the property owner.[113] The court reasoned that if a property owner had a right to change the nonconforming use of his property to any other nonconforming use "not substantially more detrimental to the neighborhood, [then] nonconforming uses would tend to exist in perpetuity, and any comprehensive municipal plan for regulating uses in particular districts would never

106. 31 Mass. App. Ct. at 33, 574 N.E.2d at 425.
107. *Id.* at 33, 574 N.E.2d at 425.
108. *Id.* at 34, 574 N.E.2d at 426.
109. *Id.* at 36, 574 N.E.2d at 427 (quoting MASS. GEN. L. ch. 40A, § 6).
110. *Id.*
111. *Id.*
112. *See supra* note 52 and accompanying text.
113. *Id.* at 38, 574 N.E.2d at 428.

fully take effect."[114] The *Blasco* Court held that section 6 recognizes the continuing right of municipalities, through their local zoning laws, to regulate *or forbid* changes in nonconforming uses.[115] The change of use in this case was not permitted by the town's by-law, however, the court acknowledged that the town is free to amend its by-law to allow such a change; furthermore, "whatever harshness might result from a particular town by-law's strict regulation of changes in nonconforming uses is justified by policy considerations which generally favor their eventual elimination."[116] The *Blasco* decision stands for the proposition that a municipality is free to regulate changes in nonconforming uses or "forbid changes."[117] It follows that in the absence of municipal regulation allowing for change, the property owner will not find relief in section 6. Consequently, the finding requirement is not mandatory; it does not mandate the allowance of a property owner to change a nonconforming use or structure.

Section 6 mandates that the finding shall be made by the PGA or SPGA "designated by ordinance or by-law."[118] Since the statute authorizes either of these two authorities to make the finding, the procedure to be used in making the required finding (which will differ depending on the granting authority), is not specified by the statute. The result has been additional confusion at the local level. The first step is to examine the municipality's zoning laws to determine if the finding requirement is delegated to a special permit procedure or a less formal procedure.[119] The Massachusetts Supreme Judicial Court recently concluded that section 6 "authorizes, but does not require, a municipality to choose a special permit application as the procedure for extension or alteration of a nonconforming use."[120] In *Shrewsbury Edgemere Assoc. v. Board of Appeals of Shrewsbury*,[121] the plaintiff developer argued that the section 6 finding provision allows a town to choose the authority by which a finding may be issued, but not the procedure, and therefore, a "special permit requirement of a four-fifths vote cannot be imposed on

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114. *Id.* at 39, 574 N.E.2d at 428.

115. *Id.* at 39, 574 N.E.2d at 429. The court also notes that this conclusion is supported by the underlying principle of the Home Rule Amendment, which allows for the maximum scope of local self determination; the alternative conclusion would detract from this principle. *Id.* at 39, 574 N.E.2d at 428.

116. *Id.* at 39, 574 N.E.2d at 428-29.

117. *Id.*

118. MASS. GEN. L. ch. 40A, § 6 (1992).

119. Fishman & Lago, *supra* note 8, at 6-19.

120. Shrewsbury Edgemere Assoc. v. Board of Appeals of Shrewsbury, 409 Mass. 317, 321-22, 565 N.E.2d 1214, 1217 (1991).

121. 409 Mass. 317, 565 N.E.2d 1214 (1991).

requests to change nonconforming uses."[122]

Although section 9, the zoning provision governing special permits,[123] requires a four-fifths vote in order to grant a special permit, the special permit granting authority, in this case the board of appeals, is not always required to act by super majority vote; it may act by simple majority.[124] The court disagreed with the developer's argument and reasoned that because the section 6 finding provision authorizes a municipality "to choose the special permit granting authority, when it does so, that body uses the procedure which defines it."[125] The court further noted that prior to adoption of the 1975 Zoning Act, the Zoning Enabling Act[126] "allowed a town to forbid any changes in nonconforming uses, and required a unanimous vote by a zoning board of appeals to decide in favor of any application under any zoning ordinance or by-law."[127] The court surmised that the legislature had liberalized the prior rule by allowing towns to require either a super majority vote, the same as any other grant of a special permit, or to delegate the procedure to a permit granting authority which would grant approval by a simple majority.[128] Whether the finding requirement is delegated to a PGA or an SPGA, in either case that body must use the same "not . . . substantially more detrimental" standard mandated by section 6.[129] The *Shrewsbury* decision at least clarifies that when the ordinance or by-law designates the granting authority responsible for making the required finding, that authority "uses the procedure which defines it."[130] Since, for example, a board of appeals may act as either a PGA or an SPGA, the municipal by-law or ordinance should specify in which capacity that board is acting when required to make a section 6 finding. Even with this clarification by the Supreme Judicial Court, there are still unresolved procedural problems with section 6.

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122. *Id.* at 321, 565 N.E.2d at 1217. The Board of Appeals had voted three to two in favor of the developer's application, but they denied the special permit because "under G.L. c. 40A, § 9, as it is incorporated into the by-law, a four-fifths vote was required to grant a special permit." *Id.* at 318-19, 565 N.E.2d at 1216. See also § 9, which reads: "Special permits issued by the special permit granting authority shall require a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board." MASS. GEN. L. ch. 40A, § 9 (1992).

123. Special Permits, MASS. GEN. L. ch. 40A, § 9 (1992).

124. *Shrewsbury Edgemere Assoc.*, 409 Mass. at 321, 565 N.E.2d at 1217.

125. *Id.* at 321, 565 N.E.2d at 1217.

126. *See* The Zoning Enabling Act, ch. 368, §§ 5 and 19, 1954 Mass. Acts, 244, 245, 250.

127. *Shrewsbury Edgemere Assoc.*, 409 Mass. at 322, 565 N.E.2d at 1218.

128. *Id.* at 322, 565 N.E.2d at 1218.

129. *Id.* at 323-24, 565 N.E.2d at 1218.

130. *Id.* at 321, 565 N.E.2d at 1217.

C. *Additional Procedural Problems*

Section 6 is silent on what criteria should be used to determine when or how an alteration or extension to a nonconforming structure or use will become "substantially" more detrimental to the neighborhood.[131] The boundaries of the "neighborhood" are undefined by section 6. It is not clear whether these criteria should be explicitly outlined in the local ordinance or by-law or whether such determinations are solely within the province of the granting authority.[132] If the latter is true, we need to know what standard of review the courts will employ, and how much deference will be shown to local municipal board decisions.[133]

Upon review of the case law in this area, it appears as though most municipalities opt for a special permit procedure for making the required statutory finding.[134] As the guidance provided by section 6 is something less than crystal clear, municipalities have turned to their local provisions addressed to special permits.[135] There are no definitive answers as to whether a special permit application for change, extension or alteration of a nonconforming use or structure, is equivalent to any other special permit application under section 9 of the Zoning Act. The courts have illuminated this issue to an extent.

Section 9 of the Zoning Act allows the special permit granting authority to condition the grant of a special permit.[136] If a special permit application for change, extension or alteration of a nonconforming use or structure is similar to any other special permit, then it follows that the former permit could likewise be granted with conditions attached. The only court to date which has addressed this issue was a Massachusetts superior court which held the opposite. In *Merna v. Long*

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131. Section 9 of the Zoning Act, pertaining to special permits, specifies a variety of procedures, but does not address the finding requirement of § 6. *See* MASS. GEN. L. ch. 40A, § 9 (1992).

132. One appeals court suggested that these determinations fall within the discretion of the board; at the same time requiring an explicit explanation by the board as to what criteria were used. *See* Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 22-23, 514 N.E.2d 369, 373-74 (1987).

133. *See infra* notes 139-41 and accompanying text.

134. *See, e.g.*, Shrewsbury Edgemere Assoc. v. Board of Appeals of Shrewsbury, 409 Mass. 317, 565 N.E.2d 1214 (1991); Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32, 574 N.E.2d 424 (1991); Rockwood v. Snow Inn Corp., 409 Mass. 361, 566 N.E.2d 608 (1991); Texstar Construction Corp. v. Board of Appeals of Dedham, 26 Mass. App. Ct. 977, 528 N.E.2d 1186 (1988).

135. Local special permit provisions are often based on the special permit provision of the Zoning Act. *See* MASS. GEN. L. ch. 40A, § 9 (1992).

136. "[Special] permits may also impose conditions, safeguards and limitations on time or use." MASS. GEN. L. ch. 40A, § 9 (1992).

Point Marine, Inc.,[137] the superior court held void a Duxbury by-law which would have allowed limiting expansion or change of a nonconforming use to ten percent of its original size or intensity.[138]

The Massachusetts Appeals Court reviewed the denial of special permits for structural change in a nonconformity in *Texstar Construction Corp. v. Board of Appeals of Dedham.*[139] The appeals court utilized the same standard of review applicable to any other special permit; in order to overturn the board's decision, it must be based on "legally untenable ground, or [be] unreasonable, whimsical, capricious or arbitrary."[140] Therefore, when the special permit granting authority is designated by the local law to make the section 6 finding under a special permit procedure, if that decision is challenged in the courts, the standard of review applied will be the same standard applicable to the review of any other special permit.[141] It should be kept in mind, however, that the authority of the local board to act, is dictated by the local zoning ordinances or by-laws.[142]

D. *Courts' Interpretation of Zoning Ordinances and By-Laws*

In nearly all cases involving a zoning issue, the court will be interpreting the applicable municipal zoning regulation. In *Murray v. Board of Appeals of Barnstable*,[143] the court discussed how such interpretation should be handled. The *Murray* Court stated, "[a] zoning by-law must be read in its complete context and be given a sensible meaning

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137. Merna v. Long Point Marine, Inc., Case No. 80-12466 (Plymouth Super. Ct. 1982).

138. Merna v. Long Point Marine, Inc., Case No. 80-12466 (Plymouth Super. Ct. 1982). *See also* Fishman & Lago, *supra* note 8, at 6-20. Fishman & Lago conclude that the imposition of "a time period after which a nonconforming use must cease appears impermissible." *Id.* at 6-6 (citing Merna v. Long Point Marine, Inc., Case No. 80-12466 (Plymouth Super. Ct. 1982)). A condition on the continued existence of a nonconformity runs afoul with the minimum tolerance afforded by § 6. *See also supra* note 97 and accompanying text.

139. 26 Mass. App. Ct. 977, 528 N.E.2d 1186 (1988).

140. *Texstar Constr. Corp.*, 26 Mass. App. Ct. at 978, 528 N.E.2d at 1187 (and cases cited therein).

141. The applicable standard of review gives wide deference to local boards. "A judge in 'reviewing a decision of the board denying a permit does not possess the same discretionary power as does the board . . . .'" *Texstar Constr. Corp.*, 26 Mass. App. Ct. at 979, 528 N.E.2d at 1187 (quoting Subaru of New England, Inc. v. Board of Appeals of Canton, 8 Mass. App. Ct. 483, 486, 395 N.E.2d 880, 882 (1979)). "The 'board may deny [a permit] even if the facts showed that a permit could be lawfully granted.'" *Texstar Constr. Corp.*, 26 Mass. App. Ct. at 979, 528 N.E.2d at 1187 (quoting Zaltman v. Board of Appeals of Stoneham, 357 Mass. 482, 484, 258 N.E.2d 565, 566 (1970)).

142. *See* Blasco v. Board of Appeals of Winchendon, 31 Mass. App. Ct. 32, 574 N.E.2d 424 (1991), discussed *supra* notes 108-19 and accompanying text.

143. 22 Mass. App. Ct. 473, 494 N.E.2d 1364 (1986).

within that context,"[144] and "where the language of an enactment is clear and unambiguous it should be followed even if an injustice or hardship results."[145] Alternatively, when an ordinance or by-law "is faulty, lacks precision or is ambiguous, a court may utilize general rules of construction, presumptions and interpretational aids to glean its meaning."[146]

The court in *Fitzsimonds v. Board of Appeals of Chatham*,[147] recognized that the board of appeal's administrative view is "valuable and is wanted" because the local board "brings . . . an intimate understanding of the immediate circumstances, of local conditions, and of the background and purposes of the entire by-law."[148] In *Murray*, the court scrutinized the relevant sections of the by-law for cross-reference, to determine if a specific section was meant to apply in the circumstances of that case.[149] The *Murray* Court found that the by-law section in issue did not apply; supported by the fact that the board of appeals did not refer to the questionable section when making their decision.[150]

In *Sullivan v. Board of Appeals of Harwich*,[151] the appeals court reviewed several cases involving temporal extension of a nonconforming use.[152] The court compared the local zoning laws in the cases addressing this issue, stating that those cases "focused on the degree of specificity with which the zoning by-law prohibits the particular extension

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144. *Murray*, 22 Mass. App. Ct. at 478, 494 N.E.2d at 1367-68 (citing Selectmen of Hatfield v. Garvey, 362 Mass. 821, 826, 291 N.E.2d 593, 596 (1973)).

145. *Id.* at 478, 494 N.E.2d at 1368 (citing Massachusetts Mut. Life Ins. Co. v. Commissioner of Corps. & Taxation, 363 Mass. 685, 690, 296 N.E.2d 805, 809 (1973)).

146. *Id.* at 478, 494 N.E.2d at 1368.

147. 21 Mass. App. Ct. 53, 484 N.E.2d 113 (1985).

148. *Id.* at 57, 484 N.E.2d at 116.

149. *Murray*, 22 Mass. App. Ct. at 479, 494 N.E.2d at 1368. "If the town had intended that § M alter or limit the permissive nature of § G, it could have done so by cross-referencing the sections . . . the absence of explicit reference to § M is a strong indication that the drafters intended an exclusion." *Id.* at 479, 494 N.E.2d at 1368.

150. *Id.* at 479, 494 N.E.2d at 1368 (citing *Fitzsimonds*, 21 Mass. App. Ct. 53, 84 N.E.2d 113 (1985) and quoting same as text accompanying *supra* note 147).

151. 15 Mass. App. Ct. 286, 445 N.E.2d 174 (1983).

152. Temporal extension/expansion of a nonconforming use, may describe an increase in the hours of operation; the term has more often been used to describe an increase in use from seasonal to year-round. *See* Berliner v. Feldman, 363 Mass. 767, 776-77, 298 N.E.2d 153, 159-60 (1973) (use of an inn year-round allowed as of right due to absence of explicit guidance in the by-law, and otherwise general permissiveness of the by-law); McAleer v. Board of Appeals of Barnstable, 361 Mass. 317, 280 N.E.2d 166 (1972) (change from seasonal to year-round operation of a hotel allowed where by-law did not specifically prohibit a mere increase in the time of a nonconforming use).

and, absent specific mention therein, on the general permissiveness of the by-law towards extensions of nonconforming uses."[153]

An understanding of what the courts look for when interpreting an ordinance or by-law will enable local authorities to better effectuate their policies regarding regulation of nonconforming uses and structures. Judicial interpretation of local zoning laws is an important consideration. Under the 1975 Zoning Act,[154] and "Home Rule" authority, municipalities are given a great deal of latitude in regulatory discretion.[155] In reviewing the cases that follow, one must be keenly aware that the court is interpreting not only section 6, but also the particular ordinance or by-law applicable in that case. Since local zoning laws vary, and municipalities have wide discretion, the outcome of any particular case will not be determinative of all factual situations in all municipalities in the Commonwealth.

IV. REGULATION OF NONCONFORMING USES

Although a use may have lawfully acquired nonconforming status at some point in the past, that status may be lost, and with it the protection afforded by section 6. If over time, alterations to a nonconforming use work a change or substantial extension of that use, the use will become subject to the current zoning laws and may thereby be deemed in unlawful noncompliance.[156]

A. *The Powers Tests*

In *Powers v. Building Inspector of Barnstable*,[157] the Supreme Judicial Court restated three tests utilized by the courts over the years in "determining whether current use of property fits within the exemption granted to nonconforming uses."[158] These have become known as the "Powers Tests":

> (1) Whether the use reflects the 'nature and purpose' of the use prevailing when the zoning by-law took effect;
> (2) Whether there is a difference in the quality or character, as well as the degree, of use; and
> (3) Whether the current use is 'different in kind in its effect on the neighborhood.'[159]

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153. *Sullivan*, 15 Mass. App. Ct. at 289, 445 N.E.2d at 176.

154. MASS. GEN. L. ch. 40A, §§ 1-17 (1992).

155. *See supra* notes 32-35 and accompanying text, discussing the Home Rule Amendment.

156. Fishman & Lago, *supra* note 8, at 6-6, 6-7.

157. 363 Mass. 648, 296 N.E.2d 491 (1973).

158. *Id.* at 653, 296 N.E.2d at 495.

159. *Id.* at 653, 296 N.E.2d at 495 (citations omitted). The court had previously recognized these three tests in the earlier case, Bridgewater v. Chuckran, 351 Mass. 20, 23, 217 N.E.2d 726, 727 (1966).

Meeting the criteria of any one of the three tests will result in loss of protection under the "nonconforming use" status.[160] The *Powers* Court acknowledged that the application of these rules of law governing nonconforming uses, the results of which usually turn on the individual facts of each case, have produced two distinct lines of cases.[161] One line of cases holds that the disputed use remains protected as a lawful nonconforming use; the other line of cases holds that although lawful when the prohibiting by-law or ordinance was originally adopted or amended, the use has so changed that it is no longer protected.[162] These tests come into play when one of two situations arises. Any party aggrieved by another's use of his or her property may seek enforcement of the zoning laws pursuant to section 7 of the zoning act.[163] Second, a property owner may seek to change, extend or alter a preexisting nonconforming use, or a structure connected with that use. By applying to the municipal authority for a building permit or special permit, the applicant subjects his or her nonconforming status to municipal scrutiny and may thereby lose the protective status. Thus, there are three ways a municipality may deny change, extension or alteration of a nonconforming use: (1) by finding that the use is no longer entitled to protective status after applying the Powers Tests;[164] (2) by failing to make the requisite statutory finding in favor of the applicant; or (3) by denying change, extension or alteration of nonconforming uses in their local zoning laws.[165]

Most often, the Powers Tests will be applied when an aggrieved party seeks enforcement of the zoning laws, with respect to another's nonconforming use of his or her property. Many of these cases fall

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160. Fishman & Lago, *supra* note 8 at 6-7. *See also* Green v. Board of Appeals of Provincetown, 26 Mass. App. Ct. 469, 472, 529 N.E.2d 159, 162 (1988) (fulfillment of all three not a requisite), *rev'd on other grounds,* 404 Mass. 571, 536 N.E.2d 584 (1989).

161. *Powers*, 363 Mass. at 653, 296 N.E.2d at 495.

162. *Id.* at 653, 693, 296 N.E.2d at 495.

163. MASS. GEN. L. ch. 40A, § 7 (1992).

> If the officer or board charged with enforcement of zoning ordinances or by-laws is requested in writing to enforce such ordinances or by-laws against any person allegedly in violation of the same and such officer or board declines to act, he shall notify, in writing, the party requesting such enforcement of any action or refusal to act, and the reasons therefore, within fourteen days of receipt of such request.

Id. Furthermore, "any person aggrieved by a decision . . . [of] any municipal officer or board . . . may appeal to the land court department the superior court department in which the land concerned is situated . . . or to the division of the district court department within whose jurisdiction the land is situated . . . ." MASS. GEN. L. ch. 40A, § 17 (1992).

164. *See* the Powers Tests, *supra* text accompanying note 159.

165. *See supra* note 117 and accompanying text.

under the old zoning enabling law, nevertheless, the Powers Tests remain valid and are used by the courts today.[166] An examination of each of the three Powers Tests follows.[167]

1. Present use does not reflect "nature and purpose" of use prevailing when zoning law took effect

In *Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth*,[168] change from a hotel offering guests bingo, cards, movies, and dances to an "entertainment complex" with three night-clubs, constituted a change in the "nature and purpose" of the use of the facility.[169] The Supreme Judicial Court noted, "[w]hile it is true that a use is not different in kind simply because it is bigger . . . the increased use must be attributable to growth of the original nonconforming use . . . ."[170] In this case, the increased business of the hotel was a direct result of the change in emphasis from "lodging and meals to night entertainment."[171]

Concrete mixing, incidental to a house builder's main business, changed to "ready mixed concrete manufactory and center for supply," worked a change different than the original "nature and purpose" of the enterprise in *Bridgewater v. Chuckran*.[172]

This rule seems to turn on whether the changes or alterations would be ordinarily and reasonably adapted to the original use.[173] For example, an increase in the volume of business or the hours of operation will generally not be deemed to render the use different in "nature and purpose" than the original use.[174] Alterations for the purpose of

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166. *See supra* note 44 and accompanying text.

167. The following examination is meant to provide the reader with a flavor for the analysis used in the application of the Powers Tests. The analyses in these cases are fact-intensive; hence, these cases represent only a sampling of the many cases in Massachusetts that have applied the Powers Tests. This examination is meant to convey to the reader a working understanding of how the courts apply the analytical device of the Powers Tests. For additional cases applying one or more of the Powers Tests, see, e.g., Goldman v. Town of Dennis, 375 Mass. 197, 375 N.E.2d 1212 (1978); Vokes v. Avery W. Lovell, Inc., 18 Mass. App. Ct. 471, 468 N.E.2d 271 (1984); Building Inspector of Chatham v. Kendrick, 17 Mass. App. Ct. 928, 456 N.E.2d 1151 (1984); Board of Selectmen of Blackstone v. Tellestone, 4 Mass. App. Ct. 311, 348 N.E.2d 110 (1976).

168. 385 Mass. 205, 431 N.E.2d 213 (1982).

169. *Id.* at 214-15, 431 N.E.2d at 219 (1982).

170. *Id.* at 214, 431 N.E.2d at 218 (citations omitted).

171. *Id.* at 214, 431 N.E.2d at 219.

172. 351 Mass. 20, 23, 217 N.E.2d 726, 728 (1966).

173. Fishman & Lago, *supra* note 8, at 6-8.

174. *Id.* at 6-7. The following did not reflect a change from the "nature and purpose" of the original nonconforming use: Powers v. Building Inspector of Barnstable, 363 Mass. 648, 659-60, 296 N.E.2d 491, 498 (1973) (increase in the volume and variety of goods sold); Building Inspector of Seekonk v. Amaral, 9 Mass. App. Ct. 869, 869, 401 N.E.2d 158, 159 (1980) (increase in volume of business of a

increasing efficiency or modernizing a use will not result in a change or substantial extension of the use, as long as "they are ordinarily and reasonably adapted to the original use and do not constitute a change in the original nature and purpose of the undertaking."[175]

2. Present use is different in quality or character, as well as degree from original nonconforming use

An interesting interpretation of this test appeared in *Green v. Board of Appeals of Provincetown.*[176] Essentially, the question presented was whether use of property to operate a Burger King restaurant constituted a change of use from the prior operation of a restaurant called Cicero's.[177] A large portion of the court's decision is occupied by the issue of standing; on the merits of the case the court held that "the change from Cicero's to Burger King would effect 'a difference in the quality or character, as well as the degree, of use,' and would thus constitute an extension or change of a nonconforming use."[178] Although the exterior of the building would not be substantially altered and the seating capacity would not be enlarged, the court supported its conclusion based on a projected increase in sales, and the fact that a full-service, sit-down restaurant is "substantially different" than a fast food, counter service operation.[179] The *Green* Court affirmed the lower court ruling, recognizing that "an increase in the volume of business does not by itself constitute a change of use, if the increased use is

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junkyard); Selectmen of Blackstone v. Tellestone, 4 Mass. App. Ct. 311, 315, 348 N.E.2d 110, 114 (1976) (increase in the number of customers). *But see* Jasper v. Michael A. Dolan, Inc., 355 Mass. 17, 24, 242 N.E.2d 540, 545 (1968) (change from a food store that sold beer and wine to an all alcohol package store, does not reflect the same "nature and purpose" of original use).

175. Berliner v. Feldman, 363 Mass. 767, 775, 298 N.E.2d 153, 159 (1973) (nonconforming inn rebuilt after fire could have proper insulation and heat, modernized plumbing with separate baths for each room). *See also* Crawford v. Building Inspector of Barnstable, 356 Mass. 174, 177-78, 248 N.E.2d 488, 490 (1969) (interior remodeling and enclosure of porches removed deterioration and improved appearance; enlargement of the use was negligible); Morin v. Board of Appeals of Leominster, 352 Mass. 620, 622, 227 N.E.2d 466, 468 (1967) (installation of heat and electricity to more efficiently carry on original undertaking of one man printing business).

176. 26 Mass. App. Ct. 469, 529 N.E.2d 159 (1988), *rev'd*, 404 Mass. 571, 536 N.E.2d 584 (1989) (judgment reversed because plaintiff lacked standing).

177. *Id.* at 470, 529 N.E.2d at 161.

178. *Id.* at 472, 529 N.E.2d at 162 (citation omitted).

179. *Id.* at 472, 529 N.E.2d at 162 ("gross income was projected to increase from $412,000 in 1985, Cierco's [sic] last year of operation, to $1,050,000 in Burger King's first year of operation").

attributable to growth of the original nonconforming use."[180] The court attributed the increased business to "a change in the character of the restaurant, exemplified by changes in the method of service, type of food sold, internal surroundings, and style of food preparation."[181]

This test is phrased in the conjunctive not the disjunctive, therefore, there must be a difference in quality or character *and* degree of use, before the new use will be unlawfully changed or extended over the prior use. The *Green* Court espouses as sufficient criteria for meeting the test, what might be viewed by some, as rather inconsequential changes.[182] The Supreme Judicial Court worked a similar result in the 1968 case, *Jasper v. Michael A. Dolan, Inc.*[183]

In *Jasper*, a group of neighbors were successful in thwarting the alteration of a neighborhood grocery store, selling beer and wine, to accommodate a partitioned store selling all alcoholic beverages on one side and groceries on the other.[184] Without explanation, the court concluded that "the operation of a separately conducted all-alcoholic package store is *substantially different* from the sale of beer and wine in connection with a food store."[185]

It is questionable whether the Supreme Judicial Court would reach the same result if *Jasper* were decided today. The second of the Powers Tests seems to be more manipulable than the first and the third test. The third test is called to the attention of courts less frequently because in the usual case, if the first two tests are satisfied, so is the third; likewise, if the first two are not satisfied, there is no occasion to reach the third.

3. Present use is "different in kind in its effect on the neighborhood."

This test is fairly straightforward, although the elusive idea of the "neighborhood" is present. Courts have applied this test quite literally

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180. *Id.* at 472, 529 N.E.2d at 162 (citing Cape Resort Hotels, Inc. v. Alcoholic Licensing Board of Falmouth, 385 Mass. 205, 214, 431 N.E.2d 213, 218 (1982)).

181. *Id.* at 472, 529 N.E.2d at 162.

182. *Compare Green*, 26 Mass. App Ct. at 472, 529 N.E.2d at 162 *with Powers*, 363 Mass. at 658-59, 296 N.E.2d at 498-99 (change from manufacture and sale of candles, to retail and wholesale of candles and a variety of "gift shop" items, different in degree, but not quality or character); Derby Refining Co. v. City of Chelsea, 407 Mass. 703, 714, 555 N.E.2d 534, 531 (1990) (change from storage of fuel products to storage of petroleum derived building material was not different in degree, quality or character).

183. 355 Mass. 17, 242 N.E.2d 540 (1968).

184. *Id.* at 21, 242 N.E.2d at 543.

185. *Id.* at 24, 242 N.E.2d at 545 (emphasis added). The court stated that the sale of "hard liquor" does not reflect the "nature and purpose" of the prior use, and differs in "quality or character as well as degree." *Id.*

as illustrated by the case *Derby Refining Co. v. City of Chelsea.*[186] Even if the present use of property produces offensive odors and noxious fumes which admittedly would have a deleterious effect on the neighborhood, if the prior protected use similarly produced odors and fumes, then the effect of the present use on the neighborhood will be no different and thus upheld.[187] This was the situation in *Derby*. Texaco's prior use of the property was as a storage facility for petroleum fuels and plaintiff's subsequent use was for storage of liquid asphalt.[188] After Derby acquired title to the property, but before commencement of the new use by Derby's lessee, Chelsea passed a zoning ordinance which radically changed the permitted uses in the waterfront district where the property was situated.[189] Upon a thorough review of each of the three Powers Tests the court was persuaded that Derby Refining had met its burden of proof.[190]

The party seeking "protected status" has the burden of "establishing compliance with the [Powers Tests]."[191] All three tests apply when a party is seeking to maintain protective status for use of property; failure to meet the requirements of only one will result in denial of the protected status.

V. NONCONFORMING STRUCTURES

Section 6 provides that zoning ordinances or by-laws shall apply to "any reconstruction, extension or structural change of [a nonconforming] structure and to any alteration of a [nonconforming] structure . . . to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent."[192] The above quoted portion of section 6 provides that local zoning laws will apply to nonconforming structures in three situations. To facilitate this analysis, these three situations are identified below and will be discussed separately herein.

(1) Extension or structural change of a nonconforming structure;
(2) Reconstruction of a nonconforming structure; and

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186. 407 Mass. 703, 555 N.E.2d 534 (1990).
187. *Id.* at 715-17, 555 N.E.2d at 541-42.
188. *Id.* at 705-06, 555 N.E.2d at 536.
189. *Id.* at 706-07, 555 N.E.2d at 536-37.
190. *Id.* at 712-17, 555 N.E.2d at 540-42.
191. *Id.* at 712, 555 N.E.2d at 540. Derby Refining did their homework; they presented three expert witnesses at trial to rebut two experts put on by Chelsea. The testimony from both sides presented highly technical data on the potential effects of the noxious emissions, including estimated risks of cancer. This case may very well have turned on the clash of expert testimony. *See id.* at 715-16, 555 N.E.2d at 541-42.
192. MASS GEN. L. ch. 40A, § 6 (1992).

(3) Alteration of a nonconforming structure, to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent.

A. *Extension or Structural Change*

Most of the reported cases involving change or extension to a nonconforming structure arise in the context of change or expansion of a nonconforming use.[193] The scarcity of case law dealing with a nonconforming structure, apart from the use of the property, is largely due to the fact that structural changes and extensions require a building permit, and therefore come to the attention of municipal authorities before the change takes place.[194]

In *Wrona v. Board of Appeals of Pittsfield*,[195] a 1958 case decided under the old Zoning Enabling Act, the Supreme Judicial Court held that an extension to a building, protected as a nonconforming use, must comply with setback and other requirements of the city's zoning ordinance; otherwise the building owner must apply for a variance.[196] The court stated that, "[t]he board could have properly allowed an extension of the nonconforming use up to the setback lines . . . . However, when it permitted the extension beyond the . . . setback requirements contained in the ordinance it exceeded its authority."[197] The court analyzed this case under section 4 of the Zoning Enabling Act,[198] addressed to special permits, and the city's zoning ordinance.[199] The court does not mention section 5 of the Zoning

193. Fishman & Lago, *supra* note 8, at 6-13. *See, e.g.*, Texstar Constr. Corp. v. Board of Appeals of Dedham, 26 Mass. App. Ct. 977, 528 N.E.2d 1186 (1988) (special permits for structural changes to buildings connected with nonconforming use denied because result would be expansion of the nonconforming use).

194. Fishman & Lago, *supra* note 8, at 6-13. Contrast the situation with nonconforming uses. A "use" may change gradually over a long period of time without coming to the attention of municipal authorities; the owner is thus committed to the use and more likely to resort to litigation if the use is challenged. *Id.*

195. 338 Mass. 87, 153 N.E.2d 631 (1958).

196. *Id.* at 89, 153 N.E.2d at 633.

197. *Id.*

198. *See* The Zoning Enabling Act, ch. 368, § 4, 1954 Mass. Acts, 244, 245. Section 4 provides: "A zoning ordinance or by-law may provide that exceptions may be allowed to the regulations and conditions contained therein . . . . Such exceptions shall be in harmony with the general purpose and intent of the ordinance or by-law . . . ." *Id. Compare* with the ordinance, *infra* note 199.

199. The Pittsfield Ordinance, set out below, may be characterized as "permissive in spirit" to changes and extensions in nonconformities.

> The Board of Appeals may in a specific case . . . determine and vary the application of the provisions of this Ordinance, in harmony with the general purposes and intent, as follows: . . . (3) Permit a substitution for, or an alteration to, an existing building, structure, or use, whether conforming or

Enabling Act, which dealt with nonconforming uses and structures, as the 1954 enactment did not have the finding provision, allowing change, extension, or alteration of nonconforming uses and structures. As illustrated by this case, municipalities still allowed changes and extensions, even though the statute did not explicitly provide for it. The *Wrona* case provides an interesting backdrop for examination of a more recent Supreme Judicial Court decision.

In 1991, the Supreme Judicial Court of Massachusetts, on direct appellate review, decided *Rockwood v. Snow Inn Corp.*,[200] wherein they interpreted the application of section 6 to cases involving change or extension of a nonconforming structure. At issue in this case was the extension of certain structures that did not comply with the setback requirements of the Harwich zoning by-law, but which preexisted the by-law and were therefore given lawful nonconforming status.[201] The proposed extension by Snow Inn called for an increase in the building coverage of the lot "from 64,740 square feet to 85,865 square feet."[202] This increase in lot coverage conflicted with another Harwich zoning by-law, requiring that the "buildings must not cover more than fifteen percent of the Snow Inn lot."[203] The Harwich Board of Appeals granted Snow Inn a special permit for the proposed extension, upon finding that the proposed project would not be "substantially more detrimental to the neighborhood than the existing nonconforming structure."[204] The issue addressed by the court was whether under section 6 and the Harwich zoning by-law, the board of appeals was authorized to grant a special permit for the proposed structural changes, when those changes would violate the current zoning requirements.[205] The court held that the first sentence of section 6 "requires that, *in the absence of a variance*, any extension or structural change of a nonconforming structure must comply with the applicable zoning ordinance or by-law."[206] The court reasoned that if section 6 were not construed in this

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non-conforming, or an extension in the same . . . including the erection of a supplementary non-conforming building.

Wrona, 338 Mass. at 88, 153 N.E.2d at 632. The court stated that the Board's action, allowing an extension in violation of the city's ordinance, "cannot be said to be in harmony with the general purposes and intent of the ordinance." *Id.* at 89, 153 N.E.2d at 633.

200. 409 Mass. 361, 566 N.E.2d 608 (1991).

201. *Id.* at 361-62, 566 N.E.2d at 609-10 (1991).

202. *Id.*

203. *Id.*

204. *Id.* at 365, 566 N.E.2d at 611.

205. *Id.* at 364-65, 566 N.E. at 611.

206. *Id.* at 364, 566 N.E.2d at 610 (emphasis added). This was the same conclusion reached by the Massachusetts Supreme Judicial Court in 1958 in *Wrona*. *See supra* notes 195-99 and accompanying text.

way, "the provision in the first . . . sentence that a zoning ordinance or by-law 'shall apply . . . to any reconstruction, extension or structural change of [a protected nonconforming structure]' would be meaningless surplusage."[207] The court explicitly stated the requirement of section 6 with regard to structural change or extension of a nonconforming structure as follows: "[E]xtensions and changes to nonconforming structures [are permitted] if (1) the extensions or changes themselves comply with the ordinance or by-law; and (2) the structures as extended or changed are found to be not substantially more detrimental to the neighborhood than the preexisting nonconforming structure or structures."[208] Simply put, under section 6, structural change or extension of a nonconforming structure must comply with applicable zoning requirements, or a variance[209] must be sought, the same as any conforming structure.

Upon closer examination, the result obtained in this case may not be so cut and dry. The court's interpretation of section 6 was particularly applicable to the facts of the case because the Harwich zoning by-law, providing for change or extension of a nonconforming structure, mirrored the language of the finding provision in section 6.[210] Although the Board made the appropriate finding required under section 6, the court stated, "we do not understand section X(J) [of the Harwich zoning by-law] to mean that the board's finding . . . entitles the developer to make structural changes or extensions that would cause lot coverage or other by-law provisions to be violated."[211] If this case is read narrowly, the outcome turns on the fact that the Harwich zoning by-law contained language identical to section 6. The finding, in and of itself, does not function as a grant of permission to violate other zoning requirements. It has been suggested that if a town's zoning by-law was

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207. *Rockwood*, 409 Mass. at 364, 566 N.E.2d at 610.

208. *Id.*

209. The statutory criteria for the grant of a variance are very strict; variances are difficult to obtain. *Mendes*, 28 Mass. App. Ct. 527, 531, 552 N.E.2d 604, 606 (1990). *See also* MASS. GEN. L. ch. 40A, § 10 (1992) (Variances).

210. *Rockwood*, 409 Mass. at 364, 566 N.E.2d at 611. The applicable Harwich zoning by-law, § X(J), governing change or extension of a nonconforming structure, provided:

> Pre-existing non-conforming structures or uses may be changed, extended or altered on special permit from the Board of Appeals, provided that no such change, extension or alteration shall be permitted unless there is a finding by the Board that such change, extension or alteration shall not be substantially more detrimental to the neighborhood than the existing non-conforming use.

Id. at 364, 566 N.E.2d at 611. *Compare* with the § 6 language, *supra* text accompanying note 69.

211. *Id* at 364-65, 566 N.E.2d at 611. *See* § X(J) of the Harwich zoning by-law, *supra* note 210.

more explicit, providing more than a mere repetition of the section 6 language, changes and extensions of nonconforming structures could be allowed to violate other zoning provisions, without resort to the strict variance procedure.[212]

The requirement of a variance in the *Rockwood* situation places nonconforming structures on the same footing as conforming structures. As the scenario above suggests, municipalities may be able to give more lenient treatment to nonconformities under their zoning laws. That option would not apply to conforming structures as it would directly conflict with the variance provision of the Zoning Act.[213] The narrow interpretation, allowing municipalities to give more lenient treatment of nonconformities, if they so chose, appears to this author, to be the appropriate interpretation. As long as the local rule is not in conflict with section 6, it should prevail under Home Rule authority.

B. *Reconstruction of Nonconforming Structures*

The first sentence of section 6 states that local zoning laws shall apply to the "reconstruction" of nonconforming structures.[214] Whereas structural change and extension are further addressed in the second

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212. Don J. Schmidt, *Regulating Nonconforming Structures*, 8 LAND USE MANAGER (EOCD, Boston, MA), Ed. No. 4, Nov. 1991 at 6. Schmidt suggested that municipalities may want to re-examine the nonconforming provisions of their zoning laws; provisions that simply insert the § 6 finding language severely limit the owner of a nonconforming structure wishing to make structural changes or extensions. In order to authorize changes or extensions to nonconforming structures that violate current zoning requirements, "communities may want to consider amending their zoning regulations to provide alternatives to the variance process." *Id.* Donald J. Schmidt is the Chief Land Use Planner with the Executive Office of Communities & Development in Boston, Massachusetts. Mr. Schmidt has worked in land use planning and regulation for approximately twenty-two years. Mr. Schmidt worked in the Department of Community Affairs (predecessor of the EOCD) in the early 1970s and was part of the team investigating and studying the zoning laws, whose work culminated in the 1975 Zoning Act. Mr. Schmidt writes the LAND USE MANAGER, a newsletter distributed state-wide to all municipal zoning boards of appeal, planning boards, building officials, as well as several non-municipal professionals in the land use field, including attorneys, land surveyors, engineering firms and real estate firms. Mr. Schmidt generates his newsletter articles from current zoning and land use decisions in the state appeals court and the Supreme Judicial Court, and from questions he receives from municipal officials. Mr. Schmidt works with the state legislature on drafting land use related legislation. As Mr. Schmidt works with officials from every municipality in the state of Massachusetts, and the state legislature, and other professionals in the land use field, he essentially has his finger on the pulse of the land use and regulation professional community.

213. *See* MASS. GEN. L. ch. 40A, § 10 (1992). Municipal authority under "Home Rule" powers is limited only by inconsistent state law or the state's preemptory exercise of authority. *See* Healy, *Massachusetts Zoning Practice, supra*, note 33 at 157.

214. *See supra* text accompanying note 192.

sentence, "reconstruction" is not mentioned anywhere in the second sentence.[215] As a premise to this discussion, there are no reported cases that deal with reconstruction of a nonconforming structure which is not connected with a nonconforming use.[216] Although it seems as though local zoning laws should apply when a nonconforming structure is rebuilt after being destroyed by some natural disaster, this has not been the case.[217] In *Berliner v. Feldman*,[218] a 1973 case decided under the old Zoning Enabling Act, an inn damaged by fire was rebuilt, with the requirement that the dimensions of the new structure not exceed those existing prior to destruction.[219] Furthermore, modernization of plumbing, heating, and insulation, and interior functional improvements were allowed, so that "preservation of former inconveniences" was not a requisite of reconstruction.[220] The inn was a nonconforming use; whether the structure itself was nonconforming cannot be ascertained from the facts given in the Supreme Judicial Court decision. The *Berliner* Court stated that although section 6 does not confer upon the owner of property "used for a nonconforming purpose," the right to rebuild a structure which has been involuntarily destroyed, "there is no statutory prohibition" against local zoning laws which do provide that right to the owner.[221] A similar result was reached in *Lomelis v. Board of Appeals of Marblehead*,[222] where the court permitted reconstruction of a nonconforming residential structure with slight deviations in the perimeter for protection against future flooding.[223]

It is clear that a nonconforming structure voluntarily destroyed may only be rebuilt in compliance with applicable zoning requirements; the structure cannot be rebuilt as it was because the protections afforded by

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215. *See supra* text accompanying note 69.

216. Fishman & Lago, *supra* note 8, at 6-14.

217. *Id.* The "courts have afforded the same protections to a reconstructed structure built pursuant to local reconstruction provisions that Section 6 affords to the original nonconforming structure." *Id.*

218. 363 Mass. 767, 298 N.E.2d 153 (1973).

219. *Id.* at 775, 298 N.E.2d at 159.

220. *Id.* The *Berliner* Court stated that, "although each circumstance much be assessed on its facts . . . interior changes not amounting to reconstruction or structural change (MASS GEN. L. ch. 40A, § 5) generally may be made in a nonconforming building." *Id.* at 775, 298 N.E.2d at 159 (referencing the 1954 version of § 6).

221. *Berliner*, 363 Mass. at 769, 298 N.E.2d at 156. Even where the local zoning laws do not explicitly authorize reconstruction of a nonconforming structure which has been involuntarily destroyed, some municipalities have allowed the nonconforming structure to be rebuilt without resort to zoning relief. Fishman & Lago, *supra* note 8, at 6-14. Fishman & Lago further note that "no reported cases [address] the validity of this practice." *Id.*

222. 17 Mass. App. Ct. 962, 458 N.E.2d 740 (1983).

223. *Id.* at 963-64, 458 N.E.2d at 741-42.

section 6 are lost.[224] In *Chilson v. Zoning Board of Appeal of Attleboro*,[225] however, the Supreme Judicial Court sustained the decision of the Attleboro zoning board of appeals, approving the replacement of an old run down building with a new, modern service station building in order to continue a prior nonconforming use.[226] The city's zoning ordinance authorized the board's action and the court determined that section 5 of the Zoning Enabling Act[227] did not prohibit the allowance in the zoning ordinance for this type of change.[228] The court acknowledged that without local zoning provisions of this nature, "the alternative in many cases would be that the owner would hold on to rundown structures and premises in the hope of salvaging the business value."[229] Recognition of the dilemma described by the *Chilson* Court led to the Department of Community Affairs' recommendation that the new Zoning Act explicitly recognize the validity of local zoning law provisions authorizing changes in nonconformities.[230]

C. *Alteration of Nonconforming Structures*

Section 6 provides that zoning ordinances and by-laws shall apply to "any alteration of a structure . . . to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent . . . ."[231] The Massachusetts Appeals Court addressed this provision and the local ordinance mirroring this provision in *Nichols v. Board of Zoning Appeal of Cambridge*.[232] This case involved structural alterations to a garage, a pre-existing nonconforming structure, in order to accommodate its use as a home architect's office.[233] Two questions were raised on appeal: (1)

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224. Fishman & Lago, *supra* note 8, at 6-14 (citing Martin v. Board of Appeals of Yarmouth, 20 Mass. App. Ct. 972, 482 N.E.2d 336 (1985); Angus v. Miller, 5 Mass. App. Ct. 470, 473, 363 N.E.2d 1349, 1352 (1977)). Voluntary destruction is treated as an abandonment of the structure. *See Berliner*, 363 Mass. at 772, 298 N.E.2d at 157 (1973).

225. 344 Mass. 406, 182 N.E.2d 535 (1962).

226. *Id.* at 413-14, 182 N.E.2d at 540.

227. This case was decided under MASS. GEN. L. ch. 40A, § 5 (1954); *see supra* note 29 (nonconforming uses and structures).

228. *Chilson*, 344 Mass. at 412, 182 N.E.2d at 539.

229. *Id.* The *Chilson* Court noted that municipalities have recognized this unwanted alternative as evidenced by provisions in their ordinances and by-laws for "the substitution of a business found not [to] be more detrimental to the neighborhood." *Id.* at 412, 182 N.E.2d at 539.

230. *See supra* notes 48-55 and accompanying text.

231. MASS. GEN. L. ch. 40A, § 6 (1992).

232. 26 Mass. App. Ct. 631, 530 N.E.2d 1257 (1988).

233. *Id.* at 631, 530 N.E.2d at 1258. "The garage did not meet the sideline requirements of the ordinance but was a preexisting nonconforming structure." *Id.*

whether, under the Cambridge ordinance, a special permit was required to make alterations "to a nonconforming building to accommodate a change from one permitted accessory use to another permitted use;" and (2) whether the renovations to the garage were alterations as a matter of law, under the ordinance.[234]

The plaintiffs, the Nichols, obtained a building permit to make the necessary renovations to convert their garage into a home architect's office, a permissible accessory use in their zoning district.[235] More than a year after the conversion was complete, another zoning inspector notified the Nichols that they were in violation of the zoning ordinance because the alterations required a special permit.[236] The Cambridge Board of Zoning Appeals upheld the determination made by the second zoning inspector.[237] The plaintiffs appealed the decision of the Cambridge Board of Zoning Appeal arguing that the ordinance did not apply when, as in their case, the alterations were to accommodate a change from one permitted use to another permitted use.[238] The appeals court responded, "[t]he plaintiffs would have us construe the ordinance as only requiring a special permit when there is an alteration to a building to accommodate a change from a nonconforming use to another nonconforming use."[239] The court concluded that "[n]either the statute nor the ordinance is so limited," and that "[w]hen . . . a nonconforming structure is altered to provide for a use different from the use prior to alteration . . . the ordinance applies even if the new use is a permitted one."[240] The *Nichols* Court noted that beginning in 1920, with only minor differences in language, the zoning statute has applied to "'any alteration of a building to provide for its use for a purpose, or in a manner, substantially different from the use to which it was put before the alteration.'"[241] The court stated that if "no alterations" were made then a change from one permitted use to another permitted use could be made as of right, without resort to the Board of Appeal.[242] Thus the second question raised on appeal, whether the changes were "alterations" as a matter of law, became pivotal. The court

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at 632, 530 N.E.2d at 1258.

234. *Id.* at 631, 530 N.E.2d at 1258.

235. *Id.* at 632, 530 N.E.2d at 1258.

236. *Id.*

237. *Id.* at 632, 530 N.E.2d at 1259.

238. *Id.* at 633, 530 N.E.2d at 1259.

239. *Id.*

240. *Id.* at 633-34, 530 N.E.2d at 1259.

241. *Id.* at 634, 530 N.E.2d at 1259 (citing *Opinion of the Justices*, 234 Mass. at 603, 127 N.E. at 527). *See supra* text accompanying note 231 for the language of the modern version of this provision.

242. *Id.* at 633, 530 N.E.2d at 1259.

ruled that because the changes were more substantial than "ordinary repairs" they were "alterations as a matter of law."[243]

This is the only Massachusetts case revealing facts that fall squarely within this provision of section 6. Most cases involving structural alterations involve a nonconforming use and are analyzed by the courts under the Powers Tests.[244] The most disturbing aspect of the *Nichols* case is that if the garage was not a nonconforming structure,[245] the Nichols could have made the conversion as of right. While holding that a special permit would be required to sanction the alterations, the *Nichols* Court suggested that the board consider several factors weighing in favor of granting the special permit: the footprint of the building had not changed, there was no increase in the nonconformity, the appearance of the garage had improved, and finally the plaintiffs proceeded with the alterations in good faith, relying on the first building inspector's actions.[246]

VI. SINGLE AND TWO-FAMILY RESIDENTIAL STRUCTURES

Local zoning laws "shall apply . . . *except* where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure."[247] This provision of section 6 is commonly referred to as the "second 'except' clause."[248] As there was no equivalent to this clause in the predecessor zoning statutes, the cases interpreting this provision are relatively few, and recent, as they were litigated after the 1975 enactment of the Zoning Act. In contrast, even though the second

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243. *Id.* at 634, 530 N.E.2d at 1260.

> The following work was performed: installation of utilities (water, gas, and electric); installation of lighting fixtures, electric outlets, a gas space heater, two telephones, a ceiling fan, and carpeting on the floor; installation and insulation of a new interior wall over the cement wall; dropping the ceiling; placing wooden panels over the garage doors; reshingling the roof; enlargement of one window to three times its original size; and installation of storm windows.

Id. at 632 n.2, 530 N.E.2d at 1258 n.2.

244. *See, e.g.*, Crawford v. Building Inspector of Barnstable, 356 Mass. 174, 248 N.E.2d 488 (1969); Morin v. Board of Appeals of Leominster, 352 Mass. 620, 227 N.E.2d 466 (1967). The issue in these cases tends to be whether the alterations function to enlarge or change the nonconforming use, if they do not, there is no question that the alterations are allowed.

245. The garage was nonconforming because it did not meet the minimum sideline requirements of the ordinance. *Nichols*, 26 Mass. App. Ct. at 632, 530 N.E.2d at 1258.

246. *Id.* at 634, 530 N.E.2d at 1260.

247. MASS. GEN. L. ch. 40A, § 6 (1992) (emphasis added).

248. *See, e.g.*, Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 56, 484 N.E.2d 113, 115 (1985).

sentence of section 6 was also a new addition to the zoning statute, that provision only codified what the municipalities had already been condoning through their local laws.[249]

The first case to address this provision of section 6 was *Fitzsimonds v. Board of Appeals of Chatham*.[250] The Fitzsimonds owned a summer cottage, originally one of ten similar units that were part of a "cottage colony."[251] The cottage colony had been "condominiumized" and the plaintiffs had taken title to one of the ten structures and its underlying land (the "footprint"), as well as a "ten percent undivided interest in the 'common areas and facilities' of the former colony."[252] The house was considered nonconforming by virtue of a deficiency in minimum lot area, as well as other dimensional defects alluded to by the court.[253] The plaintiffs were issued a building permit to add a second story to the structure, pursuant to which they commenced work on the project until they were issued a "stop-work order" when the job was 80-90% finished.[254] The plaintiffs were told to apply for a special permit; their request was denied and they appealed the decision of the board of appeals.[255]

The *Fitzsimonds* Court began, "the first two sentences of [section 6] . . . are as difficult and infelicitous as other language of the act . . . ."[256] The court then went on to state:

> An alteration, reconstruction, extension, or structural change of a nonconforming single-family or two-family residential structure is legitimated under the second "except" clause of the first sentence if it "does not increase the nonconforming nature of said structure"; otherwise . . . it must be submitted to the special permit procedure of the second sentence for a determination by the board of the question whether it is "substantially more detrimental than the existing nonconforming use to the neighborhood."[257]

The case was remanded to the board with instructions that it should first consider whether the alterations to the structure fit within the "except" clause, that is, determine whether the alterations would increase the nonconforming nature of the structure.[258] Second, if the answer to that question is "yes" then the question of "detriment" should next be

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249. *See supra* notes 44, 48-55 and accompanying text.
250. 21 Mass. App. Ct. 53, 484 N.E.2d 113 (1985).
251. *Id.* at 54, 484 N.E.2d at 114.
252. *Id.*
253. *Id.*
254. *Id.* at 55, 484 N.E.2d at 115.
255. *Id.*
256. *Id.* at 55-56, 484 N.E.2d at 115.
257. *Id.* at 56, 484 N.E.2d at 116.
258. *Id.*

addressed.[259] The Board, in its initial decision, had not addressed the first question and had "made a dubious approach to the second."[260] The foregoing was the extent of guidance given to the board of appeals by the court.

Presumably, if the alteration did not increase the nonconforming nature of the structure, the Fitzsimonds would be entitled to their building permit, although this is not clearly stated.[261] It was clearly stated that if the nonconforming nature was increased, the board must then determine whether to grant a special permit by addressing itself to the finding provision in the second sentence of section 6.[262] The *Fitzsimonds* Court is only concerned with the language of section 6, there is no mention of the applicable local provision. Assuming the statutory finding is made by the granting authority, *Fitzsimonds* seems to interpret this clause as allowing the grant of a special permit even when there is an increase in the current zoning violation. Whether this clause is more permissive than the portion of section 6 addressed by the *Rockwood* Court requires further examination. Such a conclusion would support the proposition that single and two-family structures are given more lenient treatment by section 6. Notwithstanding, that proposition must be examined in light of subsequent cases addressed to the second "except" clause of section 6.

The Massachusetts Court of Appeals was confronted with this provision two years later in *Willard v. Board of Appeals of Orleans*.[263] Plaintiff's single family home preexisted the zoning by-law establishing minimum setback and was therefore lawfully nonconforming.[264] Unlike the Fitzsimonds' situation, the plaintiff's proposed addition was to be located partly within the setback, thereby increasing the nonconforming nature of the structure.[265] The building inspector denied the application for a building permit and the board of appeals denied the special permit application.[266] After deciding the first paragraph of section 6 governed the facts of the case,[267] the court went on to

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259. *Id.*

260. *Id.*

261. *See* Donald J. Schmidt, *The Single and Two-Family Protection*, 8 LAND USE MANAGER (EOCD, Boston, MA), Ed. No. 5, Dec. 1991, at 3 (making the same presumption).

262. *See supra* note 257 and accompanying text.

263. 25 Mass. App. Ct. 15, 514 N.E.2d 369 (1987).

264. *Id.* at 16, 514 N.E.2d at 370.

265. *Id.*

266. *Id.*

267. There was an issue over whether the fourth paragraph or the first paragraph of § 6 governed the situation in this case. The court quickly resolved this issue in favor of the first paragraph, concluding that the fourth paragraph applies to new construction on vacant lots. *See id.* at 17-19, 514 N.E.2d at 370-71.

address issues of construction and appropriate procedure under this provision.[268] The court stated that the second "except" clause, "[a]s pointed out in *Fitzsimonds v. Board of Appeals of Chatham*, [requires] a board of appeals in a case such as this one to make an initial determination" whether the proposed addition would result in an increase in the nonconforming nature of the structure.[269] In *Fitzsimonds*, the proposed addition was a second story to the house, which, at least superficially, would appear not to increase the nonconforming nature of the structure.[270] In fact, the plaintiffs urged that this was the case, and the court responded, "[w]e think it would be unwise for the court to decide this question of the application of the 'except' clause as if it presented a nice legal point upon a motion to dismiss an action for failure to state a claim."[271] By contrast, in *Willard*, it was indisputable that the proposed addition would increase the nature of the nonconformity.[272] The *Willard* Court analogizes the two situations when they should have been distinguished. The importance of this distinction will become apparent as this discussion progresses. Clearly, the *Willard* Court wanted to follow the line of reasoning in *Fitzsimonds*.

The *Willard* Court went on to say that section 6 requires the board of appeals to: (1) identify the nature of the nonconformity; (2) determine "whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones;" (3) issue the special permit if the outcome of the second determination is negative; and (4) if the outcome of the second determination is affirmative, consider the question of "detriment" before granting or denying the special permit.[273] In *Fitzsimonds*, it was not clear whether a determination by the board that the proposed project would not increase the nonconformity or result in new zoning violations would entitle the applicant to a building permit; the presumption being that the building permit would issue.[274] The *Willard* Court told us that if the board makes this determination, a special permit should issue.[275] By requiring that a special permit issue, as opposed to a building permit, the *Willard* Court seems to suggest that in this situation, issuance of the special permit is mandatory. Special permits by definition are discretionary.[276]

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268. *Id.* at 20-22, 514 N.E.2d at 272-73.

269. *Id.* at 21, 514 N.E.2d at 373 (citing Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. at 56, 484 N.E.2d at 115-16 (1985)).

270. *Fitzsimonds*, 21 Mass. App. Ct. at 55, 484 N.E.2d at 115.

271. *Id.* at 57, 484 N.E.2d at 116.

272. *Willard*, 25 Mass. App. Ct. at 16, 514 N.E.2d at 370.

273. *Id.* at 21-22, 514 N.E.2d at 373.

274. *See supra* note 261 and accompanying text.

275. *Willard*, 25 Mass. App. Ct. at 22, 514 N.E.2d at 373.

276. *See e.g.*, Schiffone v. Zoning Board of Appeals, 28 Mass. App. Ct. 981, 553 N.E.2d 1308 (1990) (denial of special permit within discretion of zoning board); S.

The disposition of the *Willard* case may be read two ways. The board is to make a determination as to whether the nature of the nonconformity will be increased only in questionable circumstances, and upon finding in the negative, issue the special permit without reaching the question of "detriment." In line with this reasoning, if the situation is not questionable then the building inspector can make the determination and issue a building permit. Alternatively, the board is required to make the initial determination in all cases, whether questionable or not. Under both lines of reasoning, if the board makes an initial determination that the nature of the nonconformity will not be increased, the *Willard* Court suggests that a special permit should issue. The issuance of a special permit under these conditions would be nondiscretionary, unlike all other special permits. The *Willard* decision foreshadowed the eventual resolution of this issue: which line of reasoning is the appropriate interpretation.[277] Before the appeals court would settle this issue, the land court department chose its interpretation of *Willard.*

Beginning with *Lique v. Nahant Zoning Board of Appeals,*[278] the land court developed what eventually became known as the "footprint theory."[279] The land court stated the following in its disposition of the *Lique* case.

> In two recent Appeals Court decisions it has been made clear that if the footprint of the building is not changed, the Town is required to issue a building permit. It is only where the proposed addition to a single family residence is outside the existing footprint that the further requirements of [section] . . . 6 as to detriment become material.[280]

According to this theory, any alteration or addition within the footprint may be made as of right. It is not clear what happens once the proposed project extends beyond the footprint. It is uncertain whether a board of appeals, upon making the statutory finding in the applicant's favor, may issue a special permit for an increase in the nonconformity, may issue a special permit for an additional zoning violation not connected with the prior nonconformity, or both. The disposition of both *Fitzsimonds* and

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Kemble Fischer Realty Trust v. Board of Appeals, 9 Mass. App. Ct. 477, 402 N.E.2d 100, *cert. denied,* 449 U.S. 1011 (1980) (zoning board has power to deny special permit so long as decision is not based on legally untenable ground, and is not unreasonable, whimsical, capricious or arbitrary).

277. This issue is addressed in Goldhirsh v. McNear, 32 Mass. App. Ct. 455, 590 N.E.2d 709 (1992). *See infra* note 289 and accompanying text.

278. Land Court Case No. 124421 (June 1988).

279. Donald J. Schmidt, *The Single and Two-Family Protection (Part III),* 8 LAND USE MANAGER (EOCD, Boston, MA), Ed. No. 7, Feb. 1992, at 2.

280. Lique v. Nahant Zoning Board of Appeals, Case No. 124421 (Land Court, June 1988) (citing Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 484 N.E.2d 113 (1985) and Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 21-22, 514 N.E.2d 369, 373 (1987)).

Willard would lead to the conclusion that in the case of an increase in the prior nonconformity, a board of appeals would have the authority to issue a special permit, provided of course, that the applicable ordinance or by-law also empowered the board to take such action.[281] In *Tweed v. Zoning Board of Appeals of Tisbury*,[282] the appeals court upheld the grant of a special permit for an increase in the nonconformity of a residential structure, rejecting the argument advanced by the defendant, that under *Wrona v. Board of Appeals of Pittsfield*,[283] a variance is required. Whether a special permit may issue for an addition to a residential structure resulting in additional zoning violations remains uncertain. The Massachusetts Supreme Judicial Court decided *Rockwood v. Snow Inn Corp.*[284] after both *Willard* and *Fitzsimonds*, and it may, therefore, have an impact on the issue.

The *Rockwood* Court pronounced, "even as to a single or two-family residence, structures to which the statute appears to give special protection, the zoning ordinance or by-law applies to a reconstruction, extension or change that 'would intensify the existing nonconformities or result in additional ones.'"[285] If the rule announced in *Rockwood* applied to single and two-family residential structures, then a variance would be required for an increase in nonconformity or an additional zoning violation, unless the local zoning regulations explicitly permit otherwise.[286] Supposition such as this may be irrelevant if one accepts the premise that the outcome in many of these cases turns on the relevant language found in the local ordinance or by-law. If this analysis thus far supports this premise, then it would be a fair statement to say that section 6 left a good deal of discretion to local zoning authorities, but when the issue foreshadowed in *Willard*[287] was resolved by a recent appeals court, a portion of that discretion was diminished and problems at the local level were intensified.

The appeals court in *Goldhirsh v. McNear*[288] ruled that cases involving determinations of whether an addition or extension will result in an increase in the nonconforming nature of a single or two-family

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281. *See Willard*, 25 Mass. App. Ct. at 22, 514 N.E.2d at 373 (citing *Fitzsimonds*, 21 Mass. App. Ct. at 56, 484 N.E.2d at 115-16).

282. 28 Mass. App. Ct. 1106, 548 N.E.2d 202 (1989) (unpublished, *see* Donald J. Schmidt, *The Single and Two-Family Protection (Part II)*, 8 LAND USE MANAGER, (EOCD, Boston, MA), Ed. No. 6, Jan. 1992 at 2).

283. 338 Mass. 87, 153 N.E.2d 631 (1958).

284. 409 Mass. 361, 566 N.E.2d 608 (1991).

285. *Id.* at 364, 566 N.E.2d at 610-11 (quoting Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 22, 514 N.E.2d 369, 373 (1987)).

286. *See supra* notes 200-09 and accompanying text. *See also* Donald J. Schmidt, *The Single and Two-Family Protection (Part III)*, 8 LAND USE MANAGER (EOCD, Boston, MA), Ed. No. 7, Feb. 1992 at 3.

287. *See supra* note 277 and accompanying text.

288. 32 Mass. App. Ct. 455, 590 N.E.2d 709 (1992).

residential structure, must be submitted to the board of appeals "in the first instance," regardless of whether the issue is questionable or not.[289] This decision effectively overruled the "footprint theory" utilized by lower courts for the past three or four years.[290]

McNear owned a single family structure, originally built as a carriage house, an accessory structure to an estate, in the late nineteenth century.[291] McNear applied for and was granted a building permit for various alterations;[292] two months later he filed application for an additional permit to "replace existing dormers" and add a second level to the house.[293] The building inspector granted the permit, reasoning under the footprint theory that the expansion would be allowed as of right.[294] Goldhirsh, an abutter, attempted to have the work stopped, and at some point thereafter the building inspector reconsidered and told McNear he needed a variance for the work.[295] The board of appeals granted McNear a special permit, concluding that "he had the right to expand vertically within the structure's original footprint."[296] The trial judge (land court department) upheld the grant of the special permit under the footprint theory.[297]

The applicable Manchester by-law tracked the language of the second "except" clause in section 6.[298] The *Goldhirsh* Court cited to *Rockwood, Willard,* and *Fitzsimonds* in succession, directly quoting the language in *Willard*:

> [A]n application for changes to a residential structure "requir[es] a board of appeals to identify the particular respect or respects in which the existing structure does not conform to the requirements of the present

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289. *Id.* at 461, 590 N.E.2d at 712.

290. Donald J. Schmidt, *Footprint Theory Overturned*, 9 LAND USE MANAGER (EOCD, Boston, MA), Ed. No. 1, July 1992.

291. *Goldhirsh*, 32 Mass. App. Ct. at 456-57, 590 N.E.2d at 710. The residential structure was nonconforming as it was originally built as an accessory building and protruded three feet into the "sidelot setback distance," required under the Manchester zoning by-law. *Id.* at 456, 590 N.E.2d at 710.

292. The proposed alterations for this permit were "enclosure of an existing deck, the addition of a second deck, and interior alterations." *Id.* at 457, 590 N.E.2d at 710.

293. *Id.*

294. *Id.*

295. *Id.* at 457-58, 590 N.E.2d at 710. The building inspector determined that a variance was needed as the house had been subject to a variance in 1955, thus calling into question the nonconforming status. The court ruled that the earlier variance was irrelevant as nonconforming status had been established prior to its grant. *Id.* at 457-59, 590 N.E.2d at 710-11.

296. *Id.* at 458, 590 N.E.2d at 710.

297. *Id.* at 458, 590 N.E.2d at 711.

298. *Id.* at 458-59 n.5, 590 N.E.2d at 711 n.5. This is an immediate trigger that the decision may be limited in respect of this town's by-law, as was illustrated in the *Rockwood* discussion.

> by-law and then determine whether the proposed alteration or addition would intensify the existing nonconformities or result in additional ones."[299]

The court then opined, "we see nothing in *Willard* which supports the proposition that there will never be an increase in a structure's nonconforming nature where the proposed alterations are confined to the existing footprint."[300] Thus, the court wielded its mighty pen, and struck down the footprint theory. There is an upside to the disposition of *Goldhirsh*. If there was any question as to whether the *Rockwood* decision would have an impact on single and two-family structures, the *Goldhirsh* case suggests that it does not. If it did, a variance might be required for any additional zoning violations, however, or increases in existing nonconformities. *Goldhirsh* reiterated what had been said by the *Willard* and *Fitzsimonds* Courts–that a special permit may issue and a variance is not required.[301]

The downside of *Goldhirsh* is the practical implications of overturning the footprint theory. Most municipalities tend to incorporate the section 6 language into their local laws, as was the case in *Goldhirsh*[302] and *Rockwood*.[303] For cities and towns that reproduce the section 6 language in their local zoning provision, all cases involving structural change or extension to nonconforming residential structures would have to be reviewed by the board of appeals. The building inspector may no longer make a decision as to whether the nonconforming nature of the structure will be increased; "[it] must be determined by the board in the first instance."[304] Anyone who owns a residential structure that is considered nonconforming will be effected by this decision. There are a substantial number of single and two-family residential structures

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299. *Id.* at 460, 590 N.E.2d at 712 (quoting Willard v. Board of Appeals of Orleans, 25 Mass. App. Ct. 15, 21-22, 514 N.E.2d 369, 373 (1987)).

300. *Id.* at 461, 590 N.E.2d at 712.

301. *See id.* at 460, 590 N.E.2d at 712.

> Should the board conclude that there will be no intensification or addition, the applicant *will be entitled to* the issuance of a special permit. If the conclusion is otherwise, the applicant will be required to show that the change will not be "substantially more detrimental than the existing nonconforming structure or use to the neighborhood."

Id. (quoting Fitzsimonds v. Board of Appeals of Chatham, 21 Mass. App. Ct. 53, 56, 484 N.E.2d 113, 116 (1985) (emphasis added)). The emphasis above underscores the nature of the special permit in this circumstance–it is mandatory and not discretionary. This anomalous special permit could have been avoided if the *Willard* court had called for the issuance of a building permit in this situation. *See supra* notes 275-78 and accompanying text.

302. *See Goldhirsh*, 32 Mass. App. Ct. at 458-59 n.5, 590 N.E.2d at 711 n.5.

303. *See Rockwood*, 409 Mass. at 364, 566 N.E.2d at 611.

304. *Goldhirsh*, 32 Mass. App. Ct. at 461, 590 N.E.2d at 712 (1992).

considered to be nonconforming in Massachusetts.[305] For all those homeowners wishing to add an extension on to their house, or do any work requiring a building permit, they must now apply to their zoning board of appeals for a special permit. As all homeowners similarly situated must seek board of appeals approval, the caseloads of the boards will increase dramatically. The end result for the homeowner will be, and has been, procedural delay. As municipalities became aware of the *Goldhirsh* decision, homeowners in the months following had stop-work orders issued; before they could continue construction, they were required to seek a special permit.[306] There have also been more serious repercussions to this decision.

Many of the coastal communities have a large percentage of nonconforming residential structures due to the passage of local laws addressing preservation of the coastal shorelines.[307] In one of these coastal communities, homeowners experienced problems closing on the sale of their homes, as additions erected pursuant to a building permit, pre-*Goldhirsh*, were considered unlawful.[308] In essence, *Goldhirsh* held that the procedure delineated by the court should have been used all along. Therefore, these previous additions should have been under special permit; now, in order to legalize the addition or extension, the homeowners were forced into seeking the special permit, after the fact.[309]

One might wonder whether the Massachusetts Appeals Court, in this case, fully considered all of the possible implications of its decision.[310]

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305. Interview with Donald J. Schmidt, Principal Planner for Planning & Management, Executive Office of Communities & Development, in Boston, MA (Jan. 26, 1992). Mr. Schmidt bases this statement on his twenty-two years of experience in working with the 351 municipalities in the state of Massachusetts.

306. *Id.* Mr. Schmidt had numerous phone calls during the months following the disposition of *Goldhirsh*, both from homeowners and builders trying to verify whether the building inspector was correct in telling them to go to the board of appeals.

307. *Id.*

308. *Id.* The banks would not close mortgages on homes that were considered to be illegally noncomplying with local zoning laws.

309. *Id.* This is what occurred in the coastal community of Ipswich. The lending institutions were concerned with the six year statute of limitations provided in § 7 of the Zoning Act. Prior to the lapse of six years, enforcement of the zoning laws could result in removal of the addition or extension, if found to be in violation. *See* MASS. GEN. L. ch. 40A, § 7 (1992).

310. Mr. Schmidt has been made aware of one implication that has given rise to serious concern, particularly among the mortgage lending community. The provision of § 6 addressed by the appeals court in *Goldhirsh*, governs the "reconstruction" of residential structures. If additions and extensions may only be made upon approval of the board of appeals, then likewise, reconstruction would require board approval and could not be made "as a matter of right." If a hurricane were to hit the Massachusetts shoreline, homeowners would not be "guaranteed" of any right to

Recall, however, that the *Goldhirsh* Court was interpreting the Manchester by-law which mirrored the section 6 second "except" clause.[311] If local laws are more explicit as to what will constitute an intensification in nonconformity, then municipalities should be able to define the circumstances under which a building permit may issue for extension or alteration of a nonconforming residential structure. This should be a valid exercise of Home Rule authority.[312]

VII. CONCLUSION

If the goal of this Note has been accomplished, then many of the ambiguities present in the first paragraph of section 6 of the Massachusetts Zoning Act have been identified and carefully examined. This author's endeavor was to facilitate the work of local practitioners and municipal authorities in zoning matters involving nonconforming uses and nonconforming structures. A comprehensive understanding of this area of the law is necessary if communities in Massachusetts are to effectively carry out their municipal zoning goals. The Home Rule Amendment permits Massachusetts communities to exercise the widest latitude of regulatory discretion. There are many procedural pitfalls, however, which must be skillfully addressed by the language of the local laws. The task at hand calls for careful drafting of municipal zoning laws addressed to nonconformities; in harmony with the state statute and with consideration given to the concerns of both local zoning officials and homeowners.

*Teresa Rohwedder**

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rebuild their home. Interview with Donald J. Schmidt, Principal Planner for Planning & Management, Executive Office of Communities & Development, in Boston, MA (Jan. 26, 1992).

311. *See supra* note 298 and accompanying text.

312. This conclusion is espoused by Mr. Schmidt, *supra* note 212. In fact, this is the approach being taken presently by many municipalities to address the problems they are confronting in the wake of the *Goldhirsh* decision.

* This article is dedicated to my brother Daniel F. Rohwedder, who continues to be an inspiration in my life. Success at life can only be measured by the extent to which we give of ourselves to others whose lives we touch.

SJC Steers Off Course: DUI Breath Test Refusals Inadmissible

"To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."[1]

I. INTRODUCTION

In 1991, approximately fifty percent of the 41,000 highway fatalities in the United States were alcohol related.[2] To combat this carnage, the minimum drinking age has been raised from eighteen to twenty-one nationally,[3] every state has enacted aggressive anti-drinking and driving statutes,[4] and a variety of techniques and devices have been made available to law enforcement entities to apprehend drunk drivers.[5]

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1. Schmerber v. California, 384 U.S. 757, 762 (1966) (quoting Miranda v. Arizona, 384 U.S. 436, 460 (1966)).

2. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE SOURCEBOOK OF CRIMINAL STATISTICS 1992, tbl. 3.119 (Kathleen Maguire et al. eds., 1993) (citing 41,462 automobile fatalities in the United States during 1991, of which 19,900 were alcohol-related). In 1991, 1,288,876 persons nationally were arrested for driving under the influence. *Id.* at tbl. 4.7. During the same time period in Massachusetts, 15,872 motorists were arrested for driving under the influence. *Id.* at tbl. 4.29. The annual toll from drunken drivers is over one million dollars worth of personal injuries and five billion dollars property damage. Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451 (1990) (citing 4 WAYNE LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.8(d), at 71 (2d ed. 1987)).

3. Ruth Gastel, *Drunk Driving and Liquor Liability*, INS. INFO. INST. REP., Jan. 1992, *available in* LEXIS, Nexis Library, IIRPRT File.

4. See the Drunk Driving Prevention Act of 1988, 23 U.S.C. § 410 (1988 & Supp. III 1991), which conditioned the grant of federal highway funding to states on their adoption of statutes prohibiting driving under the influence with a blood alcohol content above 0.10%.

5. *See* Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (holding that Fourth Amendment was not violated by random checkpoint stops to detect drunk drivers because government's interest in preventing drunk driving outweighs any intrusion on the motorist's right to privacy); Jacques LeBoeuf, *Videotaping Drunk Drivers: Limitations on Miranda's Protections*, 81 J. CRIM. L. & CRIMINOLOGY 883 (1991).

The most effective means of detecting whether the operator of a motor vehicle has been driving under the influence of intoxicating liquor or drugs (DUI) is through the use of various breath testing devices.[6] Although the legal use of these methods is predicated upon the arrested motorist's acquiescence to the test, a refusal to submit to the test gives rise to a civil penalty in nearly every state.[7] Further, a significant majority of states penalize suspected drunken drivers who refuse to submit to breath analysis by allowing evidence of such refusal to be introduced by the state in a subsequent criminal proceeding.[8] The Massachusetts state legislature considered legislation that would allow "refusal evidence" in criminal DUI proceedings, but the Massachusetts Supreme Judicial Court issued an advisory opinion holding that such evidence would be unconstitutional under the state constitution, thus foreclosing passage of the legislation.

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6. *See generally* RICHARD E. ERWIN, 2-3 DEFENSE OF DRUNK DRIVING CASES §§ 19, 21 & 22 (1994) (describing breath-test devices, including the Intoximeter, Intoxilyzer, and Breathalyzer); JOHN A. TARANTINO, 1 DEFENDING DRINKING DRIVERS §§ 230-34 (2d ed. 1993) (describing the theory, operation, and sources of error of the Breathalyzer, Intoxilyzer, Intoximeter, and BAC Verifier). Due to the wide variety of breath-testing devices employed by the nation's police forces, this Note will use the term "breath test" to include all such means and devices used to ascertain a person's blood-alcohol content.

7. A 1991 study by the National Highway Traffic Safety Administration found that forty-eight states have a mandatory license suspension or revocation penalty to be imposed upon a defendant who refuses to submit to a breath test. RALPH K. JONES ET AL., NAT'L HIGHWAY OF TRAFFIC SAFETY ADMIN., IMPLIED CONSENT REFUSAL IMPACT 9-13 (1991) [hereinafter NHTSA REPORT]. The minimum length of a license suspension or revocation for a first refusal varies widely across states. Lengths of license suspension range from 60 days in Maryland to 375 days in North Carolina. *Id.* at 5. The average period across all the states was 241 days. *Id.* All fifty states expressly provide in their statutes whether a refusal is a crime or an infraction: thirty-seven states classify a refusal as an infraction, twelve as a crime, and one state as either a crime or infraction depending on whether it is a first or a second refusal. *Id.* For most states, sanctions for second or multiple refusals are harsher than those for a first refusal. *Id.*

8. The NHTSA study found that forty-seven of the fifty states allow refusal evidence in a criminal DUI proceeding. NHTSA REPORT, *supra* note 7, at 5. This is a misleading statistic, however, as some states only allow refusal evidence in certain circumstances and do not allow the refusal evidence to be used in determining the defendant's guilt or innocence. *See, e.g.*, State v. Pineau, 491 A.2d 1165, 1169 (Me. 1985); People v. Duke, 357 N.W.2d 775, 777-78 (Mich. Ct. App. 1984); State v. Albright, 298 N.W.2d 196, 197 (Wis. Ct. App. 1980). The three states which do not allow refusal evidence in a criminal DUI proceeding are Hawaii, Massachusetts, and Rhode Island. *See* HAW. REV. STAT. §§ 286-159 (1991 Supp); MASS. GEN. L. ch. 90, § 24(1)(e) (1992); R.I. GEN. LAWS §§ 31-27-2.1 (1992 Supp). Although Virginia statutorily prohibits the admission of refusal evidence, it allows a defendant to introduce such evidence in his or her defense to prove the reasonableness of the refusal. VA. CODE. § 18.2-268(s) (Michie 1988).

On February 4, 1992, the Massachusetts Senate requested the opinion of the Massachusetts Supreme Judicial Court to determine the constitutionality of a bill pending in the state Senate.[9] The bill, entitled "An Act Providing for the Admissibility of the Refusal to Take a Test for the Chemical Analysis of Breath into Evidence at Criminal Trials,"[10] was intended to amend the current DUI statute. The latter provides that evidence of such a refusal is inadmissible.[11] The new proposal would permit the state to offer refusal evidence in criminal proceedings against defendants accused of operating a motor vehicle while under the influence of intoxicating liquor or drugs.[12] The Senate requested the Justices' opinion because "[g]rave doubts exist[ed] as to the constitutionality of [the bill] if enacted into law."[13]

In the *Opinion of the Justices to the Senate (Opinion of the Justices)*, issued on May 12, 1992, the Massachusetts Supreme Judicial Court answered the Senate query by concluding that the proposed legislation would be unconstitutional.[14] The Justices reasoned that evidence of a defendant's

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9. Senate Order No. 1418 (1992). The Senate question stated:
> Would the provisions of Senate No. 717 which permits a defendant's failure or refusal to submit to a chemical test or analysis of his breath to be admissible as evidence in a criminal proceeding violate the self-incrimination clause of Article XII of Part the First of the Constitution of the Commonwealth in that the defendant is therefore compelled to furnish evidence against himself?

Id.

10. Senate Bill, No. 717 (1992).

11. MASS. GEN. L. ch. 90, § 24(1)(e) (1992) provides in pertinent part: "Evidence that the defendant failed or refused to consent to such test or analysis *shall not be admissible against him in a* civil or *criminal proceeding* . . . ." (emphasis added).

12. Senate Bill Number 717 would have amended MASS. GEN. L. ch. 90, § 24(1)(e) (1992) by striking out the second and third sentences and inserting in place thereof: "Evidence that the defendant failed or refused to consent to [a breath or blood] test or analysis shall not be admissible in a civil proceeding but *shall be admissible in a criminal proceeding*, and shall be admissible in any action by the registrar under paragraph (f)." (emphasis added).

13. Senate Order, No. 1418 (1992). Article 2 of Chapter 3, Part II of the Massachusetts Constitution, as modified by Amendment 85, defines the authority of the Supreme Judicial Court to render advisory opinions. Answer of the Justices to Senate, 406 Mass. 1220, 1224, 547 N.E.2d 17, 20 (1989). The provision provides, in pertinent part, that "[e]ach branch of legislature . . . shall have the authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions."

14. Opinion of the Justices, 412 Mass. 1201, 1211, 591 N.E.2d 1073, 1078 (1992). On February 11, 1992, the SJC invited interested parties to file *amicus briefs* in response to the Senate question. Five briefs were filed (four supporting Bill No. 717, one against). The briefs filed included: Brief and Addendum for Thomas C. Rapone Secretary of Public Safety, Opinion of the Justices, 412 Mass. 1201, 591 N.E.2d 1073 (1992) (No. 5880); Brief and Appendix of the District Attorney for the Middle District as *Amicus Curiae*, Opinion of the Justices, 412 Mass. 1201, 591 N.E.2d 1073 (1992) (No. 5880); Brief of Amici Attorney General and District Attorneys, Opinion

refusal to submit to a breath test, used in the manner proposed, "is both compelled and furnishes evidence against oneself," and would therefore violate the privilege against self-incrimination afforded by article twelve of the Declaration of Rights of the Massachusetts Constitution.[15]

This Note focuses on the reasoning of the Massachusetts Supreme Judicial Court in the *Opinion of the Justices* and compares it to decisions by the United States Supreme Court and the many state courts that have considered the issue of whether evidence of a suspect's refusal to submit to a breath test is constitutionally admissible in a DUI criminal proceeding.

Part II of this Note discusses driving under the influence legislation and explains the use and significance of refusal evidence.[16] Part III-A is a brief overview of the privilege against self-incrimination, focusing on the policies the privilege attempts to serve and its application in the modern legal system.[17] Part III-B reviews the series of United States Supreme Court cases interpreting and applying the federal privilege against self-incrimination to situations in which suspects have been compelled to perform a test for the government.[18] Part IV presents the Massachusetts Supreme Judicial Court's advisory opinion to the Massachusetts Senate, the *Opinion of the Justices*.[19] Part V analyzes and critiques the *Opinion*.[20] Finally, Part VI contains a conclusion.

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of the Justices, 412 Mass. 1201, 591 N.E.2d 1073 (1992) (No. 5880); Brief on Behalf of Mothers Against Drunk Driving, Massachusetts, Opinion of the Justices, 412 Mass. 1201, 591 N.E.2d 1073 (1992) (No. 5880); Brief of the Massachusetts Association of Criminal Defense Lawyers, as Amicus Curiae, 412 Mass. 1201, 591 N.E.2d 1073 (1992) (No. 5880).

15. *Opinion*, 412 Mass. at 1211, 591 N.E.2d at 1078. Article 12 of the Declaration of Rights of the Massachusetts Constitution provides:

> No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.
>
> And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

MASS. CONST. art. 12.

16. *See infra* notes 21-53 and accompanying text.
17. *See infra* notes 54-87 and accompanying text.
18. *See infra* notes 88-189 and accompanying text.
19. *See infra* notes 190-258 and accompanying text.
20. *See infra* notes 259-372 and accompanying text.

II. BACKGROUND

A. *The Role of Blood-Alcohol Tests*

Courts have consistently held that blood alcohol content machines are scientifically reliable devices for the determination of the percentage of alcohol in a person's body.[21] The results of these tests are admissible in civil and criminal DUI proceedings to provide more credible and objective evidence of intoxication than such nonscientific proof as witness testimony.[22] Because a person's memory is fallible, oral

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21. Commonwealth v. Neal, 392 Mass. 1, 17, 464 N.E.2d 1356, 1367 (1984). Breath testing technology and methodology have gained judicial acceptance in Massachusetts: "[s]cientific instruments that measure blood alcohol content on the basis of breath samples have for some time been deemed to satisfy this Commonwealth's 'general acceptance' standard for admissibility of scientific evidence." *Id.* Despite judicial acceptance of breath tests, their reliability is frequently questioned by the public. A recent decision by the Massachusetts Supreme Judicial Court (SJC) attempted to insure the reliability of such tests. In Commonwealth v. Barbeau, 411 Mass. 782, 585 N.E.2d 1392 (1992), the SJC held that if a breath analysis report is to be admitted into evidence, the Commonwealth must show that a certified operator used a certified breath device to obtain a chemical analysis of a DUI suspect's breath. *See* MASS. GEN. L. ch. 90, § 24(1)(K) (1992). The Commonwealth must also prove the existence of, and compliance with, the requirements of a periodic testing program for certified operators. *Barbeau*, 411 Mass. at 784, 786, 585 N.E.2d at 1394, 1395. Two days after the *Barbeau* decision was issued, the Secretary of Public Safety amended CODE MASS. REGS. tit. 501, § 2.41 (1992) to codify the existing program of periodic testing of breath analysis devices to comply with the *Barbeau* mandate. Brief for the Secretary of Public Safety, *supra* note 14, at 9-10 n.5.

The United States Supreme Court has also accepted blood and breath tests as reliable means of determining a motorist's level of intoxication. *See* Schmerber v. California, 384 U.S. 757, 771 (1965) ("Extraction[s] of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol."). The Supreme Court recently noted that it saw "no reason to distinguish between chemical blood tests and breathalyzer tests for" the purpose of determining Fifth Amendment issues. Pennsylvania v. Muniz, 496 U.S. 582, 604 n.19 (1990).

Although breathalyzers have been accepted by courts, many questions have been raised concerning their reliability. *See generally* Debra T. Landis, *Necessity and Sufficiency of Proof That Tests of Blood Alcohol Concentration Were Conducted in Conformance with Prescribed Methods*, 96 A.L.R. 3d 745 (1980 & Supp. 1993); Donald H. Nichols, *Toward a Coordinated Judicial View of the Accuracy of Breath Testing Devices*, 59 N. DAK. L. REV. 329 (1983); Paul Schop, *Is DWI DOA?: Admissibility of Breath Testing Evidence in the Wake of Recent Challenges to Breath Testing Devices*, SW. U. L. REV. 247 (1990).

22. Mark A. Ellis, Comment, *Admissibility of Refusal to Submit to Blood-Alcohol Test and the Fifth Amendment*: South Dakota v. Neville, 17 CREIGHTON L. REV. 203, 216 (1983) (citing People v. Sudduth, 421 P.2d 401, 403 (Cal.), *cert. denied*, 389 U.S. 850 (1967)); Peter Arenella, *Schmerber and the Privilege Against Self-Incrimination: A*

testimony describing the defendant's driving performance, behavior, and appearance at the time of arrest may not be as convincing as scientific data.[23] Consequently, the prosecution often seeks to admit the results of a blood-alcohol test to prove a defendant's intoxication because "the best evidence of intoxication is harbored within the body of the suspect."[24] As such, a chemical analysis report indicating the accused's level of intoxication takes on great evidentiary value in the state's case-in-chief.[25]

Since chemical analysis tests provide the most reliable means of proving intoxication, all states have enacted statutes requiring a motorist arrested for DUI to submit to a chemical blood test.[26] These statutes are known as "implied consent" laws, under which all motorists suspected of driving under the influence are deemed to have consented to a chemical analysis test designed to measure blood alcohol content

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Reappraisal, 20 AM. CRIM. L. REV. 31, 32 (1982).

To obtain a DUI conviction in Massachusetts, the Commonwealth must prove that the defendant operated a motor vehicle on a public way and was impaired by the voluntary ingestion of alcohol. *See generally* Commonwealth v. Tynes, 400 Mass. 369, 510 N.E.2d 244 (1987); Commonwealth v. Connolly, 396 Mass. 169, 474 N.E.2d 1106 (1985); Commonwealth v. Marley, 394 Mass. 433, 486 N.E.2d 715 (1985). To prove impairment, the Commonwealth must show that the motorist's alertness, judgment, and ability to promptly and effectively respond to unexpected emergencies, were diminished by alcohol consumption. *Connolly*, 394 Mass. at 172, 474 N.E.2d at 1109.

23. LAWRENCE TAYLOR, DRUNK DRIVING DEFENSE § 5.0.3, at 511-12 (3d ed. 1991) (quoting Robert Buckhout, *Eyewitness Testimony*, 231 SCIENTIFIC AMERICAN 23). Psychological factors that could influence a witness in a DUI trial include the witness's "emotional condition at the scene of the incident, prejudice against the defendant, bias in favor of the prosecution, an authoritarian desire to satisfy a judicial or law enforcement father figure, or simply a motive for lying." *Id.* § 5.0.3, at 511.

24. Robert B. Beauchamp, *"Shed Thou No Blood": The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. CAL. L. REV. 1115, 1116 (1987); *see also* Winston v. Lee, 470 U.S. 753, 763 (1985) ("Especially given the difficulty of proving drunkenness by other means, these considerations showed that results of the blood test were of vital importance if the State were to enforce its drunken driving laws.").

25. Penn Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 ST. JOHN'S L. REV. 39, 44 n.13 (1978).

26. *Id.* at 39. *See id.* at n.3 (citing implied consent laws of the fifty states); *see generally* Kelly M. Tullies, Note, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873 (1992).

The Massachusetts DUI implied-consent statute is typical of most states' statutes in providing that: "[by] operat[ing] a motor vehicle upon any way or in any place to which the public has a right of access . . . [the operator is] deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that he is arrested for operating a motor vehicle while under the influence of intoxicating liquor . . . . " MASS. GEN. L. ch. 90, § 24(1)(F) (1992). In addition to intoxication by liquor, a motorist can violate the statute for driving under the influence "of marihuana, narcotic drugs, depressants or stimulant substances . . . or the vapors of glue . . . ." MASS. GEN. L. ch. 90, § 24 (1)(a)(1) (1992).

level.[27] Before such a test can be administered, the police must first advise the motorist that his or her consent is required and refusal to submit to the test automatically imposes a civil penalty, usually that of license suspension, as well as possible criminal sanctions in some states.[28] Therefore, the "implied consent" language is in reality only a legal fiction, as the motorist must actually submit to the test before it can be administered.[29]

Despite the significant value of a blood alcohol content report,[30] all states allow a motorist to refuse to submit to the test[31] in order to avoid the unconstitutional use of forced testing.[32] To counter the state's loss

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27. Lerblance, *supra* note 25, at 41. *See* Hess v. Palowski, 274 U.S. 352 (upholding principle that motorists who avail themselves of a state's benefits and protections by using its highways also impliedly consent to the burdens of the state's laws) *overruled on other grounds* International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See generally* Lerblance, *supra* note 25, at 41-46 (detailing features of implied-consent statutes).

28. Lerblance, *supra* note 25, at 41-42 n.8. *See, e.g.*, MASS. GEN. L. ch. 90, § 24(1)(e), (f) (1992). States have various penalties attached to a suspect's refusal to submit to a breath test. The most common penalty is the mandatory revocation of a motorist's license to operate a motor vehicle. The United States Supreme Court has upheld the constitutionality of state statutes which mandate the suspension of a motorist's license for refusal to take a breath test upon arrest for operating a motor vehicle while under the influence of intoxicating liquor. *See, e.g.*, Mackey v. Montrym, 443 U.S. 1, 19 (1979). In *Mackey*, the Supreme Court upheld the provision of the Massachusetts implied consent statute provision which mandated the suspension of drivers' licenses upon a refusal to take a breath test. *Id.* at 19. The wording of the challenged statute, MASS. GEN. L. ch. 90, § 24(1)(f) (1979), was identical to the 1992 version, except that the suspension period had been increased from 90 days to 120 days. MASS. GEN. L. ch. 90, § 24(1)(f) (1992). In holding that the statute did not violate the Due Process Clause of the Fourteenth Amendment, the *Mackey* Court reasoned that "[a] state plainly has the right to offer incentives for taking a test that provides the most reliable form of evidence of intoxication for use in subsequent proceedings." *Mackey*, 443 U.S. at 19. Rather than viewing the penalty as a form of impermissible state compulsion, the Court found that the license revocation sanction was both permissible and a "strong inducement" for an arrestee to take the breath test. *Id.* at 18. The Court stated that the sanction served to deter drunken driving and allowed a state to promptly remove dangerous drivers from the road, thereby increasing the safety on public highways. *Id.* As a result of *Mackey*, currently forty-eight states penalize a person's first refusal to take a breathalyzer test with a mandatory license revocation or suspension. NHTSA REPORT, *supra* note 7, at 5.

29. Lerblance, *supra* note 25, at 42-43 & 64.

30. *See* South Dakota v. Neville, 459 U.S. 553, 564 (1983) ("[T]he State wants [the accused] to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.").

31. NHTSA REPORT, *supra* note 7, at 5.

32. Commonwealth v. Davidson, 27 Mass. App. Ct. 846, 849, 545 N.E.2d 55, 57 (1989). The legislative intent behind implied consent statutes has been described as:

> This type of statute provides for mandatory consent with a freedom of refusal to prevent unseemly struggles that are likely to arise when police

of this objective, scientific proof of intoxication,[33] most states allow the fact of the defendant's refusal into evidence in a criminal DUI proceeding as circumstantial evidence of the accused's consciousness of guilt.[34] In these circumstances, refusal evidence is used to allow the jury to infer that the defendant's reason for refusing the test was caused by knowledge of his or her intoxication and fear that the test would provide irrefutable proof of this condition.[35]

For example, in Massachusetts, the results of a breath test are admissible in any criminal proceeding against the accused for DUI.[36] If the percentage of alcohol in the defendant's blood at the time of the alleged offense is above a set amount, 0.10% in Massachusetts, a presumption that the defendant was operating a motor vehicle while

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> and citizens fail to appreciate the import of a common purpose. An act of this type does not contemplate a *per se* right of refusal, but rather an acquiescence in refusal in the parties of avoiding violent conflict.

State v. Jennings, 637 P.2d 1, 9 (Hawaii 1981) (Haswell, C.J., dissenting). *See also* Lerblance, *supra* note 25, at n.22 (citing Bush v. Bright, 71 Cal. Rptr. 123, 125 (1968) (explaining that a suspect is allowed to refuse to submit to a sobriety test because "such a person has the *physical power* to make the test impractical, and dangerous to himself and those charged with administering it")).

33. *See* People v. Sudduth, 421 P.2d 401, 403 (Cal. 1966) (refusing to submit to a breath-alcohol test operates to suppress evidence of intoxication that will otherwise dissipate rapidly), *cert. denied*, 389 U.S. 850 (1967); *see also* NHTSA REPORT, *supra* note 7, at 4 (noting that 47 of the 50 states allow refusal evidence in criminal proceedings for some reason).

34. *See, e.g.*, City of Westerville v. Cunningham, 239 N.E.2d 40, 41 (1968). The court in *Cunningham* explained the significance of refusal evidence in the DUI context:

> Where a defendant is being accused of intoxication and is not intoxicated, the taking of a reasonably reliable chemical test should establish that he is not intoxicated. On the other hand, if he is intoxicated, the taking of such a test will probably establish that he is intoxicated . . . . Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant's fear of the results of the test and his consciousness of guilt . . . .

Id. An "inference" is "[a] logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts. Inferences are deductions or conclusions which with reason and common sense lead the jury to draw from facts which have been established by the evidence in a case." BLACK'S LAW DICTIONARY 536 (6th ed. 1990). *See generally* J. WIGMORE, 8 EVIDENCE § 2273 (McNaughton rev. 1961). As will become evident later in this Note, it is important to distinguish that "the inference of a consciousness of guilt arises not from the results such a test could actually have detected, but from the suspect's fear of what the test might have detected." Commonwealth v. Monahan, 549 A.2d 231, 237 (Pa. Super. Ct. 1988). *See also* Beauchamp, *supra* note 24, at 1116.

35. Ellis, *supra* note 22, at 216.

36. MASS. GEN. L. ch. 90, § 24(1)(e) (1992).

under the influence of intoxicating liquor arises.[37] If the motorist refuses to submit to the test, then it cannot be administered, and the fact that the defendant refused the opportunity to take the test is admissible only in an action before the registrar for license suspension purposes.[38] Refusal evidence is statutorily prohibited from admission in all other civil and criminal proceedings in Massachusetts.[39]

B. *Refusal Evidence*

Proponents of the admission of refusal evidence for the consciousness of guilt inference maintain that such evidence can further the state's strong interest in safeguarding its highways by aiding in the conviction of drunken drivers.[40] Admission of refusal evidence is also favored because it is relevant and serves as a substitute in the prosecution's chain of evidence for the chemical analysis report lost when the accused refused to submit to the test.[41] Because the existence and use of breath

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37. *Id.* The statute further provides that if the evidence shows that the "percentage was [0.05%] or less, there shall be a presumption that such defendant was not under the influence of intoxicating liquor, and he shall be released from custody forthwith . . . if such evidence is that such percentage was more than [0.05%] but less than [0.10%], there shall be no presumption . . . ." *Id.* The Massachusetts Senate recently unanimously voted to lower the blood alcohol content threshold to .08. Doris S. Wong, *Mass. Senate Approves Toughening Drunken Driving Laws*, BOSTON GLOBE, Jan. 25, 1994, at 1, 19.

38. MASS. GEN. L. ch. 90, § 24(1)(e)-(f) (1992). The incidence of breath test "refusals in Massachusetts rose from 10,692 in 1984 to 13,007 in 1990, an increase of nearly 22%." Brief for Secretary of Public Safety, *supra* note 14, at 5. According to the NHTSA Report, the incidence of breath test refusals per number of DUI arrests in Massachusetts is estimated at 30%, which ranks the state as the sixth highest of forty states studied. NHTSA REPORT, *supra* note 7, at 18. A recent survey in Massachusetts estimates that of the twenty percent of drunken driving cases that actually reach a jury (the other eighty percent not being contested with the defendants enrolling in alcohol education programs), only fifty percent result in a conviction, versus a seventy percent conviction rate in all jury criminal trials. Sean P. Murphy, *Juries are Called Soft on Drunken Driving*, BOSTON GLOBE, Feb. 3, 1994, at 1, 19.

39. MASS. GEN. L. ch. 90, § 24(1)(e) (1992).

40. Brief for the District Attorney of the Middle District, *supra* note 14, at n.4; Brief for the Attorney General, *supra* note 14, at 2. *See also* State v. Stever, 527 A.2d 408, 415 (N.J.) (reasoning that to not admit refusal evidence would impede the strong public policy of "rid[ding] the highways of drunken drivers"), *cert. denied*, 484 U.S. 954 (1987). In fact, the Massachusetts legislature enacted Chapter 90, § 24, to protect the public from the danger posed by drunken drivers. Commonwealth v. Connolly, 394 Mass. 169, 172, 474 N.E.2d 1106, 1109 (1985).

41. Ellis, *supra* note 22, at 216; Note, *Constitutional Limitations on the Taking of Body Evidence*, 78 YALE L.J. 1074, 1083 (1969) (refusal evidence is an effective substitute for the evidence not obtained).

tests to measure intoxication are common knowledge in today's society,[42] refusal evidence also serves to prevent jury speculation about the absence of such a test.[43] Juries might wrongly assume that the state did not offer an analysis report into evidence at trial because, although a test was administered, it proved exculpatory.[44] The admission of refusal evidence is also favored on the ground that disallowing such evidence creates the anomalous situation in which a suspect is severely punished in a civil hearing while simultaneously making the state's possibility of obtaining a criminal conviction more difficult.[45]

Those opposed to the admission of refusal evidence primarily rely on the argument that other valid reasons may exist to refuse a breath test

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42. Murray B. Cohen, *The Case for Admitting Evidence of Refusal to Take a Breath Test*, 6 TEX. TECH L. REV. 927, 945 (1975).

43. Attorney General's Brief, *supra* note 14, at 2 (admitting refusal evidence would increase the accuracy of the fact-finding process by eliminating a ground for jury speculation).

44. Brief for the Secretary of Public Safety, *supra* note 14, at 6. The Secretary of Public Safety noted on this point that:

> In Massachusetts . . . anecdotal reports abound, from judges, prosecutors, and jurors, that juries are often confused by the absence of evidence of either the results or the refusal of a breath test, and not infrequently attribute the absence of such evidence to police inadvertence or conclude that if no test was done the defendant must not have been under the influence. . . . [T]he unavailability of [refusal] evidence seriously undermines and impairs the Commonwealth's ability to punish, and treat, the worst and most dangerous offenders on our highways.

Id. In an attempt to prevent jury speculation on the absence of a breath test report, a Massachusetts General Law instructs:

> When there is no evidence presented at a civil or criminal proceeding of the percentage, by weight, of alcohol in the defendant's blood, the presiding judge at a trial before a jury shall include in his instructions to the jury a statement of an arresting officer's responsibilities upon arrest of a person suspected to be operating a motor vehicle under the influence of alcohol and a statement: that a blood alcohol test may only be administered with a person's consent; that a person has a legal right to take or not take such a test; that there may be a number of reasons why a person would not take such a test; that there may be a number of reasons why such a test was not administered; that there shall be no speculation as to the reason for the absence of a test and no inference can be drawn from the fact that there was no evidence of a blood alcohol test; and that a finding of guilty or not guilty must be based solely on the evidence that was presented in the case.

MASS. GEN. L. ch. 90, § 24(1)(e) (1992). Another reason juries may acquit a defendant in a drunken driving case is because they feel sorry for the defendant, who is "not [a] real criminal, but . . . someone who got caught doing something almost all of us have done at one time in our lives." Sean P. Murphy, *Juries are Called Soft on Drunken Driving*, BOSTON GLOBE, Feb. 3, 1994, at 1, 19 (quoting Norfolk County District Attorney, William D. Delahunt).

45. Cohen, *supra* note 42, at 946.

aside from the accused's possible consciousness of guilt.[46] Consequently, opponents believe that the admission of refusal evidence is unduly prejudicial to the defendant.[47] For example, a motorist may refuse to submit to the test because of a belief that the test is inaccurate, or on account of physical disability, fear of bodily harm, religious beliefs, or a simple desire to exercise a statutory right.[48] The existence of such exculpatory reasons for refusing the test reduces the probative value of refusal evidence and may prejudice an accused with a legitimate reason for refusing the test, but who, after exercising the right to refrain from testifying in his or her own defense for reasons unrelated to a consciousness of guilt, is unable to explain the reasons to the jury.[49] Despite these commonsensical considerations, opponents believe that a jury may still ascribe too much probative value to the refusal evidence and use it as the basis of a guilty verdict.[50]

Opponents to the admission of refusal evidence also contend that the underlying purpose of DUI statutes, to remove drunk drivers from the roadways, can be achieved without the admission of refusal evidence at trial.[51] Evidence of the suspect's level of intoxication can still be offered, for example, through the arresting police officer's testimony as to his or her observations regarding the defendant's driving and

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46. Ellis, *supra* note 22, at 217 (citing People v. Knutson, 149 N.E.2d 461, 463 (Ill. App. Ct. 1958) (refusal evidence can prejudice jury by inferring suspect was intoxicated)).

47. *Id.*

48. NHTSA REPORT, *supra* note 7, at 79. Many legitimate reasons exists why a suspect might "refuse" to submit to a test, "including ignorance, advice of counsel, or concern about the reliability of such tests." Amicus Brief for the Massachusetts Association of Criminal Defense Lawyers, *supra* note 14, at 4 n.2. In a well-publicized incident in Massachusetts, a Superior Court Justice refused to submit to such a test, declaring that the tests are often rigged by the police. Bruce Mohl, *Dukakis Defends Sobriety Tests*, BOSTON GLOBE, Jan. 31, 1989, at 17. *See also* Commonwealth v. Robinson, 324 A.2d 441, 450-51 (Pa. Super. Ct. 1974) (recognizing reasons exist for a person to refuse a test that do not involve guilt or innocence, and that these reasons affect the weight and not the admissibility of refusal evidence); Dana Fulham, *Defense Lawyers Say They Advise Clients to Refuse Breath Tests*, BOSTON GLOBE, Apr. 21, 1989, at 18 (describing attorneys who advise clients to refuse a breath test in order to strengthen their defense at trial, and also because tests are unreliable).

49. *See* South Dakota v. Neville, 459 U.S. 553, 560 n.10 (1982) (citing Griffin v. California, 380 U.S. 609 (1965) (declining to extend *Griffin*'s rule prohibiting prosecutorial comment on a defendant's decision to exercise the constitutional right to remain silent because a drunk driving suspect does not have a constitutional right to refuse a blood-alcohol test).

50. Ellis, *supra* note 22, at 217; Note, *supra* note 41, at 1083.

51. Ellis, *supra* note 22, at 217-18 (enactment of statutes revoking driver's license for refusal, raising age limit to buy alcohol, limiting time when alcohol can be sold or served). Rick W. Orr, Comment, State v. Neville: *The Giving of a Meaningful Choice to the Accused*, 27 S. DAK. L. REV. 300, 312 (1982); Larry Kraft, *The Drive to Stop the Drinker from Driving: Suggested Civil Approaches*, 59 N. DAK. L. REV. 391 (1983).

performance in field sobriety tests, the presence of open alcoholic beverage containers in the suspect's vehicle, or of an alcoholic odor, as well as the suspect's general demeanor.[52] Given the availability of such alternative forms of evidence, opponents claim that the probative worth of refusal evidence is minimal and is outweighed by its prejudicial value and, consequently, should be excluded.[53]

With these considerations in mind, the Massachusetts Supreme Judicial Court set out to determine whether evidence of a defendant's refusal to submit to a chemical blood-alcohol test is inadmissible in a criminal proceeding because it violates the state constitution's privilege against self-incrimination.

III. THE PRIVILEGE AGAINST SELF-INCRIMINATION

To understand the analysis used by the Massachusetts Supreme Judicial Court in the *Opinion of the Justices*, it is necessary first to review the privilege against self-incrimination and its historical application to refusal evidence.

A. *Historical Overview*

The privilege against self-incrimination originated in American constitutional law as a means to prevent the continuation of oppressive English criminal procedures in the new colonies.[54] The colonists brought to America their disdain for such English practices as the oath *ex officio* and inquisitorial process.[55] After separating themselves from English governance in the Revolutionary War, the colonies were able to establish their own laws and end the despised English practices.[56]

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52. Ellis, *supra* note 22, at 218; *see* State v. Lynch, 274 A.2d 443, 444 (Del. Super. Ct. 1971) ("the defendant's conduct, demeanor, statements, and attitude are vital evidence on his sobriety . . . ."); Michael L. Johnson, Note, *The Admissibility of Refusals in Drunk Driving Prosecutions: A Violation of the Fifth Amendment*, 10 PAC. L.J. 141, 158 (1978).

53. Ellis, *supra* note 22, at 217 (citing People v. Knutson, 149 N.E.2d 461, 463 (1958)).

54. MARK BERGER, TAKING THE FIFTH 21 (1980). Consequently, fearing the continuation of the oppressive English practices by the new federal government, and to avoid leaving the protection of fundamental rights to legislative and judicial officials, written constitutions were created to protect those rights believed essential for a free citizenry to exist. *Id.*

For a discussion of the English and American development of the privilege against self-incrimination, see Lisa Tarallo, Note, *The Fifth Amendment Privilege Against Self-Incrimination: The Time Has Come for the United States Supreme Court to End Its Silence on the Rationale Behind the Contemporary Application of the Privilege*, 27 NEW ENG. L. REV. 137 (1992).

55. BERGER, *supra* note 54, at 21. For a description of the English *ex officio*, see Tarallo, *supra* note 54, at 139 & n.17.

56. BERGER, *supra* note 54, at 22. *See also* Tarallo, *supra* note 54, at 141-42.

Representatives from each colony met in 1789 to establish a national government and to create a constitution that would provide stronger national guidance than its predecessor, the Articles of Confederation.[57] Although a national constitution was created, this convention did not provide any written protection for fundamental rights, which led to many fears being raised during the constitution's ratification process about the new government's powers.[58] As a result of these concerns, a bill of rights providing for the protection of these fundamental liberties was created by the First Congress in 1789.[59] Because of the widespread public distrust of English inquisitorial procedures, the right to remain silent, one of the first to be created, was expressly included in the constitutions of most states.[60] The initial proposal suggesting a privilege against self-incrimination provided that no person "shall be compelled to be a witness against himself."[61] This proposal would have created a right to remain silent in all civil and criminal proceedings.[62] The House of Representatives amended this version so that the privilege would apply only to criminal matters, a draft that the Senate subsequently endorsed without change.[63] The right against self-incrimination, as finally incorporated into the Constitution, provided that no person "shall be compelled . . . in any Criminal Case to be a witness against himself."[64]

In 1833, the United States Supreme Court held that the first ten amendments to the Constitution of the United States, the Bill of Rights,

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57. BERGER, *supra* note 54, at 22. Although the Articles of Confederation united the colonies, it did not establish a strong national government. *Id.*

58. *Id.*

59. *Id.* at 22-23.

60. *Id.* The privilege against self-incrimination included in the Virginia Declaration of Rights, providing that no person could be "compelled to give evidence against himself," was the model for Pennsylvania, North Carolina, Vermont, Massachusetts, and New Hampshire, when those states enacted their bill of rights. *Id.* (citing L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 409-10 (1968); R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 787-88 (1935)). The Maryland and Delaware provisions did not limit the right exclusively to criminal matters. *Id.* Although the states of New York, New Jersey, Georgia, and South Carolina did not have a separate bill of rights to their constitution, the freedom from self-incrimination still existed in these states as a matter of English common law. *Id.* (citing L. LEVY, ORIGINS OF THE FIFTH AMENDMENT, 410-11 (1968); E. M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949)). Similarly, although Rhode Island and Connecticut chose to retain their colonial charters rather than ratify a written constitution, they did not impliedly accept compulsory self-incrimination by doing so. *Id.*

61. BERGER, *supra* note 54, at 23 (citing a draft constitution authored by James Madison).

62. *Id.*

63. *Id.*

64. *Id.*

were not applicable to the states.[65] It was not until after the passage of the Fourteenth Amendment[66] that the Supreme Court began to incorporate the guarantees of the first ten amendments into the Fourteenth Amendment and apply them to the states.[67] In the 1964 decision of *Malloy v. Hogan*,[68] the Supreme Court incorporated the Fifth Amendment's[69] privilege against self-incrimination into the Fourteenth Amendment. The *Malloy* Court held that the Fourteenth Amendment would henceforth protect against state invasion upon a person's right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."[70]

In the centuries following the Fifth Amendment's creation and the decades since its application to the states through the Fourteenth Amendment, the privilege against self-incrimination's meaning and scope has been defined by the Supreme Court. The Court has stated that the privilege against self-incrimination:

> reflect[s] many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a "fair state-individual balance" by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load . . . our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life" . . . our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[71]

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65. Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

66. The Fourteenth Amendment states in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

67. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 332 (4th ed. 1991). The provisions contained in the Bill of Rights were incorporated through the meaning of the word "liberty" in the Fourteenth Amendment and were so protected by the Due Process Clause and applied to the states. *Id.* at 384.

68. 378 U.S. 1 (1964).

69. The Fifth Amendment to the United States Constitution states in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. *See also* Tarallo, *supra* note 54, at n.52.

70. *Malloy*, 378 U.S. at 8. The right granted by the Fifth Amendment and applied to the states through the Fourteenth Amendment is the same right which the Fifth Amendment protects from federal infringement. *Id.*

71. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (citations omitted).

The Court has simplified this definition by explaining that the privilege's essential purpose, and the main protection it provides, is to prevent a person from being subjected to the "cruel trilemma of self-accusation, perjury, or contempt."[72] In other words, if the privilege against self-incrimination did not exist, a defendant could be confronted by any of the following three situations. First, a defendant could be forced to testify under oath and to admit the truth.[73] If the testimony results in a finding of guilty, the defendant would have, in effect, accused himself of a crime and subjected himself to punishment without the benefit of a trial on the merits.[74] Second, the defendant could choose to lie under oath, but in doing so possibly be subjected to punishment for perjury.[75] Finally, the third option presented by the "trilemma" would be for the defendant to remain silent, be held in contempt of court, and be punished for failing to answer.[76]

Although the privilege against self-incrimination provides protection from this "cruel trilemma," three elements must exist for it to be properly asserted, and thus allow a witness to remain silent or exclude evidence obtained in violation of the privilege.[77] First, the evidence sought or obtained must consist of testimony or communications.[78]

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72. The Supreme Court recently reaffirmed its interpretation of the Fifth Amendment privilege as protecting the general principle of the inviolability of the human personality, when it stated that the privilege, "[a]t its source . . . reflects our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt." Pennsylvania v. Muniz, 496 U.S. 582, 595 n.8 (1990) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

73. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 159(B)(2), at 336 (1991).

74. *Id.*

75. *Id.*

76. *Id.*

77. PAUL J. LIACOS, MASSACHUSETTS EVIDENCE 199-201 (5th ed. 1981). The privilege against self-incrimination has also been described as consisting of five parts, which allow "(1) natural persons (2) to prohibit the introduction in a criminal proceeding (3) of self-incriminating disclosures (4) that were obtained through 'compulsion' by the state and (5) that are testimonial in nature." CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 15.01, at 324 (2d ed. 1986).

78. LIACOS, *supra* note 77, at 199. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966). The classification of "testimonial or communicative" evidence "applies to both verbal and nonverbal conduct." *Id.* at 764. The Supreme Court has stated that "[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts." Doe v. United States, 487 U.S. 201, 213 (1988). Nonverbal conduct is testimonial when it "reflects the actor's communication of his thoughts to another . . . ." Pennsylvania v. Muniz, 496 U.S. 582, 595 n.9 (1990). For a further discussion of what the Supreme Court has held constitutes "testimonial or communicative evidence," see *infra* notes 88-188 and accompanying text.

Second, the state must be compelling the person to furnish evidence.[79] Third, it must be reasonably possible that the evidence will incriminate the witness, that is to say that the compelled testimonial communication must not be trivial or nonincriminatory.[80] The evidence protected by the privilege is that which would support a conviction or lead to any information that would furnish a "link in the chain of evidence needed to prosecute the claimant" of the privilege.[81] If the evidence sought to be withheld or excluded does not fall within these criteria, a criminal defendant could be compelled to produce inculpatory physical or real evidence.[82] When the privilege applies, it can be overcome only by a constitutionally adequate grant of immunity[83] or a valid waiver.[84] A waiver of this right must be voluntary, intelligent, and knowing to be valid.[85]

Although the Supreme Court has set general guidelines for courts to follow in determining when the privilege against self-incrimination may be asserted, the Court itself has not interpreted the privilege in a consistent manner. The Court has taken two views when determining the

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79. LIACOS, *supra* note 77, at 199. A person is under state compulsion in any proceeding, "civil or criminal, formal or informal, where the answers might incriminate him in future proceedings." Fisher v. United States, 425 U.S. 391, 397 (1976). The *Fisher* Court held that the Fifth Amendment is violated by "the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Id.* The privilege also extends to a person subjected to custodial interrogation by the police. Miranda v. Arizona, 384 U.S. 436 (1966). "Custodial interrogation" is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 440.

80. LIACOS, *supra* note 77, at 200. *See, e.g.*, Heike v. United States, 227 U.S. 131, 144 (1913). The evidence sought must be incriminating in a criminal proceeding, and its threat of incrimination must be "real and appreciable" and "not merely a remote possibility." *Id.* Claims that the Court has rejected as non-incriminating include personal disgrace (Brown v. Walker, 161 U.S. 591 (1896)); loss of employment (Ullmann v. United States, 350 U.S. 422 (1956)); and civil confinement (Allen v. Illinois, 478 U.S. 364 (1986)).

81. LIACOS, *supra* note 77, at 201 (quoting Hoffman v. United States, 341 U.S. 479 (1951); Taylor v. Commonwealth, 369 Mass. 183, 338 N.E.2d 823 (1975)); *but see* California v. Byers, 402 U.S. 424 (1971) (privilege is not violated by a statute requiring a motorist involved in an accident to stop and furnish information, including name and address, even though this information may prove an essential element of crime).

82. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 9.11, at 424 (2d ed. 1987).

83. Kastigar v. United States, 406 U.S. 441 (1972).

84. Rogers v. United States, 340 U.S. 367 (1951).

85. Johnson v. Zerbst, 304 U.S. 458 (1938); Miranda v. Arizona, 384 U.S. 436 (1966). If a defendant in a criminal proceeding voluntarily takes the stand to testify, then that act is a waiver of the privilege as to any facts material to the crime for which he or she is being tried. Jones v. Commonwealth, 327 Mass. 491, 493, 99 N.E.2d 456, 457 (1951).

privilege's proper scope. On the one hand, the Court has held that the privilege should be construed "as broad[ly] as the mischief against which it seeks to guard."[86] In another instance, the Court also stated that "the privilege has never been given the full scope which the values it helps to protect suggests."[87] Consideration of these two conflicting views is necessary to understand the various approaches taken by the Supreme Court and the many state courts that have considered the refusal evidence/self-incrimination issue.

B. *The United States Supreme Court's Interpretation of the Fifth Amendment Regarding Refusal Evidence*

The United States Supreme Court has held that the federal privilege against self-incrimination excludes evidence obtained when the government compels a communicative statement or an overt act by a person suspected of a crime. In determining whether the privilege applies to these situations, the Court has created a distinction between what it considers the "communicative or testimonial" type of evidence that is protected by the privilege, and the "real or physical" evidence that is unprotected. This distinction was first delineated by the Supreme Court in *Schmerber v. California.*[88]

1. *Schmerber v. California*

The defendant in *Schmerber* was convicted of driving a motor vehicle while under the influence of intoxicating liquor. The conviction was appealed on the grounds that the admission of an incriminating blood-alcohol report violated the Fifth Amendment.[89] Schmerber had been arrested for driving under the influence while being treated at a hospital for injuries received from an automobile accident during which he was apparently driving.[90] Despite the suspect's refusals to submit to a blood test, a police officer directed the hospital physician to withdraw a blood sample from Schmerber's body.[91] A chemical analysis of the

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86. Schmerber v. California, 384 U.S. 757, 764 (1966) (quoting Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)).

87. *Id.* at 765. One commentator has written that the Court does not interpret the Fifth Amendment's language literally because it seeks to "balance the values underlying the privilege against the needs of an efficient system of criminal justice." CHARLES H. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 255 (1980).

88. 384 U.S. 757 (1966).

89. *Id.* at 758-59. The defendant's other claims were that he was denied due process of law under the Fourteenth Amendment; his right to counsel under the Sixth Amendment; and his Fourth Amendment right not to be subjected to unreasonable searches and seizures. *Id.* at 759.

90. *Id.*

91. *Id.*

sample, performed to determine the percentage of alcohol in the defendant's blood at the time of the arrest, indicated that he was intoxicated.[92] This analysis was admitted at trial as evidence against the defendant.[93] On appeal, Schmerber contended that the taking of blood and the subsequent analysis admitted into evidence violated his privilege against self-incrimination as guaranteed by the Fifth Amendment.[94]

In its decision, the Supreme Court acknowledged that by requiring the defendant to participate in the blood withdrawal, the state had compelled the defendant to participate in a process designed to discover incriminating evidence.[95] The compulsion occurred when the police officer directed the physician to perform the test over the defendant's objection.[96] Finding the existence of state compulsion, the Court then proceeded to determine whether the coercive effect was substantial enough to force the defendant "to be a witness against himself" in violation of his Fifth Amendment rights.[97] The Court reasoned that such an analysis was necessary because the mere fact that some state compulsion exists does not make the action per se unconstitutional.[98]

The *Schmerber* Court recognized that if the privilege against self-incrimination were to be given the full scope of protecting the values it suggests to protect, then the compelled withdrawal of blood from a suspect would indeed violate the privilege.[99] On its face, the compelled extraction of blood seems to violate the privilege's plain language and meaning. Such an act clearly does not respect the "inviolability of the human personality,"[100] and, in addition, it ignores the privilege's implicit mandate that the state obtain evidence by its own efforts.[101] The Court reasoned, however, that it has implicitly recognized, and lower courts have historically held, that the privilege is limited to certain situations.[102] In other words, the language of the Fifth Amendment does not extend to protect every value it would seem to protect at first glance.

According to the Court, the proper instance for the privilege's application occurs when the state seeks to force the accused to admit incriminating evidence "from his own mouth," when he would otherwise

92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 761.
96. *Id.*
97. *Id.*
98. *Id.* at 762-63.
99. *Id.* at 762.
100. *Id.*
101. *Id.*
102. *Id.* at 762-63.

choose not to speak.[103] The privilege does not apply to situations where the evidence sought by the state is noncommunicative in that it consists of only physical evidence that does not reveal the defendant's thoughts. The *Schmerber* Court cited *Holt v. United States*[104] as the leading case supporting this proposition.[105] In *Holt*, the accused was forced, pre-trial and over his objection, to wear a blouse for identification purposes.[106] The *Holt* Court rejected a claim that the defendant's privilege against self-incrimination was violated by being forced to wear the blouse.[107] The Court reasoned that the Fifth Amendment's privilege against self-incrimination prohibits only the "use of physical or moral compulsion to extort communications from [the accused] . . . ."[108] The privilege does not exclude the physical properties of a person's body if the body may be a material factor in determining guilt or innocence.[109] The Court reasoned that if the privilege were interpreted to have such an "extravagant extension," it would, in principle, also prevent a jury from viewing the accused in person and then comparing his or her features to a photograph.[110] The *Holt* Court concluded that the privilege should not be interpreted in a manner that would allow such extreme results.[111] Therefore, the *Holt* Court held that the government may compel a defendant to perform an act if it might assist a witness's identification of the perpetrator.[112]

The *Schmerber* Court clarified the *Holt* reasoning by explaining that the Fifth Amendment's privilege against self-incrimination prohibits the compulsion of "communicative" and "testimonial" evidence, but allows compulsion in cases in which the accused is the source of "real or physical evidence."[113] Examples of when the privilege does not prevent the accused from becoming the source of real evidence are the compelled submission to being photographed, fingerprinted, to speak or write for identification, to stand, to walk, or to appear in court.[114] The Court stated that "the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature."[115] The situations

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103. *Id.* at 763.
104. 218 U.S. 245 (1910).
105. Schmerber v. California, 384 U.S. 757, 763 (1966).
106. *Holt*, 218 U.S. at 252.
107. *Id.* at 252-53.
108. *Id.*
109. *Id.* at 253.
110. *Id.*
111. *Id.*
112. *Id.*
113. Schmerber v. California, 384 U.S. 757, 764 (1966).
114. *Id.*
115. *Id.* at 761.

described in the previous examples do not implicate the privilege because the actions do not require a suspect to express any of his or her knowledge to the state. Using this analysis, the *Schmerber* Court found no testimony or communications existed in either the blood extraction or in the subsequent admission of the chemical analysis report.[116] Although incriminating evidence, the Court found that the blood test was neither testimony nor a communicative act by the defendant,[117] and therefore was admissible evidence.[118] The Supreme Court applied *Schmerber's* reasoning in subsequent cases in which the Court found that the federal privilege against self-incrimination did not prevent a defendant from being compelled to participate in a police lineup,[119] or to produce handwriting[120] or voice exemplars.[121]

The *Schmerber* line of cases confused lower federal and state courts as to whether evidence of, and prosecutorial comment upon, a defendant's refusal to submit to a test producing real evidence violated the privilege against self-incrimination.[122] This confusion was primarily caused by footnote nine in *Schmerber*, in which the Court declined to decide this issue because the defendant had not objected at trial to the admission of his refusal.[123] It was not until seventeen years after deciding

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116. *Id.* at 765.

117. *Id.*

118. *Id.*

119. United States v. Wade, 388 U.S. 218 (1967). Compelling a suspect "merely to exhibit his person for observation" by a witness does not compel the suspect to produce evidence of a testimonial nature. *Id.* at 222. The suspect is only compelled "to exhibit his physical characteristics, not . . . to disclose any knowledge he might have." *Id.*

120. Gilbert v. California, 388 U.S. 263 (1967). A robbery suspect's handwriting samples, taken to compare to the handwritten notes of a robber, were not within the Fifth Amendment's protection. *Id.* at 266-67. Applying the *Schmerber* reasoning, the *Gilbert* Court stated that although handwriting is a means of communication, the samples were taken only to be used as a means to identify a physical characteristic. *Id.* Since the state was not seeking to use the handwriting samples for their communicative content, the Court held that the samples were not testimonial and therefore permissible. *Id.*

121. United States v. Dionisio, 410 U.S. 1 (1973). The Court reasoned that the voice recordings were only being used to measure the physical properties of the suspect's voice. *Id.* at 7. The voice exemplars were not being used to identify any testimonial or communicative content of what was said, and therefore there was no Fifth Amendment violation. *Id.* A "voice exemplar" is a "[t]ype of test in which one's voice is compared to the voice heard on some particular occasion." BLACK'S LAW DICTIONARY 1573 (6th ed. 1990).

122. *See* South Dakota v. Neville, 459 U.S. 553, 558 (1982) (citations omitted) ("Since other jurisdictions have found no Fifth Amendment violation from the admission of evidence of refusal to submit to blood alcohol tests, we granted certiorari to resolve the conflict.").

123. Schmerber v. California, 384 U.S. 757, 765 n.9 (1966).

Schmerber that the Court resolved the constitutionality of refusal evidence.

2. *South Dakota v. Neville*

In *South Dakota v. Neville*,[124] the Supreme Court confronted the issue of whether evidence of a defendant's refusal to take a breath test, when introduced at a criminal proceeding, violated the Fifth Amendment's privilege against self-incrimination.[125] The facts of *Neville* represent a typical fact pattern in which a DUI suspect refuses to submit to a breath test. In *Neville*, the police arrested the defendant for DUI and asked whether he would submit to a breath test as required by South Dakota's "implied consent" law.[126] The police warned Neville that a refusal to submit to the test would result in an automatic suspension of his license to operate a motor vehicle.[127] The defendant refused to submit to the test three times.[128] On one of those occasions, the defendant stated, "I'm too drunk, I won't pass the test."[129] Although the South Dakota implied consent law expressly allowed evidence of such refusal to be admissible at trial,[130] the South Dakota trial court granted the defendant's motion to suppress the evidence,[131] and the South Dakota Supreme Court affirmed.[132] The high court held that the statute permitting the trier of fact to consider refusal evidence violated both the state and federal constitutional privileges against self-incrimination because the refusal was a compelled act involving the defendant's testimonial capacities.[133] The United States Supreme Court granted certiorari,[134] and reversed the orders that suppressed the refusal evidence.[135]

With Justice O'Connor writing for the Supreme Court, a majority of seven justices[136] began their decision by first upholding the constitutionality of the South Dakota statute as a means of furthering the important governmental and societal interests involved in the deterrence of

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124. 459 U.S. 553 (1983).
125. *Id.* at 554.
126. *Id.* at 555, 559.
127. *Id.* at 555 n.2.
128. *Id.* at 555-56.
129. *Id.*
130. *Id.* at 556 (citing S.D. COMP. LAWS ANN. § 32-23-10.1 (Supp. 1982)).
131. *Id.*
132. *Id.*
133. *Id.* at 556-58.
134. 456 U.S. 971 (1982).
135. South Dakota v. Neville, 459 U.S. 553, 566 (1983) (*overruling* State v. Neville, 312 N.W.2d 723 (S.D. 1981)).
136. The majority consisted of Chief Justice Burger, and Justices Brennan, White, Blackmun, Powell, Rehnquist, and O'Connor. A dissent was written by Justice Stevens which Justice Marshall joined.

drunken driving.[137] The Court then based its reversal on the grounds that a defendant is not "compelled" to refuse to take a breath test.[138]

The Court reasoned that because, under *Schmerber*, the results of a blood-alcohol analysis constitute "real or physical" evidence and are not "testimonial" in nature, a state may constitutionally compel a suspect to submit to such a test, just as the defendant in *Holt* was forced to wear a blouse for identification purposes.[139] Because the real evidence of blood or breath is not constitutionally protected, the state need not obtain a suspect's consent to administer the test.[140] Although the state could have compelled Neville's submission to a blood-alcohol test, the Court noted that the South Dakota legislature had declined to authorize its police officers to perform the test without the suspect's prior consent.[141] In order to avoid violent physical confrontations between the accused and the police, the statute instead expressly allowed a suspect to refuse the test.[142] Despite this legislative grant of power, however, the *Neville* Court noted that the statutory permission to refuse a test is not unconditional; it comes with a price attached to its exercise.[143] The South Dakota statute at issue included two such

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137. *Neville*, 495 U.S. at 558-59. In upholding the South Dakota statute that allows refusal evidence in DUI trials, Justice O'Connor stated that the Court has acknowledged "the carnage caused by drunken drivers" and cited some the Court's previous comments expressing the government's interest in eradicating drunk driving. *Id.* (citing Mackey v. Montrym, 443 U.S. 1 (1978) (a "compelling interest in highway safety" exists); Perez v. Campbell, 402 U.S. 637, 657, 672 (1971) (Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); Tate v. Short, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield")). *See also* Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion."); Welch v. Wisconsin, 466 U.S. 740, 755 (1984) (Blackmun, J., concurring) (expressing "personal concern about the unwillingness of our national consciousness to face up to—and to do something about—the continuing slaughter upon our Nation's highways, a good percentage of which is due to drivers who are drunk or semi-incapacitated because of alcohol or drug ingestion.").

138. *Neville*, 459 U.S. at 562-63.

139. *Id.* at 559.

140. *See supra* notes 103-21 and accompanying text.

141. *Neville*, 459 U.S. at 559.

142. *Id.* at 559-60 ("to avoid violent confrontations, the South Dakota statute permits a suspect to refuse the test, and indeed requires police officers to inform the suspect of his right to refuse").

143. *Id.* at 560 (citing Mackey v. Montrym, 443 U.S. 1, 17-19 (1979) ("a penalty for refusing to take the test is unquestionably legitimate, assuming appropriate procedural protections").

consequences that took effect upon a suspect's refusal to take a blood-alcohol test. First, the refuser's license to operate a motor vehicle was revoked for a pre-determined time period.[144] The second penalty was the admission into evidence at the defendant's criminal DUI trial of the fact that he had refused to submit to the blood-alcohol test.[145] It is the constitutionality of this latter penalty, the admission of refusal evidence in a criminal DUI proceeding, that the Supreme Court considered in *Neville*.

In determining whether refusal evidence is prohibited by the Fifth Amendment's privilege against self-incrimination, the *Neville* Court discussed the two dominant theories among state courts regarding the categorization of refusal evidence. In affirming the suppression of refusal evidence, the South Dakota Supreme Court represented the "minority" view by reasoning that a refusal involves a suspect's testimonial capacities.[146] Under this view, a refusal is a "tacit or overt expression and communication of defendant's thoughts" that is protected by the privilege against self-incrimination.[147] The opposing "majority" view described by the Court categorized a refusal as a physical act, and not as a communication.[148] Courts that employ this reasoning believe that refusal evidence is admissible because it is a physical act and, as such, it leads only to an inference of the defendant's consciousness of guilt, which is not protected by the privilege.[149] Although the *Neville* Court stated that it found "considerable force" in the consciousness of guilt analogy, it did not decide the issue by definitively categorizing a refusal as being either testimony or a physical act.[150] Instead, the Court

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144. *Id.* In *Neville*, the South Dakota statute authorized the Department of Public Safety to revoke a refuser's license to drive for a one year period, but only after a hearing on the issue. *Id.* (citing S.D. COMP. LAWS ANN. § 32-23-11 (Supp. 1982)).

145. *Id.* In expressly reserving the refusal evidence/self-incrimination issue for another time, the *Schmerber* Court stated that it thought "general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances." Schmerber v. California, 384 U.S. 757, 765 n.9 (1966).

146. *Neville*, 459 U.S. at 561.

147. *Id.*

148. *Id.* at 560-61 & n.11 (citing decisions of People v. Ellis, 421 P.2d 393 (Cal. 1966) and People v. Sudduth, 421 P.2d 401 (Cal. 1966), *cert. denied*, 389 U.S. 850 (1966), in which Justice Traynor first espoused the theory of categorizing a refusal as a physical act).

149. *See, e.g.*, People v. Ellis, 421 P.2d 393 (Cal. 1966); City of Westerville v. Cunningham, 239 N.E.2d 40 (Ohio 1968); Hill v. State, 366 So. 2d 318, 324-25 (Ala. 1979).

150. *Neville*, 459 U.S. at 561-62. The *Neville* Court stated:

> As we recognized in *Schmerber*, the distinction between real or physical evidence, on the one hand, and communications or testimony, on the other, is not readily drawn in many cases. . . . The situations arising from a refusal present a difficult gradation from a person who indicates refusal by complete inaction, to one who nods his head negatively, to one who states

based its decision on the grounds that no impermissible compulsion occurs when an accused refuses to take a test, and that the privilege is thus inapplicable.[151]

In finding no impermissible compulsion, the *Neville* Court first acknowledged that although the state grants a DUI suspect the "choice" of whether to submit to or refuse a blood-alcohol test, the fact that a choice exists does not necessarily mean that the compulsion inherent in that choice is constitutional.[152] As the Court in *Schmerber* declared, the Fifth Amendment excludes evidence when the only real option presented to the defendant is to submit to a test that either violates religious beliefs or involves such great pain, danger, or severity that a person will inevitably choose to "confess" rather than undergo its painful alternatives.[153] The *Neville* Court did not find any of these unconstitutional consequences present in a state's offer that a suspect choose whether to submit to a blood-alcohol test or have his refusal admitted against him at trial.[154] Therefore, the Court reasoned that because it is constitutionally permissible for a state to force a suspect to submit to a breath test, but instead the state chose to offer a choice to refuse the test with penalties attached, the choice presented does not become any "*less* legitimate" when the state attaches penalties to the exercise of the refusal option.[155]

Next, the *Neville* Court stated that when it offers a suspect the choice of refusing a blood-alcohol test with the attendant penalty of admitting the refusal as circumstantial evidence, a state does not "subtly coerce" the suspect into choosing the option the state could not constitutionally compel.[156] The Court found that the state does not seek to coerce the suspect into refusing the test in order to obtain refusal evidence for trial.[157] To the contrary, the Court reasoned, the state wants the suspect to choose to submit to the test because a positive blood-alcohol test report produces a much stronger inference of intoxication or sobriety than one that arises from a refusal to take a test.[158] Therefore, the *Neville* Court concluded that a refusal to take a lawfully requested blood-alcohol test is not an act compelled by the state, and thus does not

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"I refuse to take the test," to the respondent here, who stated "I'm too drunk, I won't pass the test."

Id. (citing *Schmerber*, 384 U.S. at 764).

151. *Id.* at 562.

152. *Id.* at 562-63.

153. *Id.* at 563 (citing *Schmerber*, 384 U.S. at 765 n.9).

154. *Id.*

155. *Id.*

156. *Id.* at 563-64. The choice that cannot be compelled by the state is forcing the accused to refuse the test. *Id.*

157. *Id.* at 563-64.

158. *Id.* at 564.

fall within the protection afforded by the Fifth Amendment's privilege against self-incrimination.[159]

After the *Neville* decision, the majority of state courts and legislatures followed the Court's holding and permitted admission of refusal evidence in criminal DUI proceedings.[160] These courts did so by either interpreting their constitution coextensively with its federal counterpart or by holding on independent state grounds that the state constitution was not violated by the admission of refusal evidence.[161] Problems persisted, however, because the *Neville* Court had not based its ruling on whether refusal evidence constituted testimonial or communicative evidence.[162] Although to date it has yet to decide the issue definitively, the United States Supreme Court has clarified its definition of what constitutes testimonial or communicative evidence in *Doe v. United States*[163] and *Pennsylvania v. Muniz*.[164]

3. *Doe v. United States*

In *Doe v. United States*,[165] the Supreme Court explained that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information."[166] The Court held that the purpose behind the privilege against self-incrimination is to prevent a suspect from having to reveal, directly or indirectly, "his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government."[167] The *Doe* Court explained that in *Schmerber* and its progeny, the Supreme Court had distinguished between "the suspect's being compelled himself to serve as evidence and the suspect's being compelled himself to disclose or communicate information or facts that might serve as or lead

159. *Id.* The *Neville* Court also concluded that a police request to a suspect of whether the suspect will submit to a breath test is an action "normally attendant to arrest and custody" and therefore "do[es] not constitute interrogation." *Id.* at n.15. Accordingly, the choice of refusal "enjoys no prophylactic *Miranda* protection outside the basic Fifth Amendment protection." *Id.*

160. *See* Opinion of the Justices, 412 Mass. 1201, 1204, 591 N.E.2d 1073, 1075 (1992) and cases cited therein.

161. *Id.* at 1204-05, 591 N.E.2d at 1075.

162. South Dakota v. Neville, 459 U.S. 553, 561 (1983).

163. 487 U.S. 201 (1988).

164. 496 U.S. 582 (1990).

165. 487 U.S. 201 (1988).

166. *Id.* at 210. This definition has subsequently been held to apply "to both verbal and nonverbal conduct; nonverbal conduct contains a testimonial component whenever the conduct reflects the actor's communication of his thoughts to another." Pennsylvania v. Muniz, 496 U.S. 582, 595 n.9 (1990). *See infra* text accompanying notes 176-88.

167. *Doe*, 487 U.S. at 213 (citation omitted).

to incriminating evidence."[168] The Court reasoned that a communication is not testimonial in nature unless an attempt is made by the state to secure some kind of a communication upon which reliance will be placed indicating the accused's consciousness of facts and his mind's operations in expressing that knowledge.[169] Therefore, the Court held that the defendant in *Doe* could constitutionally be compelled to sign a consent directive authorizing specific banks to release information sought by the government.[170] The Court reasoned that the defendant's execution of this directive would not have any testimonial significance because it would not communicate any implicit or explicit assertions or information to the government.[171]

The *Doe* definition of testimonial evidence has been interpreted as meaning that an action compelled by the government is only testimonial when the government forces the suspect to intentionally express a perception or belief concerning factual matters.[172] The privilege is not implicated when the government only "seeks by compulsion to learn the subject's thoughts."[173] The privilege prohibits only compulsion requiring the suspect to intentionally reveal his or her thoughts.[174] An example under this analysis is a suspect's conduct of flight from a crime scene. The conduct is not testimonial, even though it may reveal the suspect's consciousness of guilt, because the suspect's flight is not an intentional communication of any thoughts.[175] Evidence of flight from a crime scene thus does not fall within the purview of the *Doe* definition because the government has not required the defendant to intentionally communicate any thoughts.[176]

4. *Pennsylvania v. Muniz*

In *Pennsylvania v. Muniz*,[177] a DUI defendant was questioned in a police station as to his sobriety.[178] After asking the defendant his name, address, height, weight, eye color, date of birth, and current age, a police officer then asked, "[w]hen you turned six years old, do you

168. *Id.* at 211 n.10 (citing Fisher v. United States, 425 U.S. 391, 408 (1976); Gilbert v. California, 388 U.S. 263, 267 (1967); United States v. Wade, 388 U.S. 218, 223 (1967); Schmerber v. California, 384 U.S. 757, 764 (1966); Holt v. United States, 218 U.S. 245, 252-53 (1910)).
169. *Id.* at 211 (citing 8 J. WIGMORE EVIDENCE § 2265, at 386 (1961)).
170. *Id.* at 219.
171. *Id.* at 216-18.
172. JOHN W. STRONG, MCCORMICK ON EVIDENCE § 124, at 451 (4th ed. 1992).
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. 496 U.S. 582 (1990).
178. *Id.* at 586.

remember what the date was?," to which Muniz responded, "[n]o, I don't."[179] The Supreme Court held that the response to the sixth birthday question was compelled testimony and was therefore inadmissible under the federal privilege against self-incrimination.[180]

In its analysis, the *Muniz* Court began by stating that the privilege's core purpose is to protect a suspect from being confronted with the modern-day analog of the historic trilemma of self-accusation, perjury, or contempt.[181] To serve this purpose, the Court reasoned that the *Doe* definition of testimonial evidence "must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the 'cruel trilemma.'"[182] The answer to the sixth birthday question placed Muniz in the "cruel trilemma" by requiring him to communicate a belief about the functional ability of his mental processes and their result.[183] When he realized that he was unable to calculate the date he was confronted with the "trilemma" of truth, falsity, or silence.[184] The Court recognized that the custodial interrogation environment is inherently coercive and precludes silence.[185] Therefore, Muniz's choices were either to answer truthfully and incriminate himself by admitting that he did not know his sixth birthday's date, or to answer falsely with a date he did not believe to be accurate.[186] Either answer would support an inference that his mental faculties were impaired because a sober person would reasonably be expected to answer correctly.[187] Under this analysis, the Court concluded that the question forced Muniz to express the contents of his mind and make a factual statement.[188] Therefore, the answer was a compelled testimonial response which should have been suppressed.[189]

The significance of the *Doe* and *Muniz* decisions is that the Court now requires, for a statement to be classified as testimonial within the Fifth Amendment, that the state ask a question designed to elicit the defendant's thoughts or beliefs at the time the response is uttered.

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179. *Id.*
180. *Id.* at 598-99.
181. *Id.* at 596-97.
182. *Id.* at 597.
183. *Id.*
184. *Id.*
185. *Id.* at 596 n.10; *see* Miranda v. Arizona, 384 U.S. 436 (1966).
186. *Muniz*, 496 U.S. at 599.
187. *Id.*
188. *Id.* The Court also explained that nonverbal conduct falls within the scope of the Fifth Amendment protection if it "reflects the actor's communication of his thoughts to another." *Id.* at 595 n.9.
189. *Id.*

IV. THE *OPINION OF THE JUSTICES*

The issue of whether evidence of a defendant's refusal to submit to a breath test violates the privilege against self-incrimination afforded by the federal or a state's constitution has been debated for years by the courts and legal scholars. Before the Supreme Court addressed the issue in *Neville*, the states were split as to whether the privilege excluded refusal evidence in criminal proceedings.[190] After the Court's decision in *Neville* that admitted such evidence, however, a majority of states changed their positions to allow refusal evidence either by statute, by judicial decision, or both.[191] Massachusetts was poised to join this majority with the passage of legislation allowing refusal evidence,[192] but the *Opinion of the Justices* placed Massachusetts in a significant minority of states that do not allow evidence of a refusal to submit to an intoxication test.[193]

A. *Background*

In their answer to the Senate question,[194] the Justices of the Massachusetts Supreme Judicial Court began their analysis of the constitutionality of refusal evidence by reviewing other state court decisions.[195] The Justices recognized that a majority of state courts currently allow refusal evidence.[196] In deciding to admit such evidence, many of these states adopted the *Neville* rationale that a state may condition the exercise of a statutorily created right by attaching penalties which do not impermissibly compel a defendant to be a witness against himself.[197] Other state courts have found that the privilege against self-incrimination is inapplicable to the issue because a necessary element is missing for the privilege to be applicable: some courts found that refusal evidence is not testimonial;[198] others decided that a refusal is a

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190. South Dakota v. Neville, 459 U.S. 553, 558, 560-61 (1982).
191. *See infra* notes 197-201 and accompanying text.
192. *See supra* notes 9-12 and accompanying text.
193. *See supra* note 8 and accompanying text.
194. Opinion of the Justices, 412 Mass. 1201, 591 N.E.2d 1073 (1992).
195. *Id.* at 1203-04, 591 N.E.2d at 1074-75.
196. *Id.* at 1204, 591 N.E.2d at 1074-75.
197. *Id. See, e.g,* Hill v. State, 366 So. 2d 318 (Ala. 1974); Cox v. People, 735 P.2d 153 (Colo. 1987) (en banc); Allen v. State, 330 S.E.2d 588 (Ga. 1985); State v. Pagach, 442 So. 2d 331 (Fla. Dist. Ct. App. 1983); State v. Compton, 664 S.W.2d 431 (Ky. 1986); McKay v. Davis, 653 P.2d 860 (N.M. 1982); State v. Neasbitt, 735 P.2d 337 (Okla. Crim. App. 1987); State v. Gardner, 629 P.2d 412 (Or. Ct. App. 1981); Sandy City v. Larson, 733 P.2d 137 (Utah 1987); State v. Brean, 385 A.2d 1085 (Vt. 1978); State v. Zwicker, 713 P.2d 1101 (Wash. 1986) (en banc).
198. *Opinion*, 412 Mass. at 1204-05, 591 N.E.2d at 1074-75. *See, e.g.*, State v. Hoenscheid, 374 N.W.2d 128 (S.D. 1985); Hill v. State, 366 So. 2d 318 (Ala. 1974);

testimonial statement but is not compelled;[199] and other courts held that a refusal is not compelled while not considering the issue of its testimonial qualities.[200] The Justices also indicated that although some states allow refusal evidence, they do so only under certain circumstances not relevant to the issue presented to the court.[201] Regardless of the reasoning, the Justices noted that in reaching the same conclusion as the Supreme Court in *Neville*, the majority of state courts interpreted their state's constitutional privilege against self-incrimination as coextensive with the Supreme Court's interpretation of the federal privilege.[202] In doing so, these states held that their constitutions do not afford any greater protection than that of the federal provision.[203]

Campbell v. Superior Court, 479 P.2d 685 (Ariz. 1971); People v. Ellis, 421 P.2d 393 (Cal. 1966).

199. *Opinion*, 412 Mass. at 1205, 591 N.E.2d at 1075. *See, e.g.*, People v. Thomas, 385 N.Y.S.2d 584 (N.Y. 1978); State v. Green, 684 P.2d 575 (Or. Ct. App. 1984), *overruled on other grounds*, State v. Panichello, 692 P.2d 720 (Or. Ct. App. 1984).

200. *Opinion*, 412 Mass. at 1205, 591 N.E.2d at 1075 (citing South Dakota v. Neville, 459 U.S. 553, 561-62 (1983)). *See also* Commonwealth v. Monahan, 549 A.2d 231 (Pa. Super. Ct. 1988).

201. *Opinion*, 412 Mass. at 1205, 591 N.E.2d at 1075. *See* People v. Duke, 357 N.W.2d 775, 777-78 (Mich. Ct. App. 1984) (refusal evidence not admissible to prove guilt; may be admitted in circumstances "a. Where the defendant denies being given an opportunity to take a Breathalyzer test, b. Where the defendant claims that he took the test and the results were exculpatory, c. Where the defendant challenges the competency of any of the testing done by the officer, or d. Where the defendant challenges the credibility of the officer."); State v. Cozart, 298 N.W.2d 196, 197 (Wis. 1980) (prior to admitting refusal evidence as evidence of defendant's guilty conscience or knowledge, upon request, an *in camera* hearing should be held to determine whether the possible prejudicial effect outweighs the evidence's probative value). If the refusal evidence is otherwise admitted, these states hold that if refusal evidence is admitted inadvertently or to rebut defendant's evidence, jury instruction shall be given limiting admissibility only to matters not bearing on guilt or innocence. *Duke*, 357 N.W.2d at 778. *See also* State v. Pineau, 491 A.2d 1165, 1169 (Me. 1985) ("[E]vidence as to the unavailability of a test result is admissible solely to explain that unavailability. It is not to be considered on the issue of intoxication . . . .").

202. *Opinion*, 412 Mass. at 1204, 591 N.E.2d at 1075. For a list of some of these state decisions, see *infra* notes 336-43 and accompanying text.

203. *Opinion*, 412 Mass. at 1204, 591 N.E.2d at 1075. In Oregon v. Hass, 420 U.S. 714 (1975), the United States Supreme Court held that a state has a right to independently determine its own constitutional questions. *Id.* at 719. The *Hass* Court held that "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those" the Supreme Court holds to be necessary by federal constitutional standards. *Id.*

The *Neville* Court recognized that a state supreme court could hold that a statute which allows refusal evidence is unconstitutional if the state court bases its decision on "an *independent* state ground." South Dakota v. Neville, 459 U.S. 553, 556 n.5 (1983). The South Dakota Supreme Court rooted its decision on both the state and federal constitutions. *Id.* Therefore, the United States Supreme Court had jurisdiction to review the case and to reverse the South Dakota Supreme Court's decision. *Id.* *See supra* notes 124-59 and accompanying text for a discussion of the

The Supreme Judicial Court (SJC), however, emphasized that its decision would be based on independent state grounds.[204] The court indicated that it would decide the question under the principle of the privilege against self-incrimination as guaranteed by the Massachusetts Declaration of Rights, and not under the Federal Constitution's Fifth Amendment.[205] The SJC stated that it sought to analyze the proposed statute independently, under the state constitution's unique provisions, to determine whether the proposed legislation would compel a DUI suspect both to "accuse himself" and to "furnish evidence against himself," practices prohibited by the Massachusetts Constitution.[206] Because of the substantive differences between the two constitutions, the Massachusetts Constitution provided a basis for the SJC to apply a stricter interpretation of refusal evidence than the United States Supreme Court reached under the Federal Constitution.[207] Although Massachusetts precedent did not require the court to interpret the state constitution as either coextensive with the Federal Constitution or as always providing broader rights,[208] the SJC decided to answer the Senate question by following its own precedent of interpreting the state constitution as sometimes providing greater rights.[209] As a result, the court stated that it would analyze the issue independently of the course set by the Supreme Court in *Neville*.[210]

The Supreme Judicial Court has expressly recognized its power to exercise a "prerogative to interpret [the Massachusetts Constitution] more broadly" than the Federal Constitution, and has previously invoked its prerogative.[211] In doing so, the SJC has generally agreed with the

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Neville decision.

204. *Opinion*, 412 Mass. at 1206, 591 N.E.2d at 1076.

205. *Id.* at 1206 n.5, 591 N.E.2d at 1076 n.5. The Fifth Amendment to the United States Constitution states: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The analogous Massachusetts provision states: "No subject shall . . . be compelled to accuse, or furnish evidence against himself . . . ." MASS. CONST. art. 12.

206. *Opinion*, 412 Mass. at 1206, 591 N.E.2d at 1076.

207. *See infra* note 211.

208. *See generally* Alexander Wohl, *New Life for Old Liberties–The Massachusetts Declaration of Rights: A State Constitutional Law Study*, 25 NEW ENG. L. REV. 177 (1990) (describing Supreme Judicial Court's interpretations of the Massachusetts Declaration of Rights).

209. *Opinion*, 412 Mass. at 1206, 591 N.E.2d at 1076. *See generally* Wohl, *supra* note 208, at 190-210 (describing cases where SJC held state constitution provides greater rights than the Federal Constitution).

210. *See Opinion*, 412 Mass. at 1206-07, 591 N.E.2d at 1076.

211. Attorney General v. Colleton, 387 Mass. 790, 796, 444 N.E.2d 915, 919 (1982) (citing Commonwealth v. Hughes, 380 Mass. 583, 595, 404 N.E.2d 1239, 1246 (1980)). The SJC has also recognized that, when interpreting the Massachusetts Constitution, it is "'not bound by Federal decisions which are less restrictive in some aspects than our Declaration of Rights.'" Moe v. Secretary of Admin. & Fin., 382

United States Supreme Court's interpretation of the privilege against self-incrimination's proper scope.[212] The state high court, however, has also consistently held that the privilege against self-incrimination contained within article twelve of the Massachusetts Constitution "requires a broader interpretation than that of the Fifth Amendment."[213] By distinguishing the scope of the privilege as granted in "the state and federal constitutions in the *Opinion*, the SJC declared its intention to determine whether the prohibition against evidence 'furnish[ed]' by the accused ha[d] [a] particular application to the proposed statute."[214] If such a relationship was found, the court would have the independent state constitutional grounds necessary to differ from the Supreme Court's decision in *Neville* and hold refusal evidence inadmissible.

With its constitutional basis stated, the SJC recognized that all persuasive authority on the subject, despite differences in the "analytical approach to the issue,"[215] had focused on "whether the evidence [was] testimonial or real (physical), and whether the evidence [could] be said to have been compelled in a constitutional sense."[216] The SJC therefore conducted its analysis with these two issues as its guide.

Mass. 629, 651, 417 N.E.2d 387, 400 (1981) (citing Corning GlassWorks v. Ann & Hope, Inc., 363 Mass. 409, 416, 294 N.E.2d 354, 358 (1973)); *see also* Commonwealth v. Brennan, 386 Mass. 772, 779-80, 438 N.E.2d 60, 65 (1982) ("This court is, of course, free to interpret the provisions of art. 12 so as to extend its protections beyond those recognized under the Fifth Amendment."); Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 651, 417 N.E.2d 387, 400 (1981) (Massachusetts Declaration of Rights, art. 1 and art. 10, affords greater degree of protection to woman's right to choose abortion than does Federal Constitution); District Attorney for the Suffolk Dist. v. Watson, 381 Mass. 648, 650, 411 N.E.2d 1274, 1275 (1980) (death penalty contravenes cruel and unusual punishment provision in art. 26, even if permissible under Federal Constitution); Commonwealth v. Soares, 377 Mass. 461, 475-77, 387 N.E.2d 489, 510-12 (use of peremptory challenges to eliminate black jurors deprived defendants of state constitutional right to fair trial by impartial jury under art. 12), *cert. denied*, 444 U.S. 881 (1979).

212. For example, the SJC has limited the article 12 privilege against self-incrimination to that against compulsion of testimony or communications. Commonwealth v. Brennan, 386 Mass. 772, 776, 438 N.E.2d 60, 63 (1982). *See also* Carney v. City of Springfield, 403 Mass. 604, 610, 532 N.E.2d 631, 635 (1988) (article 12 provides greater protection than Fifth Amendment when an employee is compelled to answer job performance questions under threat of discharge).

213. *Opinion*, 412 Mass. at 1210, 591 N.E.2d at 1078 (quoting Attorney General v. Colleton, 387 Mass. 790, 796 (1982)).

214. *Id.* at 1207, 591 N.E.2d at 1076.

215. *Id.* at 1203, 591 N.E.2d at 1074.

216. *Id.* at 1206, 591 N.E.2d at 1076.

B. *A Refusal to Submit to a Chemical Breath Test is a Testimonial Statement*

The SJC has followed the Supreme Court's development of the privilege against self-incrimination by holding that article twelve of the Massachusetts Declaration of Rights prohibits state compulsion of testimonial or communicative evidence, but not the compelled production of real or physical evidence.[217] As previously discussed,[218] the privilege against self-incrimination prohibits only evidence that is both testimonial in nature and compelled by the state.[219] Therefore, to determine the admissibility of refusal evidence, the court began by deciding whether a defendant's refusal to submit to a chemical test was a testimonial statement.[220]

The SJC has defined "testimonial" evidence as that which "reveals a person's knowledge or thoughts concerning some fact."[221] Real or physical evidence, such as fingerprints, photographs, or blood samples, is protected from admission at trial by neither article twelve nor the Fifth Amendment.[222] In the realm of drunken driving, the SJC has held that evidence produced by breath and field sobriety tests is real evidence that does not fall within the protection of article twelve.[223] Other state courts have held that if the results of these tests themselves constitute nontestimonial evidence, then so too must evidence of a refusal to take such a test.[224] The SJC, in the *Opinion of the Justices*, disposed of this line of reasoning when it stated that it is not logical to conclude that refusal evidence was real evidence simply because the test refused would have produced real evidence.[225] Rather, to determine properly whether a refusal constitutes real or testimonial evidence, the Justices stated their belief in the necessity of analyzing the reason for which the prosecution seeks to introduce evidence of a defendant's refusal.[226]

The Justices found that in a typical criminal proceeding for driving under the influence, a prosecutor seeks "to introduce refusal evidence to show . . . 'that a defendant's refusal is the equivalent of his statement, I have had so much to drink that I know or at least suspect that I am unable to pass the test.'"[227] The court stated that "an involuntary

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217. Commonwealth v. Brennan, 386 Mass. 772, 776, 438 N.E.2d 60, 63 (1982) (citing Schmerber v. California, 384 U.S. 757, 764 (1966)).
218. *See supra* text accompanying notes 77-80, 88-189.
219. Schmerber v. California, 384 U.S. 757, 764 (1966).
220. *Opinion*, 412 Mass. at 1206-07, 591 N.E.2d at 1076.
221. *Id.*
222. *Brennan*, 386 Mass. at 776, 780, 438 N.E.2d at 63, 66.
223. *Id.*
224. *See* cases cited *supra* note 197.
225. *Opinion*, 412 Mass. at 1209, 591 N.E.2d at 1077.
226. *Id.* at 1209, 1211, 591 N.E.2d at 1077, 1078.
227. *Id.* at 1209, 591 N.E.2d at 1077.

statement" by the defendant to that effect could not be used as evidence against him.[228] To support this conclusion, the Justices analogized inferences arising from refusal evidence with those arising from out-of-court conduct.[229] The Justices stated that because out-of-court conduct that expresses an assertion, whether by intent or inference, constitutes hearsay, the conclusion "follows, therefore, that evidence of a person's thought process, if offered to show that the person had doubts about his ability to pass the test, would be testimonial."[230] The point of this analogy is to demonstrate that refusal evidence is nothing more than an inference as to the defendant's mental state, which, if offered to prove that the defendant possessed a certain mental state, would be evidence of a testimonial nature.

The SJC strengthened its finding that refusal evidence was testimonial by analogizing the incriminating inferences that arise from refusal evidence with those that arise from an act of producing incriminating physical evidence.[231] The court has held that in some situations the production of real evidence is sufficiently communicative to invoke the protection of the privilege against self-incrimination, even if the content of what is produced is real or physical evidence.[232] The crucial distinction is between a testimonial inference arising from an *act* of production and the testimonial nature of the *content* that is produced.[233] For example, if a witness is compelled by the state to produce documents, the witness's act of production would, in effect, testify to the existence, location, and authenticity of those articles, as well as to the witness's control over the documents—an exercise that can be self-incriminating in some circumstances.[234] In such a case, the SJC held that a defendant properly invoked the state's privilege against self-incrimination when he claimed that the act of producing records would be personally incriminating.[235] The court found that such an act was testimonial because it showed the witness's knowledge, understanding, and thoughts, even though the documents produced constituted physical evidence.[236]

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228. *Id.*
229. *Id.*
230. *Id.*
231. *Opinion*, 412 Mass. at 1211, 591 N.E.2d at 1078.
232. Commonwealth v. Hughes, 380 Mass. 583, 590, 404 N.E.2d 1239, 1242, *cert. denied*, 449 U.S. 900 (1980) (production of possible murder weapon).
233. Commonwealth v. Doe, 405 Mass. 676, 679, 544 N.E.2d 860, 862 (1989) (emphasis added). *See* United States v. Doe, 465 U.S. 605, 612 (1984); Commonwealth v. Hughes, 380 Mass. 583, 590, 404 N.E.2d 1239, 1242, *cert. denied*, 449 U.S. 900 (1980).
234. *See* Commonwealth v. Doe, 405 Mass. 676, 679, 544 N.E.2d 860, 862 (1989).
235. *Id.*
236. *Id.* In Fisher v. United States, 425 U.S. 391 (1976), the Supreme Court applied the same reasoning to a similar fact situation.

Similarly, the SJC has held that a murder suspect cannot be ordered to produce a revolver.[237] In *Commonwealth v. Hughes*,[238] the SJC held that the act of producing a revolver would be an implicit statement concerning the gun's existence, location, and the control the defendant exercised over it.[239] The *Hughes* Court reasoned that the Commonwealth sought to use at trial the fact that the suspect produced the revolver as an implicit statement "to show he had possession and control [of the revolver] at some point after the alleged crime."[240] The court reasoned that this information was sought because the Commonwealth did not have enough incriminating evidence and was "seeking to be relieved of its ignorance or uncertainty by trying to" obtain evidence of the defendant's knowledge concerning the crime weapon.[241] In applying the federal privilege against self-incrimination to exclude the evidence, the SJC followed a Supreme Court ruling that the privilege against self-incrimination "'does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution . . . .'"[242] Although the SJC applied the Fifth Amendment privilege in *Hughes*, the court indicated that if the result had not been required under the Fifth Amendment, the same decision would "be required by the rather clearer terms of the Constitution of the Commonwealth" via the article twelve privilege against self-incrimination.[243] The court thus indicated that the state constitution may provide greater protection against state compelled self-incrimination than the federal constitution with regard to the production of real evidence.

After considering the reasoning in its previous decisions, the SJC concluded in the *Opinion of the Justices* that the inference which arises from a refusal is analogous in nature to one that is created by the act of producing a piece of incriminating real evidence.[244] Consequently, the SJC held that evidence of a refusal to submit to a breath test, if used to show the defendant's alleged thoughts or reasons for so refusing, is evidence of a testimonial nature.[245] As a result, the Justices found the existence of the first element necessary to invoke the privilege against

237. Commonwealth v. Hughes, 380 Mass. 583, 404 N.E.2d 1239 (1980), *cert. denied*, 449 U.S. 900 (1980).
238. *Id.*
239. *Id.* at 592, 404 N.E.2d at 1244.
240. *Id.*
241. *Id.*
242. *Id.* at 593, 404 N.E.2d at 1245 (quoting Maness v. Meyers, 419 U.S. 449, 461 (1975)).
243. *Id.* at 595, 586 n.3, 404 N.E.2d at 1246, 1241 n.3.
244. Opinion of the Justices, 412 Mass. 1201, 1210-11, 591 N.E.2d 1073, 1078 (1992).
245. *Id.* at 1211, 591 N.E.2d at 1078.

self-incrimination: that the refusal evidence constituted testimonial or communicative evidence. To find that the privilege excluded refusal evidence, however, the court still needed to find that refusal evidence resulted from impermissible state compulsion.

C. *Evidence of a Refusal to Submit to a Chemical Breath Test is Compelled*

After concluding that refusal evidence is testimonial in nature, the Justices turned their analysis to whether the proposed statutory amendment allowing refusal evidence in criminal DUI proceedings would compel a person "to accuse, or furnish evidence against himself" in violation of the Massachusetts Declaration of Rights.[246]

The court explained that it has historically held that the state constitution's provision, "or furnish evidence against himself," can "be presumed to be intended to add something to the significance" of its preceding clause, that "no person shall . . . be compelled to accuse himself."[247] In previous decisions the SJC has held that the privilege's scope protects a person from "furnishing against himself" evidence that discloses "the circumstances of his offence, the sources from which, or the means by which evidence of its commission, or his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him."[248] Consequently, the court sought to determine whether the special protections provided by the Massachusetts Constitution excluded or allowed refusal evidence.

The Justices reasoned that a statute which makes the allowance of refusal evidence mandatory in criminal DUI proceedings places the accused in a "Catch-22" situation, and thus compels an involuntary disclosure of fact by the accused.[249] The SJC did not agree with the reasoning of some state courts that have found statutes which permit the admission of refusal evidence at trial merely encourage, but do not impermissibly compel, a refusal.[250] The SJC reasoned that such a statute creates a compulsory situation that places the accused in a dilemma in which only two options exist, either of which can produce incriminating evidence.[251] The first alternative presented to a DUI arrestee is to submit to the breath test. Although this test could prove the accused's innocence, the danger arising from this option is that the test could also produce incriminating evidence in the form of a high percentage of blood-alcohol content, leading to a presumption of

246. *Id.* at 1210, 591 N.E.2d at 1078 (quoting MASS. CONST. art. 12).
247. *Id.* at 1209-10, 591 N.E.2d at 1077-78 (quoting Emery's Case, 107 Mass. 172, 181 (1871)).
248. *Id.* at 1210, 591 N.E.2d at 1078 (quoting *Emery*'s Case, 107 Mass. at 182).
249. *Id.* at 1211, 591 N.E.2d at 1078.
250. *Id.*
251. *Id.*

intoxication at trial.[252] If the accused wished to bypass this risk and instead chose the second option of refusing to submit to the test, two penalties would result. The first such sanction is the mandatory suspension of the refuser's license.[253] The court acknowledged that although this is a form of compulsion, it has been upheld under the state and federal constitutions.[254] Under the proposed legislation, a motorist who is asked to submit to a chemical intoxication test would also be faced with the second, criminal penalty of having his or her refusal introduced in a criminal proceeding as "adverse testimonial evidence" of the defendant's consciousness of guilt.[255] Thus, under the proposed legislation, a person arrested for DUI would ultimately be faced with a "damned if you do, damned if you don't" situation in which adverse evidence could be produced by either option. According to the Justices, to place a defendant in such a position is to compel a choice prohibited by the Commonwealth's privilege against self-incrimination.[256] Using this analysis, the proposed statute would use "the threat of adverse testimonial evidence as a coercive tool to compel submission to a breathalyzer test."[257] The Justices therefore held that because "refusal evidence is both compelled and furnishes evidence against oneself," the proposed statutory amendment would be unconstitutional if implemented.[258]

V. ANALYSIS

A. *Does Refusal Evidence Constitute Testimonial Evidence?*

The United States Supreme Court sidestepped the issue of whether a refusal constituted testimonial or real evidence in *South Dakota v. Neville*.[259] This decision led to much disagreement among the lower courts that subsequently considered the issue.[260] Although the *Neville* Court did not resolve the question, it did comment that it found "considerable force" in the argument that a refusal is a physical act and may therefore be used as circumstantial evidence of the suspect's consciousness of guilt.[261] As the two post-*Neville* decisions of *Doe v.*

252. *See supra* notes 22-25, 37 and accompanying text.
253. *See supra* note 28 and accompanying text.
254. Opinion of the Justices, 412 Mass. 1201, 1208 n.6, 591 N.E.2d 1073, 1077 n.6 (1992) (citing Mackey v. Montrym, 443 U.S. 1 (1979); Commonwealth v. Brennan, 386 Mass. 772, 783, 438 N.E.2d 60, 67 (1982)).
255. *See supra* text accompanying notes 9, 12, 35, 40-53.
256. *Opinion*, 412 Mass. at 1211, 591 N.E.2d at 1078.
257. *Id.*
258. *Id.*
259. 459 U.S. 553, 561 (1983); *see supra* text accompanying notes 150-51 & 162.
260. South Dakota v. Neville, 459 U.S. 553, 561-62 (1983).
261. *Id.* at 561-62. *See supra* notes 150 and accompanying text.

United States and *Pennsylvania v. Muniz* indicate, the Supreme Court has distanced itself from the theory of classifying refusal evidence as a physical act by clarifying its definition of what constitutes a testimonial statement within the scope of Fifth Amendment protection.[262]

In *Doe*, the Supreme Court stated that a testimonial statement must be one in which the "communication . . . itself, explicitly or implicitly, relate[s] a factual assertion or disclose[s] information."[263] In other words, if the content of the compelled communication has testimonial significance, it is constitutionally protected; the fact that it results from a physical act is irrelevant.[264] An example of such a testimonial communication arose in *Muniz*, where the Court held that a question requiring a suspect to communicate a belief about his mind's functional abilities expressed testimonial qualities, and was therefore protected by the privilege against self-incrimination.[265] If one were to extend the reasoning of *Schmerber*, *Doe*, and *Muniz* to the question of how refusal evidence would be classified in some future case, the sum of the Court's reasoning to date supports the conclusion that evidence of a refusal to submit to a breath test is not a testimonial communication. The Court could reach this conclusion, consistent with its own precedent, by reasoning in the following manner: first, it would decide that the question asked by police officers, of whether a DUI suspect is willing to submit to a breath test, is not designed to elicit a response revealing the defendant's conscious thoughts or beliefs.[266] Therefore, the question would survive a Fifth Amendment challenge under *Doe* and *Muniz* because it is intended only to determine whether the defendant will consent to a breath test, and not to compel the accused to intentionally express a belief regarding his sobriety or intoxication.[267] Second, the Court would need to determine whether a refusal explicitly or implicitly expresses a belief regarding the accused's level of sobriety or intoxication.[268] The Court could find that a negative response to this question expresses no such explicit or implicit statements concerning a belief of intoxication because the content of the response does not contain any testimonial significance at the time it is spoken.[269] Therefore, the

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262. See *supra* notes 165-89 and accompanying text for a discussion of *Doe* and *Muniz*.

263. Doe v. United States, 487 U.S. 201, 210 (1988).

264. *Id.* at 211 n.10.

265. Pennsylvania v. Muniz, 496 U.S. 582, 599-600 (1990).

266. *See supra* text accompanying note 167.

267. For a discussion of *Muniz*, see *supra* notes 177-89 and accompanying text.

268. *See Doe*, 487 U.S. at 211.

269. *See id.* at 211 n.10. The Court stated that "[i]n order to be privileged, it is not enough that the compelled communication is sought for its content. The content itself must have testimonial significance." *Id.* (citing Fisher v. United States, 425 U.S. 391, 408 (1976); Gilbert v. California, 388 U.S. 263, 267 (1967); United States v.

response would not fall within the *Doe* Court's definition of a testimonial statement because it does not, by itself, "explicitly or implicitly . . . relate a factual assertion or disclose information."[270] Because evidence of a refusal does not take on any testimonial significance until it is offered at trial, the evidence would be admissible under the Supreme Court's interpretation of the federal privilege against self-incrimination.

A number of flaws would exist in a potential Supreme Court ruling that a refusal does not constitute testimonial evidence. As the Massachusetts Justices recognized in the *Opinion*, "evidence of a person's thought process, if offered to show that the person had doubts about his ability to pass the test, would be testimonial."[271] The use of a refusal at trial to show the defendant's thoughts turns a non-assertive statement into an implicit statement of fact about the person's belief in his sobriety.[272] It may be true, under the Supreme Court decisions, that a refusal contains no testimonial characteristics when first spoken. It is indisputable, however, that the refusal takes on testimonial characteristics when used at trial to show the defendant's thoughts.[273] The inference that a person refused to submit to a search for real or objective evidence communicates testimonial or subjective data: the accused refused to submit to the test because of the belief that the test's results would produce incriminating real evidence.[274] The inference is testimonial because it involves the contents of the person's mind, attempting to show the accused's "knowledge or thoughts concerning some fact."[275] In its use as an inference, therefore, the refusal becomes an implicit assertion by the suspect that the test was refused because of the fear that its results would prove incriminating.[276] The argument that the government does not seek to compel the defendant to reveal incriminating thoughts is irrelevant to the analysis. Evidence of a refusal, used to show the defendant's consciousness of guilt, is correctly classified as testimonial because it can reflect the accused's thoughts or knowledge.

Wade, 388 U.S. 218, 222 (1967)).

270. *Id.* at 210.

271. Opinion of the Justices, 412 Mass. 1201, 1209, 591 N.E.2d 1073, 1077 (1992).

272. *See* H. Richard Uviller, *Self-Incrimination By Inference: Constitutional Restrictions On the Evidentiary Use of a Suspect's Refusal to Submit to a Search*, 81 J. CRIM. L. & CRIMINOLOGY 37, 54 (1990); *see also* Charles G. Geyh, *The Testimonial Component of the Right Against Self-Incrimination*, 36 CATH. U. L. REV. 611 (1987).

273. Uviller, *supra* note 272, at 54.

274. *Id.*

275. Commonwealth v. Brennan, 386 Mass. 776, 778, 438 N.E.2d 60, 64 (1982).

276. Uviller, *supra* note 272, at 54.

B. *Is a Refusal Impermissibly Compelled?*

For the privilege against self-incrimination to exclude the admission of evidence at trial, the evidence must be compelled and testimonial.[277] Therefore, even if it is assumed that refusal evidence is properly classified as testimonial, the analysis of whether the privilege against self-incrimination excludes refusal evidence is not complete without a determination of whether the refusal was also impermissibly compelled by the state.[278]

In deciding the constitutionality of refusal evidence, some courts have decided the issue solely on the basis that no compulsion occurs; these courts often did not consider the distinction between testimonial and real evidence.[279] Other courts have found a refusal to be testimonial, but unaccompanied by any illegal state compulsion, and accordingly held the evidence to be admissible.[280]

The majority of state courts have found no compulsion inherent in the state's request to provide a breath sample. These courts reason that the state permissibly seeks to encourage the accused to take the test by offering "incentives" in the form of penalties, such as license revocation and the admission of refusal evidence in criminal proceedings.[281] These courts reason that the purpose of these incentives is not to force the defendant into refusing the test; instead, they are intended to encourage the driver to submit to the test. Therefore, although the state does compel a choice that can result in a refusal, the evidence is not the product of impermissible compulsion because the state's offer is not aimed at obtaining the refusal evidence.

With respect to the privilege against self-incrimination, this reasoning is logical. The state's purpose in forcing the accused to choose between taking a breath test or refusing to do so is not to obtain the refusal as evidence for prosecution, but rather to obtain the much more potent evidence of a breath test report. The inference of intoxication arising from a positive breath test is much stronger than that arising from refusal evidence.[282] Both as evidence of intoxication and as a

277. WHITEBREAD & SLOBGIN, *supra* note 77, § 15.01, at 324. *See* text accompanying *supra* notes 77-82.

278. *See* People v. Thomas, 385 N.E.2d 584, 587 (N.Y. 1978) ("Compulsion need not of course be physical; it may as well be accomplished by the State's attaching to the alternative course of action a penalty, punishment or detriment for the imposition of which no other justification exists and of which the defendant is therefore entitled to be free."), *appeal dismissed*, 444 U.S. 891 (1979).

279. *See* cases cited *supra* note 200.

280. *See* cases cited *supra* note 199.

281. *See* cases cited *supra* note 197.

282. People v. Ellis, 421 P.2d 393, 397 (1966); *see also* South Dakota v. Neville, 459 U.S. 553, 564 (1983).

prosecution tool, a breath test report is superior; refusal evidence is merely a consequence of the choice, and may lead only to a rebuttable inference of consciousness of guilt.[283]

This reasoning is analogous to the admission of evidence of flight from a crime scene after a finding that no state compulsion caused the accused's actions.[284] The state does not compel the suspect to flee from the scene of a crime; flight is a consequence of the suspect's own choice.[285] Consequently, evidence of flight is admissible as consciousness of guilt because no state compulsion exists. Similarly, in the DUI situation, the state compulsion is directed at getting the motorist to submit to the test in order to produce noncommunicative evidence.[286] It is the defendant's choice to refuse the test. The fact that testimonial evidence is produced is only incidental to the state's objectives and should not be viewed as impermissible compulsion.

The Massachusetts Justices disagreed with the majority view by defining impermissible compulsion in its most simplistic form, as consisting of a state-imposed choice between two alternatives, either of which forces the accused to furnish incriminating evidence.[287] The state's motives in offering this choice are thereby irrelevant to the Justices, although similar motives were central to the majority of courts which have decided the issue of the admissibility of refusal evidence.[288] The reasoning of the Massachusetts Justices on the compulsion issue is identical to that of the South Dakota Supreme Court in *State v. Neville*,[289] the decision reversed by the United States Supreme Court in *South Dakota v. Neville*.[290] In *South Dakota v. Neville*, the Supreme Court recognized that the very nature of the criminal process inevitably requires an accused to make difficult choices.[291] Nevertheless, the Court held that impermissible compulsion does not exist every time a suspect must make a decision that is unpleasant or difficult.[292] To the

283. *Ellis*, 421 P.2d at 397.
284. *See* cases cited *supra* note 149.
285. State v. Green, 684 P.2d 575, 578 (Or. Ct. App. 1984).
286. Sandy City v. Larson, 733 P.2d 137, 140 (Utah 1987).
287. *See supra* notes 246-58 and accompanying text.
288. *See supra* notes 152-61 and accompanying text.
289. 312 N.W.2d 723 (S.D. 1981); *see also* Susan Waite Crump, *The Admission of Chemical Test Refusals After State v. Neville: Drunk Drivers Cannot Take the Fifth*, 59 N.D. L. REV. 349 (1983); Rick W. Orr, Note, *State v. Neville: The Giving of a Meaningful Choice to the Accused*, 27 S.D. L. REV. 300 (1982).
290. South Dakota v. Neville, 459 U.S. 553 (1983). On remand the South Dakota Supreme Court held that a refusal is not compelled but is testimonial in nature. State v. Neville, 346 N.W.2d 425 (S.D. 1984) (*Neville II*). The part of the decision holding that a refusal is testimonial was subsequently overruled by State v. Hoenscheid, 374 N.W.2d 128 (S.D. 1985).
291. *See generally Neville*, 459 U.S. at 563.
292. *Id.*

contrary, the Court held that penalties attached by the state to the exercise of the refusal option are legitimate coercive tools because the state is not required to offer this choice. Breath tests produce physical evidence, thus under *Schmerber* a state can require all DUI suspects to submit to chemical breath analyses, and can force submission to such tests.[293]

State courts have expanded on this reasoning by explaining that a person does not have a "right" to refuse a breath test.[294] Instead, these courts reason that the implied consent statute creates an obligation for a person to provide a sample of real evidence if arrested for driving while intoxicated.[295] Rather than forcing the sample to be produced in each case, however, state legislatures have granted the accused the power to refuse to provide this sample.[296] Attached to the individual's exercise of this power are the "strings" that a refusal will be penalized civilly by revocation of the driver's license and criminally by allowing the defendant's refusal to be introduced as adverse evidence in the subsequent criminal proceeding.[297] The state has thus placed upon a motorist suspected of driving while intoxicated a qualified obligation to provide the sample, accompanied by a qualified right to refuse to do so.[298] The penalties are necessary to give meaning to the doctrine of "implied consent," otherwise all suspects who thought themselves guilty would presumably refuse to produce a test sample and implied consent laws would thereby be rendered useless.[299] Courts adhering to this interpretation of refusal evidence conclude that the fact that the legislature created a power and attached penalties to its exercise does not mean that the state coerced the defendant into furnishing evidence against him or herself.[300]

Furthermore, the circumstances present when a suspect refuses to take a breath test are very different from those which led to the formulation of the privilege against self-incrimination.[301] Rather than

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293. *Id.*

294. *See, e.g.*, State v. Cormier, 499 A.2d 986 (N.H. 1985). The *Cormier* decision is particularly relevant in a comparison of the decisions and reasoning of state courts to the Massachusetts Supreme Judicial Court's *Opinion of the Justices.* In *Cormier*, the Supreme Court of New Hampshire analyzed the issue under the state constitution which contains verbatim phraseology to Massachusetts's article 12. *See* N.H. CONST. Part I, art. 15 ("No subject shall . . . be compelled to accuse or furnish evidence against himself.").

295. *Cormier*, 499 A.2d at 989.

296. *Id.*

297. *Id.*

298. *Id.* at 990.

299. *Id.* at 989.

300. State v. Zwicker, 713 P.2d 1101 (Wash. 1986) (en banc).

301. State v. Cormier, 499 A.2d 986, 990 (N.H. 1988). The *Cormier* Court quoted from Griffin v. California:

imposing the alternatives of great pain or danger, the breath test procedure is, at its worst, only minimally intrusive and slightly discomforting.[302] A refusal is not compelled as the defendant's only reasonable option to what else would be an offensive or painful alternative.[303]

The coercive options which prompted the creation of the privilege against self-incrimination are not the same as those reviewed by the Massachusetts Justices in the *Opinion*. The Justices concluded that the mere threat of adverse testimonial evidence is an alternative that constituted the compulsion necessary to invoke the protection of the state constitution's privilege against self-incrimination.[304] In other words, the Justices concluded that whenever the state places a suspect in a position requiring a response that may produce adverse evidence, the state has created an impermissibly compulsive situation.[305] Many courts have disagreed with this reasoning and have held instead that it is constitutionally permissible to require the defendant to choose between either (1) producing real evidence or (2) suppressing real evidence while simultaneously producing testimonial evidence of a less probative nature.[306] Nevertheless, the SJC found that the Massachusetts Constitution prohibits the state from placing the accused in such a "Catch-22" position.

To support its conclusion, the SJC indicated that the privilege against self-incrimination historically guaranteed by the Massachusetts Constitution "applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties."[307] The *Opinion* also noted that the SJC had found that the phrase "or furnish evidence against himself" may

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> When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced.

380 U.S. 609, 620 (1965) (Stewart, J., dissenting).

302. *See* Schmerber v. California, 384 U.S. 757, 771 (1966); South Dakota v. Neville, 459 U.S. 553, 562 (1983).

303. *Neville*, 459 U.S. at 563.

304. Opinion of the Justices, 412 Mass. 1201, 1211, 591 N.E.2d 1073, 1078 (1992).

305. *Id.*

306. *See, e.g.*, State v. Cormier, 499 A.2d 986 (N.H. 1985); Coleman v. State, 658 P.2d 1364 (Alaska Ct. App. 1983); McKay v. Davis, 653 P.2d 860 (N.M. 1982).

307. *Opinion*, 412 Mass. at 1210, 591 N.E.2d at 1078 (quoting Emery's Case, 107 Mass. 172, 181 (1871)).

be reasonably construed to protect a person from being compelled to disclose an answer which is used as a "direct admission[] against him."[308] Applying this reasoning to its decision, the SJC concluded that the Massachusetts Constitution prohibits the admission of refusal evidence because it is impermissibly compelled testimonial evidence.

The SJC erred in concluding that by merely confronting a criminal suspect with a choice of producing one of two types of evidence against him or herself, the state has created a form of compulsion prohibited by article twelve.[309] The suspect's choice can produce three, not only two, types of evidence. In addition to (1) the possibility of producing incriminating real evidence in the form of a positive blood-alcohol analysis, or (2) adverse testimonial evidence arising from a refusal, the defendant's choice also offers the opportunity to produce (3) exculpatory real evidence in the form of a blood-alcohol percentage below the level that presumes intoxication. It is acceptable for a trier of fact to infer, from a suspect's refusal to participate in a test that could prove his or her innocence and which is refused despite a mandatory civil penalty accompanying such refusal, that the defendant believed he or she was guilty and that the test would provide proof of this belief. The penalty of a rebuttable inference is not the type of compulsion which the privilege was designed to protect against, and therefore the *Opinion* should not have found that the proposed statute would violate the state's self-incrimination provision.

C. *Critique of the Opinion of the Justices*

In addition to a general discussion and analysis of the *Opinion of the Justices*, this Note comments further on the persuasive authority cited and criticizes the SJC's subsequent extension of the *Opinion's* holding.

1. Research Undermines the *Opinion's* Persuasiveness

The *Opinion of the Justices* incorrectly cites several state court decisions which, in fact, were overruled, superseded by statute, or without precedential value at the time the *Opinion* was issued. One instance of these errors occurred in an important section of the *Opinion*, in which the court lists six state court decisions which have "deemed . . . refusal evidence inadmissible."[310] Of the cases cited, two were expressly overruled in 1986 to allow refusal evidence.[311] Another was a lower state court decision impliedly overruled in 1978 when the state's highest

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308. *Id.* (quoting *Emery's Case*, 107 Mass. at 182).
309. *Id.* at 1211, 591 N.E.2d at 1078.
310. *Id.* at 1203, 591 N.E.2d at 1074.
311. Hovious v. Riley, 403 S.W.2d 17 (Ky. Ct. App. 1966), *overruled*, Commonwealth v. Hager, 702 S.W.2d 431 (Ky. 1986); State v. Adams, 247 S.E.2d 475 (W. Va. 1978), *overruled*, State v. Cozart, 352 S.E.2d 152 (W. Va. 1986).

court decided to allow the admission of refusal evidence.[312] Two other cases were decided under the Federal Constitution's Fifth Amendment and have since been called into question by the Supreme Court's 1983 decision in *South Dakota v. Neville*.[313] The final case of the six cited was a Connecticut decision based on federal and state grounds.[314] As the *Opinion* correctly noted, however, the Supreme Court of Connecticut stated in 1984 that there is no distinction between that state's privilege against self-incrimination and the federal provision.[315] Therefore, it is logical to assume that this case will be overturned once the Connecticut Supreme Court addresses the issue and thus it is, at best, weak persuasive authority.

The *Opinion* also described decisions by various state courts on the refusal evidence issue.[316] This discussion included a Virginia Court of Appeals decision in which the court held that the state's privilege against self-incrimination was violated by the admission of a refusal to submit to a field sobriety test.[317] This decision was overruled in 1991 by a subsequent *en banc* decision of the same Court of Appeals, which held that refusal evidence violated neither the state nor federal privilege against self-incrimination.[318] The *Opinion* then referred to a South Dakota Supreme Court decision, *State v. Neville* (*Neville II*), which held that a refusal constitutes testimonial evidence.[319] This holding, however, was later expressly overruled in 1985 by *State v. Hoenscheid*.[320] Inexplicably, the *Opinion* refers to *Hoenscheid* immediately before it cites *Neville II* for the overruled proposition.[321] The citation of eight

312. People v. Rodriguez, 80 Misc. 2d 1060 (N.Y. Sup. Ct. 1975); *see* People v. Thomas, 385 N.E.2d 584 (N.Y. 1978).

313. State v. Anonymous, 276 A.2d 452 (Conn. Cir. Ct. 1971); State v. Andrews, 212 N.W.2d 863 (Minn. 1973), *cert. denied*, 419 U.S. 881 (1974), *superseded by statute as stated in* State v. Willis, 372 N.W.2d 180 (Minn. 1983), State v. Berge, 464 N.W.2d 595 (Minn. Ct. App. 1991).

314. State v. Munroe, 171 A.2d 419 (Conn. Cir. Ct. 1961).

315. Opinion of the Justices, 412 Mass. 1201, 1202-03 n.5, 591 N.E.2d 1073, 1076 n.5 (1992); *see* State v. Asherman, 478 A.2d 227 (Conn. 1984), *cert. denied*, 470 U.S. 1050 (1985).

316. *Opinion*, 412 Mass. at 1203-06, 591 N.E.2d at 1074-76.

317. *Id.* at 1204, 591 N.E.2d at 1075 (citing Farmer v. Commonwealth, 390 S.E.2d 775 (Va. Ct. App. 1990)).

318. Farmer v. Commonwealth, 404 S.E.2d 371 (Va. Ct. App. 1991) (en banc).

319. *Opinion*, 412 Mass. at 1204, 591 N.E.2d at 1075 (citing State v. Neville, 346 N.W.2d 425 (S.D. 1984)).

320. State v. Hoenscheid, 374 N.W.2d 128 (S.D. 1985), *overruling* State v. Neville, 346 N.W.2d 425 (S.D. 1984).

321. *Opinion*, 412 Mass. at 1205, 591 N.E.2d at 1075. The *Opinion* states: "Others have concluded that the refusal is testimonial but, since it is not compelled or coerced, the refusal is admissible in evidence." *Id.* (citing State v. Neville, 346 N.W.2d 425 (S.D. 1984)).

decisions that are no longer in force weakens the *Opinion*'s persuasive basis. The SJC's decision does not join a substantial minority of states that exclude refusal evidence, as the *Opinion* appears to suggest. Rather, the SJC is currently the only state that holds refusal evidence inadmissible solely on state grounds.

The *Opinion* continued the discussion of the difficulty courts face in resolving the refusal evidence issue by illustrating the "confused state of affairs" among the state courts that have decided the refusal evidence issue.[322] The *Opinion* describes three conflicting decisions from the Supreme Court of Minnesota as an example of this confusion.[323] The SJC, however, failed to mention that after the third cited decision was issued in 1983, the Minnesota legislature amended its DUI statute to allow refusal evidence in criminal proceedings.[324] Subsequently, when this statute was challenged as a violation of the Minnesota privilege against self-incrimination in *State v. Berge*,[325] the Minnesota Court of Appeals found that, due to "textually identical" provisions in the state and federal constitutions,[326] the state constitution would be interpreted as the equivalent of the Fifth Amendment.[327] Therefore, the Court of Appeals held that the introduction of refusal evidence did not violate Minnesota's privilege against self-incrimination.[328] The Minnesota Supreme Court affirmed the *Berge* decision without publishing a written opinion.[329] The *Opinion* thus misstated the applicable law by stating that the Minnesota Supreme Court had not yet decided "whether the admission of [refusal] evidence violated the State constitutional provision,"[330] for it implicitly did so in affirming *Berge*. The number of outdated cases cited in the *Opinion* undermines its basis of persuasive

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The *Hoenscheid* Court held: "the fact of the refusal to perform tests do not themselves constitute communicative or testimonial evidence is equally non-communicative and non-testimonial in nature. To the extent that *Neville I* and *II* are to the contrary, those holdings are overruled." State v. Hoenscheid, 374 N.W.2d 128, 130 (S.D. 1985).

322. *Opinion*, 412 Mass. at 1205, 591 N.E.2d at 1075.

323. *Id.* at 1205-06, 591 N.E.2d at 1075-76. The decisions described are State v. Willis, 332 N.W.2d 180 (Minn. 1983); State v. Schlinger, 216 N.W.2d 835 (Minn. 1974) (per curiam); and State v. Andrews, 212 N.W.2d 863 (Minn. 1973), *cert. denied*, 419 U.S. 881 (1974).

324. 1983 MINN. LAWS ch. 306, § 3 (codified as amended at MINN. STAT. ANN. ch. 306, § 169.121 (West 1986)).

325. 464 N.W.2d 828 (Minn. Ct. App. 1991), *aff'd*, 474 N.W.2d 828 (Minn. 1991).

326. State v. Berge, 464 N.W.2d 595, 596 (Minn. Ct. App. 1991) (quoting State v. Fuller, 374 N.W.2d 722, 726 (Minn. 1985)). *See* MINN. CONST. art. I, § 7 ("[n]o person shall . . . be compelled in any criminal case to be a witness against himself").

327. *Berge*, 464 N.W.2d at 597.

328. *Id.* at 596-97.

329. 474 N.W.2d 828 (Minn. 1991).

330. Opinion of the Justices, 412 Mass. 1201, 1206 n.5, 591 N.E.2d 1073, 1076 n.5 (1992).

authority, although the SJC nevertheless still has the power to decide differently, as it did here, under the Massachusetts Constitution.

The SJC's incorporation of certain other materials in the *Opinion* is also questionable. In addition to its discussion of the various approaches taken by other state courts in deciding the refusal evidence issue, the *Opinion* also quoted the provisions containing the privilege against self-incrimination in eight states' constitutions.[331] Of these eight, one provision is identical to the Massachusetts provisions,[332] another is substantially identical,[333] and the other six are described in the *Opinion* as "similar."[334] The *Opinion* creates the misleading impression that four of these eight states do not allow refusal evidence.[335] All eight of the states whose constitutions were cited do allow such evidence to be admitted at trial.[336] The *Opinion* also cited twelve states' constitutional provisions against self-incrimination,[337] stating that these provisions were "[i]n contrast" to the Federal Constitution, as they provide protection against "a person from giving evidence against himself."[338]

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331. *Id.* at 1206-07 n.5, 591 N.E.2d at 1076 n.5 (citing N.H. CONST. Part I, art. 15 ("No subject shall . . . be compelled to accuse or furnish evidence against himself."); ME. CONST. art. 1, § 6 ("The accused shall not be compelled to furnish or give evidence against himself . . . ."); MINN. CONST. art. 1, § 7 ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."); NEB. CONST. art. 1, § 12 ("No person shall be compelled, in any criminal case, to give evidence against himself . . . ."); N.Y. CONST. art. 1, § 6 ("[N]or shall he be compelled in any criminal case to be a witness against himself."); OK CONST. art. 2, § 21 ("No person shall be compelled to give evidence which will tend to incriminate him . . . ."); S.D. CONST. art. 6, § 9 ("No person shall be compelled in any criminal case to give evidence against himself . . . ."); W.VA. CONST. art 3, § 5 ("[N]or shall any person, in any criminal case, be compelled to be a witness against himself.").

332. *Compare* MA. CONST. art. 12 ("No subject shall . . . be compelled to accuse, or furnish evidence against himself. . . .") *with* N.H. CONST. Part I, art. 15 ("No subject shall . . . be compelled to accuse or furnish evidence against himself.").

333. *See* ME. CONST. art. 1, § 6 ("The accused shall not be compelled to furnish or give evidence against himself . . . .").

334. *Opinion*, 412 Mass. at 1206-07 n.5, 591 N.E.2d at 1076 n.5. See *supra* note 331 for the language of the Minnesota, Nebraska, New York, Oklahoma, South Dakota, and West Virginia constitutions.

335. *Opinion*, 412 Mass. at 1206-07 n.5, 591 N.E.2d at 1076 n.5. These four states would be Minnesota, New York, South Dakota, and West Virginia.

336. *See* State v. Vickers, 309 A.2d 324 (Me. 1974); State v. Cormier, 499 A.2d 986 (N.H. 1985); State v. Willis, 332 N.W.2d 180 (Minn. 1983); State v. Meints 202 N.W.2d 202 (Neb. 1972); People v. Thomas, 385 N.E.2d 584 (N.Y. 1978); State v. Neasbitt, 735 P.2d 337 (Okla. Crim. App. 1987); State v. Hoenscheid, 374 N.W.2d 128 (S.D. 1985); State v. Cozart, 352 S.E.2d 152 (W.Va. 1986).

337. *Opinion*, 412 Mass. at 1202-03 n.2, 591 N.E.2d at 1074 n.2 (citing ALA. CONST. art. 1, § 6; ARIZ. CONST. art. 2, § 10; CONN. CONST. art. 1, § 8; ILL. CONST. art. 1, § 10; KY. CONST. § 11; ME. CONST. art. 1, § 6; MISS. CONST. art. 3, § 26; NEB. CONST. art. 1, § 12; N.C. CONST. art. 1, § 23; OKLA. CONST. art. 2, §§ 21, 27; PA. CONST. art. 1, § 9; UTAH CONST. art. 1, § 12).

338. *Opinion*, 412 Mass. at 1202 n.2, 591 N.E.2d at 1074 n.2.

It would seem the only rationale for including these provisions in the *Opinion* was to gain support for a state court holding contrary to the United States Supreme Court's interpretation of the Fifth Amendment. At least nine of the twelve state courts cited, however, allow refusal evidence,[339] and courts in at least five of these jurisdictions have held the state constitutional provisions to be no broader than the scope of the Fifth Amendment.[340] Of course, not all states interpret their constitution as limited to the parameters of the Federal Constitution.[341] Some states that have previously interpreted their constitutions more broadly have declined to do so in determining the refusal evidence question.[342] Other states have expressed a willingness to interpret their constitutions more broadly if needed to help in determining the refusal evidence issue, but did not find it necessary to do so.[343] The courts in these states found that even if the state constitution had been interpreted to have a broader meaning than the Federal Constitution, a refusal is not compelled and therefore, not within the protection of an even broader state's privilege against self-incrimination.[344]

2. The Unforeseen Consequences of the *Opinion of the Justices*

The Supreme Judicial Court's *Opinion of the Justices* was also weakened by its subsequent decision issued just three months after the *Opinion*. In *Commonwealth v. Lydon*,[345] the SJC held that a murder suspect's refusal to allow his hands to be tested for the presence of chemical gunfire residue could not be admitted into evidence against him for the purposes of a consciousness of guilt inference as it constituted compelled evidence of self-incrimination.[346] Chemical residue on a person's body

339. *See* Hill v. State, 366 So. 2d 318 (Ala. 1974); Campbell v. Superior Court, 479 P.2d 685 (Ariz. 1971); Commonwealth v. Hager, 702 S.W.2d 431 (Ky. 1986); Commonwealth v. Pineau, 491 A.2d 1165 (Me. 1985); State v. Meints, 202 N.W.2d 202 (Neb. 1972); State v. Flannery, 230 S.E.2d 603 (N.C. Ct. App. 1976); State v. Neasbitt, 735 P.2d 337 (Okla. Crim. App. 1987); Commonwealth v. Robinson, 324 A.2d 441 (Pa. Super. Ct. 1974); Sandy City v. Larson, 733 P.2d 137 (Utah 1987).

340. *See* Commonwealth v. Hager, 702 S.W.2d 431 (Ky. 1986); State v. Vickers, 309 A.2d 324 (Me. 1973); State v. Neasbitt, 735 P.2d 337 (Okla. Crim. App. 1987); Sandy City v. Larson, 733 P.2d 137 (Utah 1987); State v. Hoenscheid, 374 N.W.2d 128 (S.D. 1985).

341. *See, e.g.*, People v. Longwill, 538 P.2d 753 (Cal. 1975); State v. Kaluna, 520 P.2d 51 (Haw. 1974); State v. Johnson, 346 A.2d 66 (N.J. 1975); Commonwealth v. McLaughlin, 379 A.2d 1056 (Pa. 1977).

342. *See* State v. Pagach, 442 So. 2d 331 (Fla. Dist. Ct. App. 1983); State v. Franco, 639 P.2d 1320 (Wash. 1982) (en banc).

343. *See* State v. Cormier, 499 A.2d 986 (N.H. 1985); Wessels v. State, 312 S.E.2d 361 (Ga. Ct. App. 1983).

344. *See* cases cited *supra* note 343.

345. 413 Mass. 309, 597 N.E.2d 36 (1992).

346. *Id.* at 315, 597 N.E.2d at 40.

indisputably constitutes real evidence and, therefore, as the SJC acknowledged, the defendant had no constitutional right to refuse to submit to the test.[347] The defendant also did not have a statutory requirement to take, or a legal right to refuse to take, a test producing nontestimonial evidence, unlike a defendant in the DUI breath test situation. Despite the nonexistence of any right of the defendant to refuse the test, the SJC applied its reasoning from the *Opinion of the Justices* and held the refusal evidence inadmissible because, it reasoned, was a compelled testimonial statement whose admission violated the state constitution's privilege against self-incrimination.[348]

The SJC erred in applying the analysis used in the *Opinion* to decide *Lydon* because the factual situations in the two cases could not be more different. It is important to note that the defendant in *Lydon* had neither a constitutional nor statutory right to refuse a test that produces real evidence.[349] The *Lydon* fact pattern is thus distinguishable from the typical breath test scenario in which a defendant is presented with a statutory right to refuse.[350] The *Opinion*, on the other hand, was predicated upon the existence of a statute that offers two choices to a defendant, each of which is capable of producing adverse evidence, and compels the suspect to make a choice by placing him or her in a "Catch-22" situation.[351] Unlike the circumstances central to the *Opinion*, a person suspected of having chemical residue on his or her hands, as in *Lydon*, is not presented with a statutory choice of either submitting to a chemical test or having the fact that he or she refused the test used as adverse evidence in a criminal trial. The defendant is actually presented with no choice whatsoever, as the state can forcibly compel the production of nontestimonial evidence, if done so in a reasonable, inoffensive manner, and accompanied by a strong showing of necessity.[352] The overwhelming weight of state and federal persuasive authority allows evidence of a suspect's refusal to submit to a procedure

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347. *Id.* at 311 n.1, 587 N.E.2d at 38 n.1. The SJC stated: "The defendant had no right to refuse to take the test, which is nonintrusive and involves no danger, pain, or discomfort. A defendant who has been arrested, and who has received Miranda warnings, may be forced to submit to tests which produce real or physical evidence." *Id.* (citing Schmerber v. California, 384 U.S. 757, 762-63, 766-72 (1966); Commonwealth v. Paradise, 405 Mass. 141, 156, 539 N.E.2d 1006, 1016 (1989); Commonwealth v. Appleby, 358 Mass. 407, 413-14, 265 N.E.2d 485, 489-90 (1970)). The SJC further stated that because it is nontestimonial, "[t]he test for the presence of gunpowder residue could have been performed without the defendant's consent." *Id.* at 314 n.3, 597 N.E.2d at 40 n.3.

348. *Id.* at 313-15, 597 N.E.2d at 39-40.

349. *See supra* notes 346-47 and accompanying text.

350. MASS. GEN. L. ch. 90, § 24(1)(f) (1992).

351. Opinion of the Justices, 412 Mass. 1201, 1211, 591 N.E.2d 1073, 1078 (1992).

352. *See* Schmerber v. California, 384 U.S. 757 (1966); Rochin v. California, 343 U.S. 165 (1952); Commonwealth v. Angivoni, 383 Mass. 30, 417 N.E.2d 422 (1981).

that involves no testimonial evidence, constitutional right, or statutory right.[353] Furthermore, the police in a *Lydon* scenario have an interest in obtaining physical, not testimonial, evidence.[354] Although evidence of a defendant's refusal at trial can indicate a consciousness of guilt, no impermissible state compulsion was used to obtain this nontestimonial evidence in the *Lydon* scenario. Evidence of a refusal to submit to a test producing nontestimonial evidence, and which the accused has no right to refuse whatsoever, should therefore be admissible.

Because a state can legitimately force a defendant to submit to a chemical test in a *Lydon* situation,[355] it is faced with its own version of the "cruel trilemma" in the event a defendant refuses to submit to the test. The state's options in the face of a suspect's refusal, in addition to prosecutorial comment, include forced testing and imprisonment.[356] The state can use force to compel the defendant to submit to the test, since he or she has no recognized right to refuse. State legislatures have placed constitutional limitations on the police to prevent violent confrontations in this situation, and the state may be wary to carry out a procedure that could be found so "sufficiently shocking to the conscience of [a court] to require exclusion of the real evidence so obtained" in violation of the defendant's due process rights.[357] To avoid such a constitutional problem, the state would seek a court order to allow it legally to obtain the sample.[358] Faced with a court order, the defendant might now accede and surrender the sample. If, however, the defendant again refuses to surrender the sample, the state must decide whether to forcibly compel the defendant to submit to the test, or instead to comply with the defendant's wishes and cease its pursuit of the evidence. By choosing not to compel the defendant to produce the sample, the state is not only relinquishing its right to the real evidence, but in Massachusetts after the *Opinion* and *Lydon* decisions, the Commonwealth will also lose the evidence of the defendant's refusal to comply with the court order. Therefore, even though a court order can

353. *See supra* notes 196-201.

354. South Dakota v. Neville, 459 U.S. 553, 564 (1983); People v. Ellis, 421 P.2d 393, 397 (1966).

355. *Schmerber*, 384 U.S. at 764; Holt v. United States, 218 U.S. 245, 252-53 (1910); *Neville*, 459 U.S. at 559.

356. WAYNE R. LAFAVE & JEROLD H. ISRAEL, 1 CRIMINAL PROCEDURE § 7.2(c), at 556-58 (1984).

357. *See* Rochin v. California, 343 U.S. 165 (1952).

358. *See* State v. Cary, 230 A.2d 384 (N.J. 1967) (court order for voice identification test); United States v. Doe, 405 F.2d 436 (2d Cir. 1968) (court order to furnish handwriting exemplars); Lewis v. United States, 382 F.2d 817 (D.C. Cir.) (handwriting sample), *cert. denied*, 389 U.S. 962 (1967); State v. Thompson, 240 So. 2d 712 (La. 1970) (handwriting exemplar); United States v. Hammond, 419 F.2d 166 (4th Cir. 1969) (to appear in lineup wearing goatee), *cert. denied*, 397 U.S. 1068 (1970).

be enforced by contempt proceedings,[359] the Commonwealth will be handicapped in its prosecution of the defendant and will be unable to present either the real evidence or the fact of the defendant's refusal.

The viability of using contempt proceedings is also called into question by the *Opinion of the Justices*. In the 1987 decision of *Commonwealth v. Brown*,[360] the Massachusetts Appeals Court held that the fact of a defendant's refusal to comply with a court order seeking saliva, hair, and blood exemplars could be admitted into evidence against him.[361] The Appeals Court reasoned that evidence of the defendant's refusal was admissible because it did not require the production of testimonial evidence.[362] Since the exemplars sought by the court order "would not have revealed the defendant's 'knowledge or thoughts concerning some fact' he was afforded no protection against compulsion."[363] Therefore, the Commonwealth was allowed to use the defendant's statements of refusal as evidence of a consciousness of guilt.[364]

After *Lydon* and the *Opinion*, it seems that the *Brown* holding has been called into doubt, as even the fact of a refusal to comply with a court order may now be excluded by the Massachusetts privilege against self-incrimination because such evidence would be used to show the defendant's consciousness of guilt.[365] The SJC's recent decisions indicate that it is irrelevant whether a defendant has a constitutional or statutory right to refuse a test—if the state is involved in a direct manner, affirmatively seeking the production of real evidence, then any evidence of a consciousness of guilt will be found by the SJC to be compelled and testimonial, and thus, will be inadmissible in a criminal proceeding.

Through its decision in the *Opinion*, the SJC has created a dangerous precedent which, if carried to its logical conclusion, will result in the inadmissibility of any evidence that a suspect or arrestee refused to submit to any test designed to produce physical evidence. As shown by *Lydon*, in the circumstances of a refusal to act or produce evidence, the Commonwealth will have neither physical evidence nor the fact of the defendant's refusal to offer at trial. Although a court order may be obtained following a defendant's refusal in order to legally compel a

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359. LAFAVE & ISRAEL, *supra* note 356, § 7.2(c), at 557.

360. 24 Mass. App. Ct. 979, 513 N.E.2d 693, *review denied*, 401 Mass. 1102, 516 N.E.2d 1170 (1987). The *Brown* decision is not mentioned in the *Opinion of the Justices*.

361. *Id.* at 981, 513 N.E.2d at 695.

362. *Id.*, 513 N.E.2d at 696.

363. *Id.* (quoting Commonwealth v. Brennan, 386 Mass. 772, 777-78, 438 N.E.2d 60, 64 (1982)).

364. *Id.* at 981, 513 N.E.2d at 695.

365. Opinion of the Justices, 412 Mass. 1201, 1209, 591 N.E.2d 1073, 1077 (1992).

suspect to submit to the test,[366] it may not be obtained soon enough to extract the evidence. A court order is only useful in situations dealing with immutable physical characteristics (saliva, blood, or hair exemplars), that will still exist after the court order has been obtained. The danger that could result from the *Opinion* and *Lydon* decisions occurs in situations where the evidence sought is evanescent, and can dissipate, evaporate, or be destroyed by the defendant before a court order can be obtained and effected. In these situations, the Commonwealth will now need to extract the evanescent evidence as a search incidental to arrest.[367] Massachusetts has already upheld the constitutionality of a search and seizure of the arrestee's person for fingernail clippings,[368] blood by a benzidine test,[369] hair samples from the pubic area,[370] and the clothing that the defendant was wearing at the time of arrest.[371] In fact, Massachusetts law expressly provides that a search conducted incident to an arrest may be made only for the purpose of seizing fruits, instrumentalities, contraband, and other evidence of the crime for which arrest has been made, *in order to prevent its destruction or concealment.*[372]

There is no basis for extending the *Opinion*'s conclusion to a situation such as *Lydon* in which a person is not being statutorily compelled to make a choice. In so doing, however, the SJC answered a question the *Opinion* left open: where a state has created the right to refuse (as in the breath test scenario), may the state condition the exercise of this right

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366. LAFAVE & ISRAEL, *supra* note 356, § 7.2(c), at 557.

But what if the court order itself is refused? Will the prosecution be able to prove a criminal contempt charge by evidence that the defendant refused to comply, or will this evidence also be excluded by the *Opinion*? Some courts have held that such a refusal is admissible in this fact scenario as the act of refusal is used at trial to show that the test was not taken when requested and does not involve any testimonial aspects. *Cf.* Estelle v. Smith, 451 U.S. 454, 463 (1981); United States v. Dionisio, 410 U.S. 1, 7 (1973) (voice exemplars); Deering v. Brown, 839 F.2d 539, 542 (9th Cir. 1988); United States v. Hammond, 419 F.2d 166, 168 (4th Cir. 1969) (wearing a goatee in line-up). The coercive effect of a court order is no less than that of the breath test statute, as the accused is placed in a "Catch-22" situation. Here, however, the refusal evidence is not being used to show the defendant's consciousness of guilt. The *Opinion*'s rationale is therefore inapplicable to proving a contempt charge as it is to a refusal to allow a hand-swabbing test for chemical gun residue, but the court does not allow evidence of a refusal to the latter.

367. After a lawful arrest has been made, a police officer has the authority to search the person of the defendant regardless of the crime's nature or whether weapons or evidence will be found. *See* Gustafson v. Florida, 414 U.S. 260, 265 (1973); United States v. Robinson, 414 U.S. 218, 235 (1973); Commonwealth v. Frazier, 410 Mass. 235, 237, 571 N.E.2d 1356, 1357 (1991).

368. Commonwealth v. Appleby, 358 Mass. 407, 265 N.E.2d 485 (1970); *see also* Cupp v. Murphy, 412 U.S. 291 (1973).

369. *Appleby*, 358 Mass. at 410, 265 N.E.2d at 487.

370. Commonwealth v. Tarver, 369 Mass. 302, 305, 345 N.E.2d 671, 674 (1975).

371. *Appleby*, 358 Mass. at 413, 265 N.E.2d at 489.

372. MASS. GEN. L. ch. 276, § 1 (1992) (emphasis added).

by attaching the penalty of allowing refusal evidence in a criminal proceeding? Although the *Opinion* did not address this rationale, which the Supreme Court approved of in *Neville*, the SJC implicitly responded to this argument in *Lydon* by unequivocally holding that the evidence of a refusal is inadmissible, even if a defendant has no constitutional or statutory right to refuse the test. Thus, under *Lydon* the Commonwealth will be unable to condition the exercise of the right to refuse a breath test on its admission into evidence. The Justices of the Massachusetts Supreme Judicial Court seem to have concluded that the fact of a suspect's refusal to submit to *any* test offered by the state is inadmissible as violative of Massachusetts's constitutional proscription against self-incrimination. The SJC extended article twelve too far in *Lydon* and the *Opinion* its decision should be reconsidered.

VI. CONCLUSION

The Supreme Judicial Court has the constitutional power to base its *Opinion* on independent state grounds and to interpret the state constitution more broadly than the Federal Constitution. Although the SJC has consistently interpreted the Massachusetts Constitution as granting greater rights to its citizens than other state constitutions do, by extending Massachusetts's privilege against self-incrimination to situations involving no statutory "Catch-22" compulsion of nontestimonial evidence, the SJC has gone too far. The SJC should reconsider the application and practical effect of its *Opinion* on nontestimonial, nonstatutory compulsive situations and decline to extend its reasoning to future *Lydon*-type cases involving refusal evidence.

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* Dedicated to my parents, for teaching me how to achieve my dreams; to my sisters and brother, for their love and support; and to Jackie, Ted, Lisa, and Tricia, for making law school enjoyable—even "mono" year.