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Civil Disturbances: Battles for Justice in New York City

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CIVIL DISTURBANCES: BATTLES FOR JUSTICE IN NEW YORK CITY

REPOHISTORY

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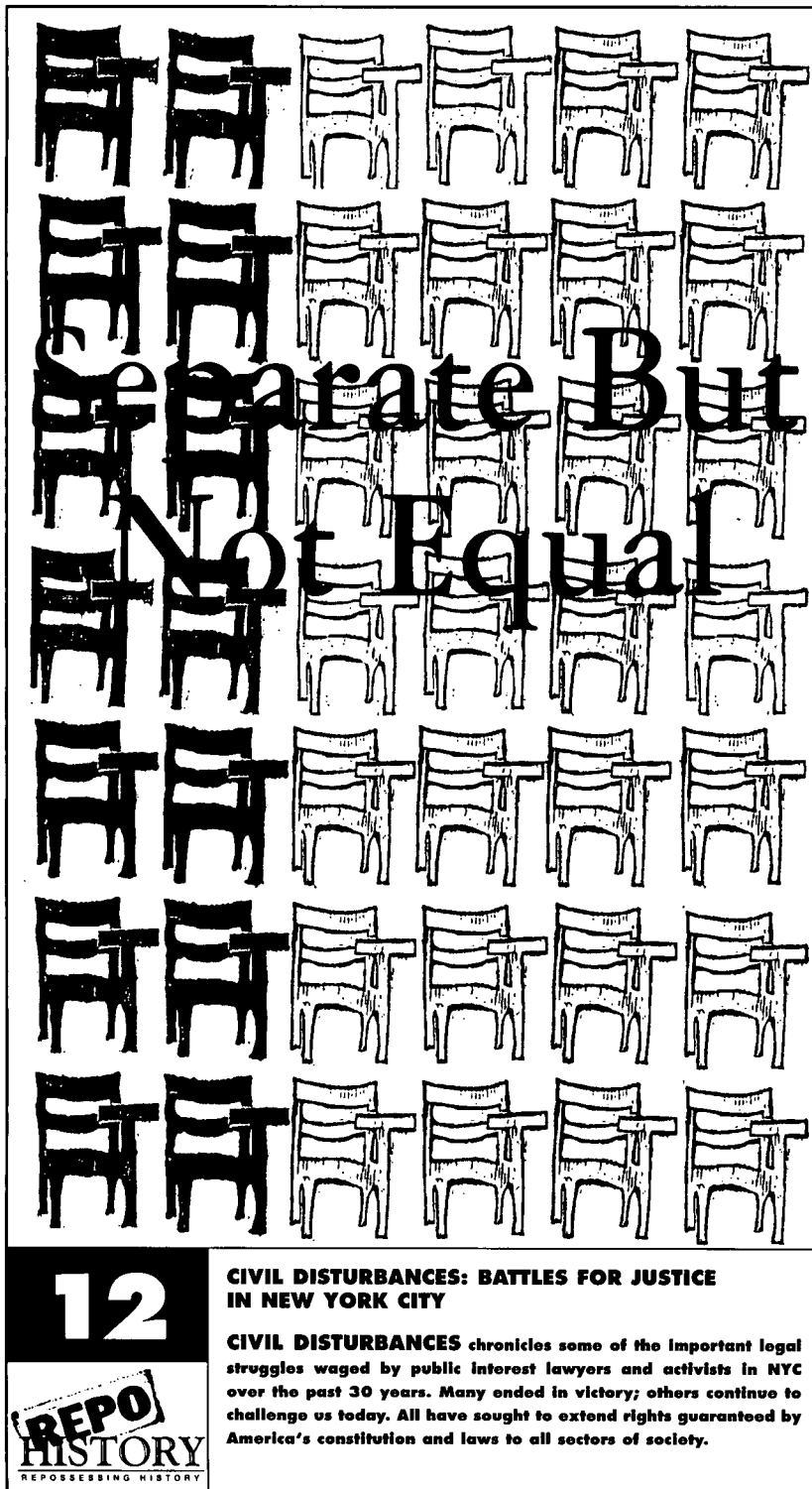


Fig. 1 Laurie Ourlicht, *Brown v. Board of Education* [front]



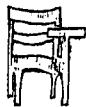
SEPARATE BUT NOT EQUAL

The Fourteenth Amendment to the Constitution guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws." But even after the abolition of slavery, government-sanctioned segregation was the law of the land.

The NAACP Legal Defense and Educational Fund (LDF) was founded in 1940 to fight racial injustice through the courts. From its headquarters at 20 West 40th Street in midtown Manhattan, LDF led a nationwide legal attack on Jim Crow laws.

Central to LDF's mission was its litigation campaign to desegregate public schools. This struggle culminated on May 17, 1954, when the U.S. Supreme Court, in *Brown v. Board of Education*, struck down the "separate but equal" doctrine and declared segregated public schools to be unconstitutional. This ruling led to the eventual banning of segregation in all areas of public life, and laid the foundation for the modern Civil Rights movement.

The success of LDF's litigation strategy also redefined the role of the courts in bringing about social justice in America, and has served as a model for generations of public interest lawyers.



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REPO
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REPOHISTORY

CIVIL DISTURBANCES: JUSTICE UNDER SIEGE

Budget cuts and political attacks threaten the practice of public interest law as never before. What will happen if the disadvantaged can no longer gain access to justice?

CIVIL DISTURBANCES is a **REPOhistory** project. Sponsored by **New York Lawyers for the Public Interest**. For a map and project guide, call (212) 727-2270, or visit our web site at <http://repo.history.xs2.net>.

Fig. 2 Laurie Ourlicht, *Brown v. Board of Education* [back]

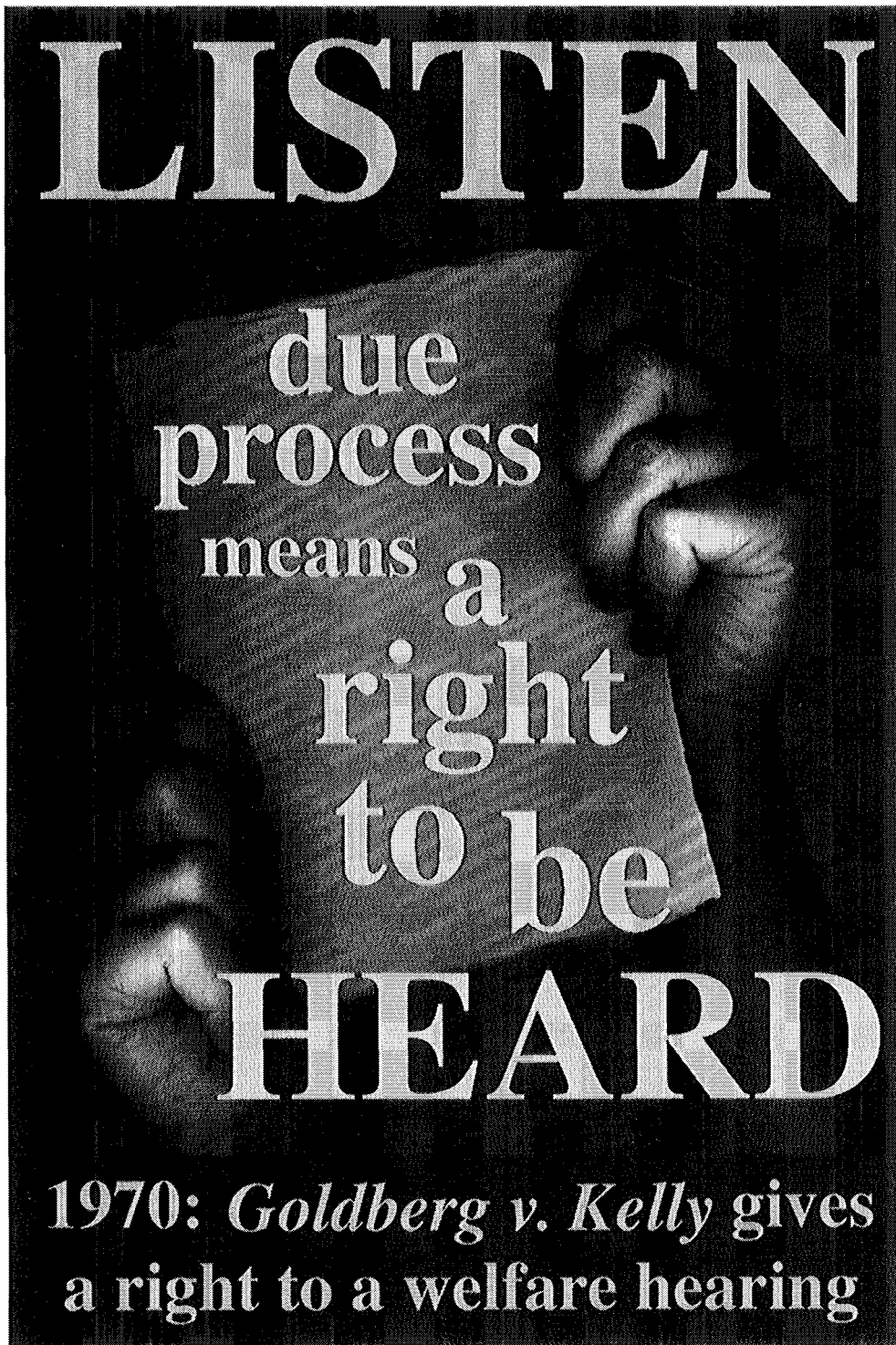


Fig. 3 Mona Jimenez, *Goldberg v. Kelly* [front]

The Supreme Court's 1970 ruling in *Goldberg v. Kelly* gives welfare recipients the right to defend themselves in a hearing, with their benefits continuing, if they believe they are being cut off in error. Before *Goldberg*, people in desperate need could be cut off on the word of a caseworker, without a chance to tell their side of the story to an impartial person.

The ruling recognizes that welfare is not charity - it is a legal entitlement for those who qualify. The right to a welfare hearing protects us from being denied assistance to which we are entitled, to meet urgent needs for food, clothing, shelter and medical care.

The Welfare Law Center estimates that in 1997, nearly 180,000 hearings were requested in New York City alone. Of the hearings held, the Social Services Department will lose approximately 75%, because they have incorrectly cut off, reduced, or denied benefits to people with legitimate needs.

Fig. 4. Mona Jimenez, *Goldberg v. Kelly* [back]

BRUNO V. CODD – 1978

LEGAL VICTORY FOR BATTERED WOMEN

In 1976, several legal aid and legal services programs filed a class action suit against the New York City Police Department and the New York Family Court for failing to protect married women who had been battered by their husbands.

Prior to this case, domestic violence was largely treated as a personal or private family matter.

The women described how the police failed to arrest husbands who assaulted them, even refusing to enforce orders of protection. Family Court personnel effectively denied battered wives access to the court through endless bureaucratic procedures.

Fig. 5 Stephanie Basch, *Bruno v. Codd* [front]

PERSONAL

In 1978, to settle the suit, the NYPD was forced to institute a new policy. Husbands who assaulted their wives or violated an order of protection would now be arrested.

Today, domestic violence and the need for higher levels of response from police and court personnel persist. However, *Bruno v. Codd* had a significant impact in changing police department attitudes and policies toward domestic violence across the country.

CONFIDENTIAL

Fig. 6 Stephanie Basch, *Bruno v. Codd* [back]

McCain v. Koch : A Right to Shelter...

1983 Legal Aid sues to force the City to provide decent shelter for homeless families. Yvonne McCain, the lead plaintiff, had been placed in The Martinique, an infamous welfare hotel near Herald Square. She and her three children lived in a rodent- and bug-infested room with a urine-soaked mattress and nowhere to cook.

1986-1987 A State appeals court rules unanimously that the City must provide shelter for all homeless families. The State's highest court later rules that such housing must meet "minimum standards of habitability."

1987-1998

The City vigorously resists efforts to enforce compliance. "We are doing everything we possibly can right now within reason," says one City lawyer. "This is the *real world*, not *fantasy land*."

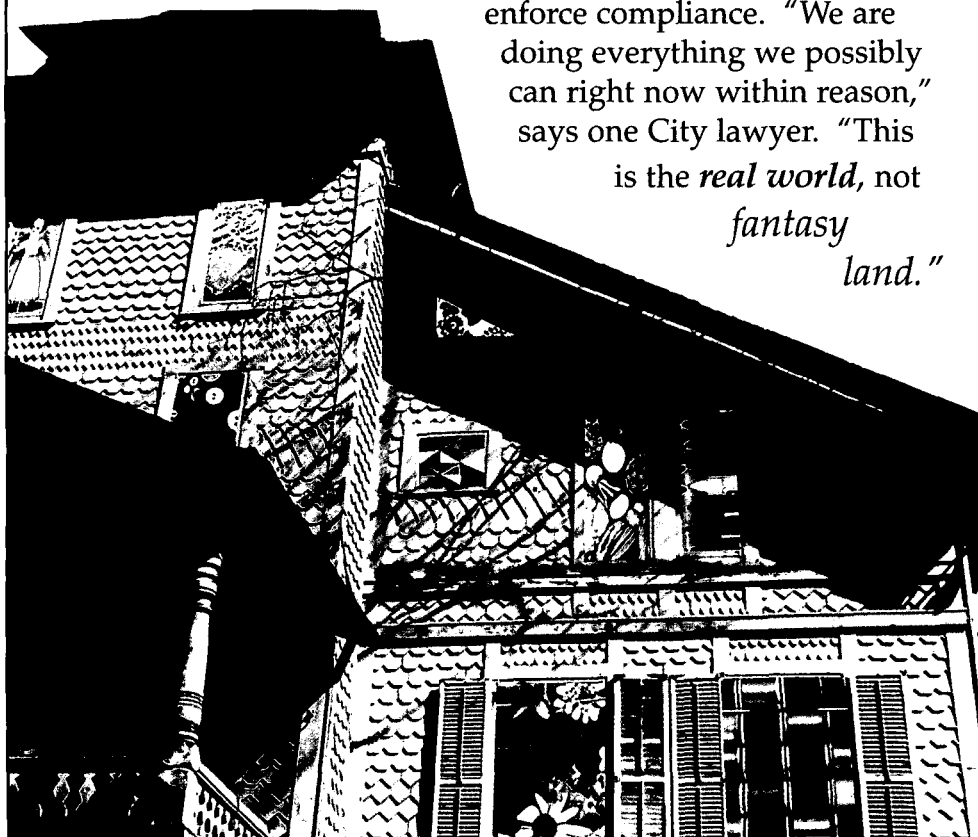


Fig. 7 Mark O'Brien and Kit Warren, *McCain v. Koch* [front]

...a House of Cards

The *McCain* lawsuit has focused public attention on the plight of homeless families in NYC and provided Yvonne McCain and thousands of others with

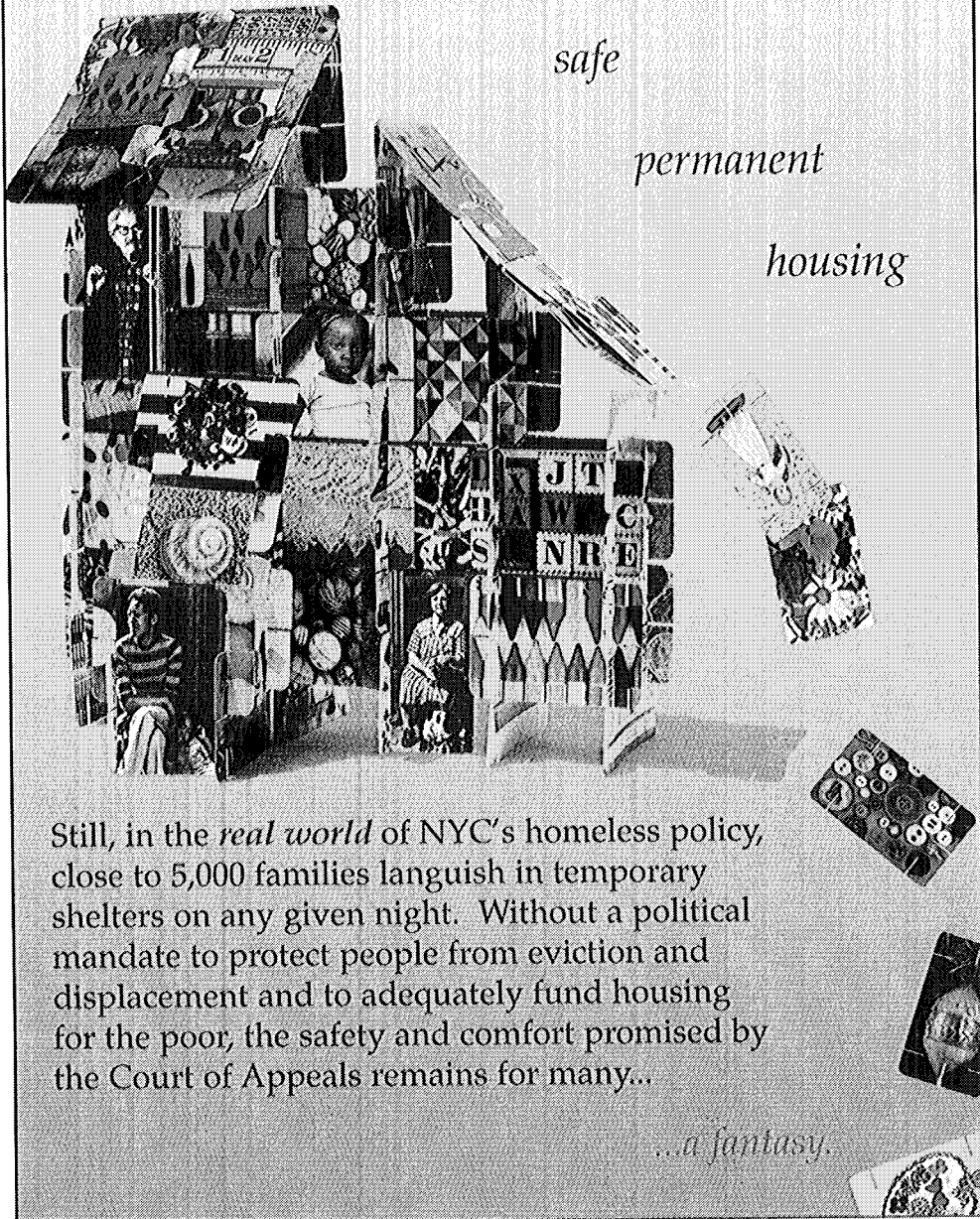


Fig. 8 Mark O'Brien and Kit Warren, *McCain v. Koch* [back]

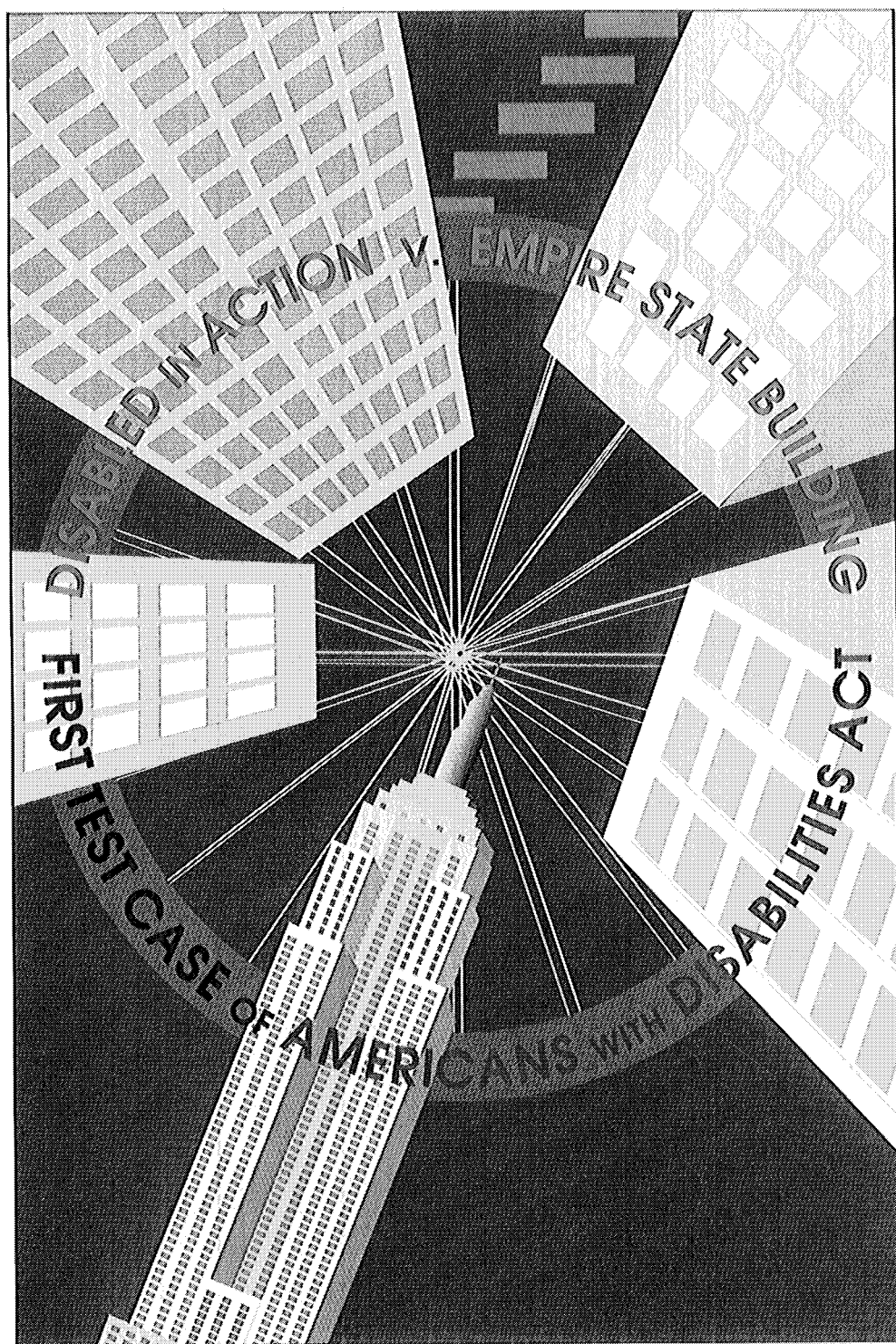


Fig. 9 Janet Koenig, *Disabled in Action v. Empire State Building* [front]

AMERICANS WITH DISABILITIES ACT FIRST TEST CASE

JULY 26, 1990 President Bush signs into law the **AMERICANS WITH DISABILITIES ACT** (the **ADA**), which guarantees persons with disabilities the equal right to enjoy the facilities, institutions, and services of public life.

But many organizations ignore the ADA. Notably, the **Empire State Building's** world famous observatory, adjacent bathrooms, snack bars and gift shops remain inaccessible to persons with disabilities.

DECEMBER 2, 1991 The **Disability Law Center** of New York Lawyers for the Public Interest sends a warning letter to the Empire State Building. No response.

JANUARY 27, 1992 (One day after the ADA's 18-months grace period ends) The Disability Law Center files the **first ADA complaint** against the Empire State Building; and disability rights groups **demonstrate** in the Empire State Building.

MARCH 3, 1994 The Empire State Building **agrees to comply** with the ADA. Today the Empire State Building's observatory and public facilities are wheelchair accessible.

THIS FIRST ADA TEST CASE IS PART OF AN ONGOING STRUGGLE TO PUT THE THEORY OF CIVIL RIGHTS FOR PERSONS WITH DISABILITIES INTO PRACTICE.

Fig. 10 Janet Koenig, *Disabled in Action v. Empire State Building* [back]

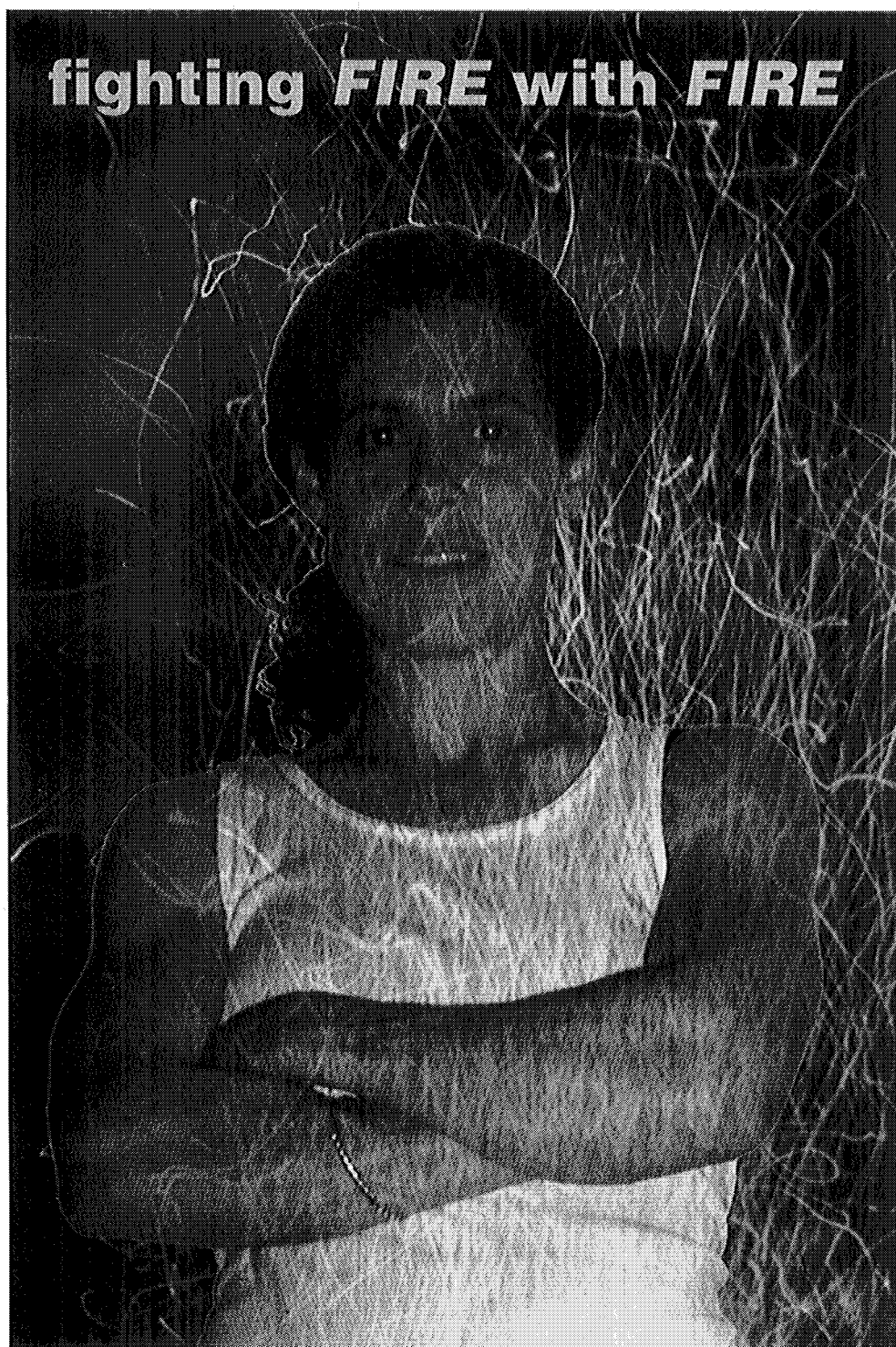
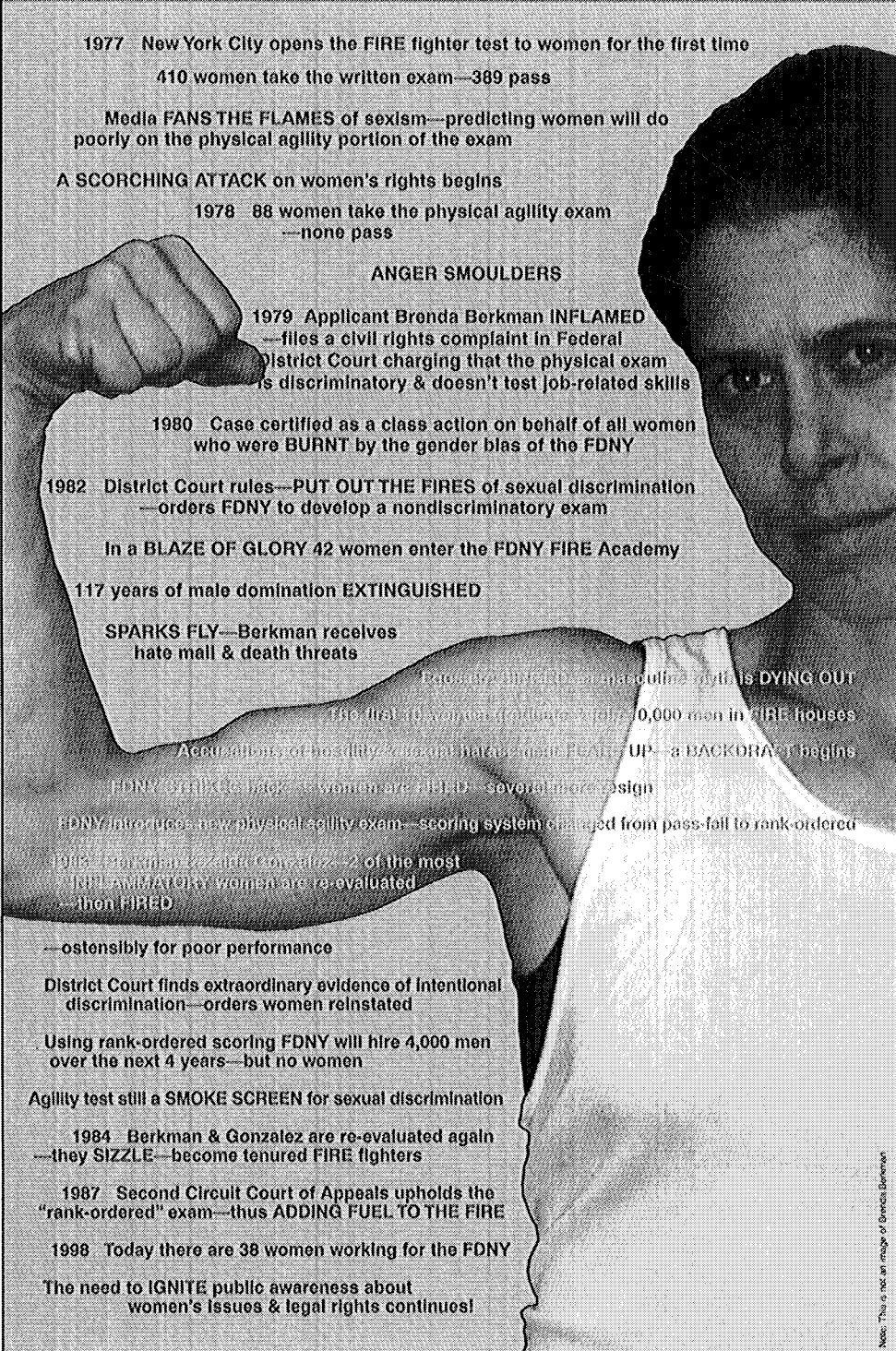


Fig. 11 Susan Schuppli, *Berkman v. FDNY* [front]



1977 New York City opens the FIRE fighter test to women for the first time
410 women take the written exam—389 pass

Media FANS THE FLAMES of sexism—predicting women will do poorly on the physical agility portion of the exam

A SCORCHING ATTACK on women's rights begins

1978 88 women take the physical agility exam
—none pass

ANGER SMOULDERS

1979 Applicant Brenda Berkman INFLAMED
—files a civil rights complaint in Federal District Court charging that the physical exam is discriminatory & doesn't test job-related skills

1980 Case certified as a class action on behalf of all women who were BURNT by the gender bias of the FDNY

1982 District Court rules—PUT OUT THE FIRES of sexual discrimination
—orders FDNY to develop a nondiscriminatory exam

In a BLAZE OF GLORY 42 women enter the FDNY FIRE Academy

117 years of male domination EXTINGUISHED

SPARKS FLY—Berkman receives hate mail & death threats

1983 FDNY's traditional masculine myth is DYING OUT
the first all-women firehouse hires 10,000 men in FIRE houses

Accumulation of hostility & hatred finally REARS UP—a BACKDRIFT begins

FDNY's 100th birthday: 1 woman are FIRED—several more resign

FDNY introduces new physical agility exam—scoring system changed from pass-fail to rank-ordered

1985 Berkman & Gonzalez—2 of the most INFLAMMATORY women are re-evaluated
—then FIRED

—ostensibly for poor performance

District Court finds extraordinary evidence of intentional discrimination—orders women reinstated

Using rank-ordered scoring FDNY will hire 4,000 men over the next 4 years—but no women

Agility test still a SMOKE SCREEN for sexual discrimination

1984 Berkman & Gonzalez are re-evaluated again
—they SIZZLE—become tenured FIRE fighters

1987 Second Circuit Court of Appeals upholds the “rank-ordered” exam—thus ADDING FUEL TO THE FIRE

1998 Today there are 38 women working for the FDNY

The need to IGNITE public awareness about women's issues & legal rights continues!

Note: This is not an image of Brenda Berkman

Fig. 12 Susan Schuppli, *Berkman v. FDNY* [back]

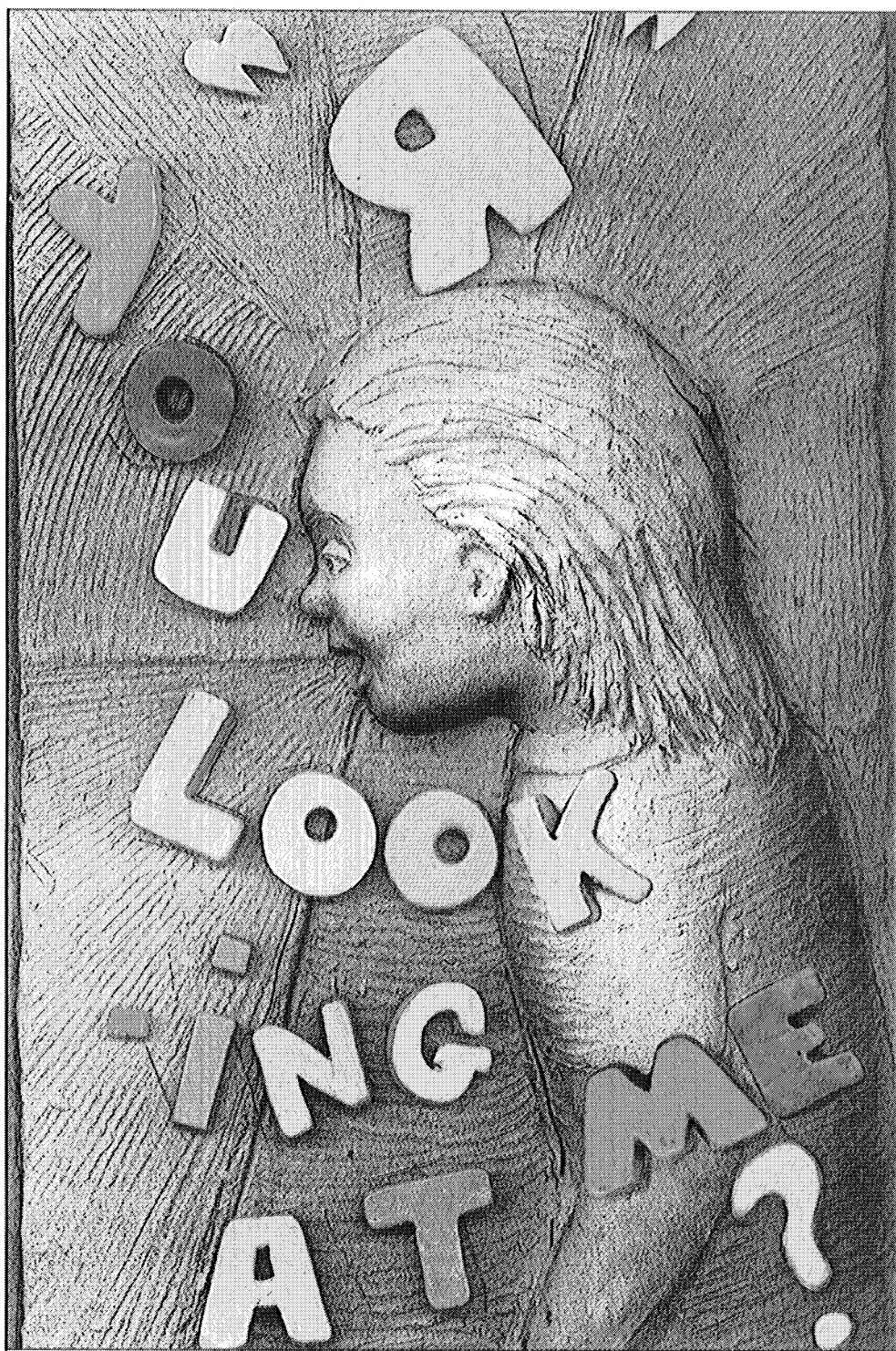


Fig. 13 Greg Sholette, *Marisol v. Giuliani* [front]

"Nothing is now better understood than the rescue of the children is the key to the problem of city poverty...the young are naturally neither vicious nor hardened, simply weak and undeveloped, except by the bad influences of the street...."— Jacob A Riis, 1890

In 1994 NYC's Child Welfare Administration returned 5-year-old "Marisol" to her mother, despite ample evidence of abuse. She was later discovered with teeth broken and stomach distended from malnutrition. Public interest lawyers at Children's Rights Inc. responded with *Marisol v. Giuliani*, a class action alleging the city had "violated Marisol's constitutional rights by failing to protect her from harm." They aim to make the City accountable not only for "Marisol," but for the 43,000 other children in foster care in NYC, as well as "countless thousands more who [are] the subjects of abuse and neglect allegations." However, public outcry over child abuse occurs even as deep cuts in social spending and shrinking federal resources impede protection of those children most at risk.

Fig. 14 Greg Sholette, *Marisol v. Giuliani* [back]

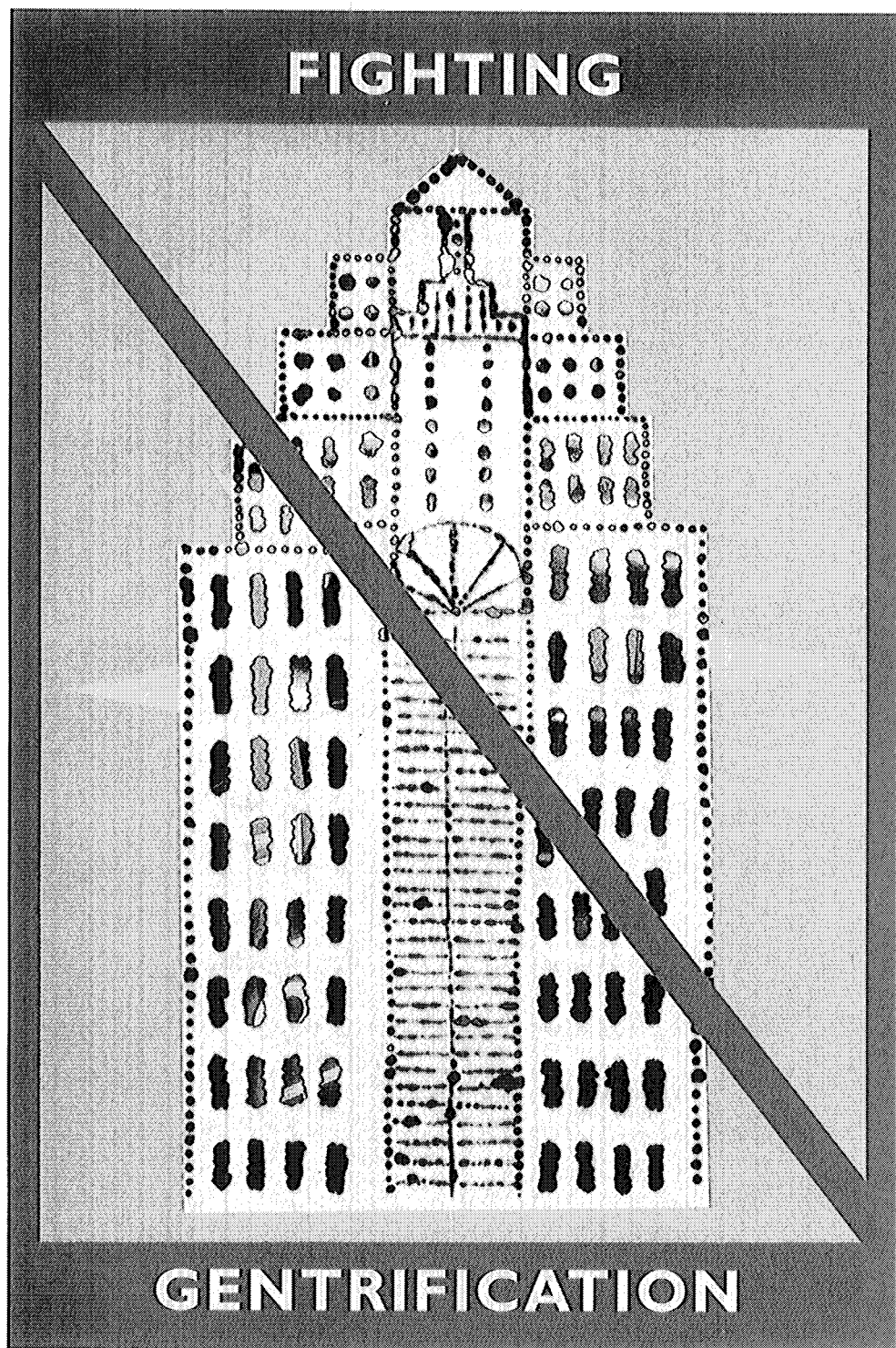


Fig. 15 Ming Mur-Ray, *Chinese Staff & Workers v. City of New York* [front]

In 1983, a coalition of Chinatown residents and community organizations went to court to stop the construction of Henry Street Tower, a 21-story high-rise luxury condominium to be built at the corner of Market and Henry Streets (*Chinese Staff and Workers Association v. City of New York*).

The plaintiffs feared that the project would accelerate the gentrification of Chinatown. They argued that the environmental impact study of this project, required under law, had failed to consider the likelihood that the introduction of luxury housing would lead to the displacement of the neighborhood's long-term, mostly low-income, Chinese residents.

On November 18, 1986, the New York State Court of Appeals blocked the construction, ruling that, "the potential acceleration of the displacement of local residents and businesses . . . (must) be considered in an environmental analysis." This ruling has been used by people throughout the state to fight real estate development that threatens to destroy their communities.

Fig. 16 Ming Mur-Ray, *Chinese Staff & Workers v. City of New York* [back]

INTRODUCTION: CIVIL DISTURBANCES — BATTLES FOR JUSTICE IN NEW YORK CITY

*Matthew Diller**

The *Fordham Urban Law Journal* has performed a true service in making selections from *Civil Disturbances: Battles for Justice in New York City* accessible to a wide audience. *Civil Disturbances* is a collaborative project between artists and lawyers that commemorates both the achievements and unfinished work in the battle for social justice in the City of New York. The project consists of twenty signs containing images and text that have been posted at pertinent sites around the City of New York.¹ The signs commemorate landmark public interest law suits and a number of legal struggles still under way. On one level, the signs are cleverly designed vehicles for conveying information. On a deeper level, they present powerful images that provoke strong and disturbing visceral reactions. Ultimately, they are works of beauty. Adding to the original project, the *Urban Law Journal* has also included a number of essays discussing a number of the cases represented by the signs from the perspective of both artists and lawyers. The editors also have given us excerpts from a forum held in connection with the project at New York Law School on November 17, 1998.

Civil Disturbances is the work of REPOhistory, a collective of artists that concentrates on site-specific public art works designed to "repossess" history by evoking remembrance of events and people that are often omitted or excluded from mainstream historical accounts.² The group's declared purpose is to "create works that intervene in an anonymous city-scape by drawing attention to the

* Associate Professor of Law, Fordham University School of Law.

1. A complete set of signs can be viewed in its entirety in and around Foley Square, near the largest courthouses in Manhattan. Members of the public called for jury duty in Supreme Court, New York County, receive brochures explaining the project, so that they can view the signs during lunch breaks. The signs will be posted from August 4, 1998 through July 23, 1999.

2. Artists participating in *Civil Disturbances* include Mark O'Brien (Project Director), Stephanie Basch, Neil Bogan, Jim Costanzo, Marina Gutierrez, Mona Jimenez, Lisa Maya Knauer, Janet Koenig, Irene Ledwith, Cynthia Liesenfeld, Bill Menking, Ming Mur-Ray, Laurie Ourlicht, Jayne Pagnucco, Jenny Polak, Susan Schuppli, Cynthia Seymour, Greg Sholette, George Spencer, David Thorne and Kit Warren.

forgotten or suppressed narratives while revealing the spatial relationships inherent in power, usage and memory.”³ The concepts of community inclusion and collaboration have been central to the vision of REPOhistory.⁴

REPOhistory got its start in 1992 with the *Lower Manhattan Sign Project*, which presented an alternative account of the history of New York’s financial district. Subsequent projects have included *Queer Spaces*, a project honoring the 25th anniversary of the Stonewall riots in New York City, *Entering Buttermilk Bottom*, an examination of an African American community in Atlanta destroyed by urban renewal, and *Out From Under King George Hotel*, a historical study of a specific site in downtown Houston that sheds light on the process of growth and displacement in an urban environment.

Civil Disturbances represents REPOhistory’s attempt to come to terms with the impact of law and legal institutions on urban society. The project was proposed by Joan Vermeulen, executive director of New York Lawyers for the Public Interest (“NYLPI”), one of the premier public interest law offices in New York City. In supporting *Civil Disturbances*, NYLPI sought to raise awareness about the impact of public interest law on our society. Mark O’Brien directed the project. A long time member of REPOhistory and the coordinator of pro bono work for a major law firm. Mr. O’Brien has a thorough understanding of the perspectives of both artists and lawyers. His leadership was essential in making the collaboration between the two disciplines productive and creative.

To lawyers accustomed to dealing with text, rather than images, the idea of artistic representations of lawsuits and legal issues may appear to be a mere curiosity. However, visual images have long played an important role in legal proceedings. The physical arrangement of the traditional courtroom, the judge’s robes, the scales of justice, and the image of justice as a blindfolded figure all convey and reinforce attitudes toward the justice system. These traditional images have focused on the authority and neutrality of the judiciary as a means of fostering respect for the law. The idea of strength has been central to this message, thereby aligning the legal system with the centers of power in society.

3. See REPOhistory, *Civil Disturbances* (visited June 10, 1999) <<http://repo.history.xs2.net>> (providing a fuller description of REPOhistory and additional selections of its work).

4. See *id.*

Moreover, apart from these institutional images, imagery plays a central role in the lawyer's craft. Every skilled courtroom lawyer uses as many means of communication as possible to convey his or her message to a jury. In addition to the increasing use of demonstrative evidence, visual aspects of presentation such as clothing, facial expressions and body language are frequently exploited in order to evoke emotional responses from the judge or jury.⁵ Opening and closing arguments are often used to "paint" images to bring the events in question to life for the jury.⁶ The courtroom has always had an element of theater, and visual images have always been of central importance on the stage.

Seen in this light, artists and lawyers are a natural pairing. The signs created by REPOhistory convey powerful emotional messages about the lawsuits that they represent, in much the same way that lawyers draw on emotions in presenting their cases. The images in *Civil Disturbances*, however, are dramatically different from the traditional iconography of law — while the symbols of law strive to be dispassionate and detached, the images of *Civil Disturbances* are vivid and intense, calling for engagement with, rather than distance from the issues.

In proposing the project, NYLPI's initial goal was celebratory — to commemorate the successes that have been achieved in the struggle for social justice through law and efforts that are still continuing. The celebration, however, was not simply an end in itself. The project was intended to draw attention to the accomplishments of public interest law at a time when funding for legal services is under attack.⁷ After a process of collaboration between artists,

5. Texts on trial technique offer advice on how lawyers should position themselves and how to use body language and gestures for effect. A leading text advises that lawyers addressing the jury should:

Keep your hands out of your pants or coat pockets, avoid playing with coins, pencils or papers and restrict constant or aimless wandering about the courtroom. Use upper body gestures, those involving your hands, arms, shoulders, head and face, since these usually strengthen your speech. Remember that your physical and verbal mannerisms should always reinforce your speech.

THOMAS MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 49 (3d ed. 1992).

6. Mauet counsels that effective opening statements are based on good story telling. *See id.* at 43. Where appropriate, he advises that the story should be "emotional and dramatic" in order to create empathy for the litigant. *See id.*

7. As posted, each sign contains the following text at the bottom:

CIVIL DISTURBANCES: JUSTICE UNDER SEIGE

Budget cuts and political attacks threaten the practice of public interest law as never before. What will happen if the disadvantaged can no longer gain access to justice?

lawyers and some of the litigants involved in the cases, the final product is more ambivalent and nuanced than might be expected in a celebration. Many of the signs focus attention on the underlying injustices that the lawsuits sought or seek to address. Many of them deal with issues that remain unresolved. Nonetheless, the signs serve as a reminder that law can be an agent for freedom and equality that can help us to reach for the highest aspirations that we hold for society. The signs point out the rich and long history in which lawyers, courageous individuals and communities have worked to use law as an instrument for achieving social justice. The medium of the project — public signs posted at critical locations — reinforces the point that the struggle for social justice through law has had an immediate impact on the lives of New Yorkers and the City's communities. In this sense, *Civil Disturbances* grounds the fight for social justice in the physical terrain of the City. The signs remind us that lawsuits brought on behalf of disempowered individuals and communities have shaped the fabric of life in New York City as much as the streets on which New Yorkers walk and the buildings in which we live and work.

Before turning to the specific signs included in this selection, it is important to note that *Civil Disturbances* came perilously close to becoming a battle for social justice in its own right. Hours before the signs were due to be posted, the City of New York announced that it was denying the necessary permits on the basis of a policy prohibiting the posting of any signs on New York street lamps other than those relating to traffic.⁸ To New Yorkers accustomed to seeing all kinds of postings on lampposts, including holiday decorations, parade banners and community notices, the existence of such a policy must surely come as a surprise. After threatened litigation, the City relented and allowed the project to go forward three months later. The dispute over *Civil Disturbances* is a reminder of the fact that free expression in New York's public places continues to be a contested issue.⁹

8. See David Gonzalez, *Lampposts as a Forum For Opinion*, N.Y. TIMES, May 20, 1998; Stuart Elliot, *Some Legal History Still Being Overturned*, N.Y. TIMES, Nov. 15, 1998.

9. See Benjamin Weiser, *City Pays \$59,000 to Settle Times Sq. Preaching Group Suit*, N.Y. TIMES, June 16, 1999, at B6; Bruce Lambert, *The Giuliani Way: Sue and be Sued*, N.Y. TIMES, May 23, 1999; Benjamin Weiser, *Ban on Big Gatherings at City Hall Is Ruled Unconstitutional*, N.Y. TIMES, July 21, 1998; Susan Sachs, *Giuliani's Goal of Civilized City Runs into First Amendment*, N.Y. TIMES, July 8, 1998.

The sign for *McCain v. Koch*,¹⁰ the lawsuit which established the right of homeless families to decent emergency shelter, is posted outside of the old Martinique Hotel, where hundreds of homeless children were sheltered in filthy inhuman conditions during the 1980s. The design, by artists Mark O'Brien and Kit Warren, evokes a child's fantasy of home, while at the same time revealing the illusory nature of promises of safe housing. It draws on traditional images of a home as a source of warmth and spiritual repose, completely at odds with the reality of the nightmarish conditions of the Martinique Hotel. Also included remarks by Steven Banks, the lead attorney for the plaintiffs in *McCain*.¹¹

*Goldberg v. Kelly*¹² was initiated by John Kelly, a resident of the Lower East Side, with the assistance of MFY Legal Services, the first store front legal services office in the nation. The Supreme Court's decision in *Goldberg* established that welfare recipients are entitled to a hearing prior to termination of benefits. The pair of hands holding up a piece of paper suggests both an emphatic assertion of rights and a desperate plea. The growing size of the text suggests that due process demands not simply an opportunity to speak, but a right to be listened to. The editors of the *Urban Law Journal* have also given us the remarks of Henry Freedman,¹³ one of the attorneys for the plaintiffs in *Goldberg* and Mona Jimenez¹⁴ the artist who designed the sign relating to the case. The sign is posted outside the welfare office responsible for assigning recipients to workfare positions.

*Disabled in Action v. Empire State Building*¹⁵ was the first public access case brought under the Americans with Disabilities Act ("ADA"). It challenged the inaccessibility of the building's observation deck to people with disabilities. Artist Janet Koenig's circular design suggests the mobility of a wheelchair — a reference that is explicit on the back of the sign which depicts the building itself on wheels. The images remind us that community activism and law can work together to move the most rooted of institutions and structures. The sign commemorating the case is posted outside of

10. 511 N.E.2d 62 (N.Y. 1987).

11. See *infra*, REPOhistory Roundtable Discussion: *McCain v. Koch* (remarks of Steven Banks).

12. 397 U.S. 254 (1970).

13. See *infra*, REPOhistory Roundtable Discussion: *Goldberg v. Kelly* (remarks of Henry A. Freedman).

14. See *infra*, REPOhistory Roundtable Discussion: *Goldberg v. Kelly* (remarks of Mona Jimenez).

15. United States Dep't of Justice Complaint No. 202-51-1 (Jan. 27, 1992).

the building. In addition, Cary LaCheen, one the lawyers for the plaintiffs, has given us a fascinating account of how the case was brought and the impact that it has had.¹⁶

The sign commemorating *Berkman v. City of New York*¹⁷ emphasizes the strength and power of Brenda Berkman, the plaintiff who challenged the New York City Fire Department's refusal to hire women firefighters. The image of a woman's flexed biceps simultaneously points out Ms. Berkman's qualifications as a firefighter and her power as a fighter for justice. It suggests that the Fire Department discovered the hard way that Ms. Berkman has considerable incendiary power of her own — she ignited a fire that the Department simply could not extinguish. The sign is posted on Livingston Street in Brooklyn, at the site of the Fire Department's former headquarters. Included in this collection are remarks by Brenda Berkman,¹⁸ her attorney Laura Sager¹⁹ and artist Susan Schuppli.²⁰

*Marisol v. Giuliani*²¹ is a major class action challenging the City of New York's mal-administration of its child welfare system. The case was settled on the eve of trial in 1998. The childlike lettering of the sign contrasts the image of innocence associated with childhood with the grim realities of the City's foster care system. The sign hangs on Chambers Street, just north of City Hall. In accompanying essays, artist Greg Sholette discusses his goals and approach to the sign²² and Marcia Lowery, attorney for the plaintiff class, has provided discussion of the litigation.²³

Also included in this selection is artist Ming Mur-Ray's sign for *Chinese Staff & Workers Ass'n v. City of New York*.²⁴ In *Chinese Staff & Workers*, New York's highest court required that zoning decisions take into consideration the impact of proposed develop-

16. See *infra*, Cary LaCheen, *REPOhistory: "Equal Access is Our Right": Increasing Accessibility at the Empire State Building*.

17. 536 F. Supp. 177 (E.D.N.Y. 1982), *aff'd* 705 F.2d 584 (2d Cir. 1983), *later proceeding* 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd in part and rev'd in part* 12 F.2d 52 (2d Cir. 1987), *cert. denied* 484 U.S. 848 (1987).

18. See *infra*, *REPOhistory Roundtable Discussion: Berkman v. City of New York* (remarks of Brenda Berkman).

19. See *infra*, *REPOhistory Roundtable Discussion: Berkman v. City of New York* (remarks of Laura Sager).

20. See *infra*, *REPOhistory Roundtable Discussion: Berkman v. City of New York* (remarks of Susan Schuppli).

21. 929 F. Supp. 662 (S.D.N.Y. 1996), *aff'd* 126 F.3d 372 (2d Cir. 1997).

22. See *infra*, Greg Sholette, *REPOhistory: Я We Not Human?*.

23. See *infra*, Marcia Robinson Lowry, *REPOhistory: Why Settle When You Can Win: Institutional Reform and Marisol v. Giuliani*.

24. 502 N.E.2d 176 (N.Y. 1986).

ments on community residents and businesses, including the displacement of low income residents that can result from the process of "gentrification." The decision recognizes that the character of the neighborhoods is an important component of the urban environment. As is often the case, the judicial decision is the tip of an iceberg. The lawsuit grew out of the efforts of activists and community groups to halt the creation of a high rise luxury apartment building in the heart of Chinatown. The sign is posted at the corner of Henry and Mott streets, in the heart of New York's Chinatown.

*Bruno v. Codd*²⁵ challenged the failure of the New York City Police Department and the Family Court to protect wives from violence perpetrated by their husbands. The sign, designed by Stephanie Basch, points out how treatment of spousal abuse as a private matter was used to deny women police protection from violence and access to the justice system. It is posted outside of police headquarters.

Finally, the editors have included the sign for *Brown v. Board of Education*,²⁶ a decision that needs no introduction. Although the *Brown* decision is more likely to evoke images of Topeka than of Manhattan, the sign honors the NAACP Legal Defense Fund, a New York institution for more than fifty years. It is posted at 20 West 40th Street, the site from which Thurgood Marshall and his colleagues waged their battle against segregation during the years when *Brown* was litigated. As an eight year old child, artist Laurie Ourlicht was a plaintiff in the first suit brought to desegregate Detroit's public schools. That case was filed in 1962.

In sum, the artists of REPOhistory, the lawyers of NYLPI and the editors of the *Urban Law Journal* have joined together to present a truly unique experience for the readers of this journal. Their work, however, is underpinned by the labors of the lawyers, judges, community activists and individual litigants that made possible the accomplishments commemorated in this project.

25. 47 NY.2d 582 (1979).

26. 347 U.S. 483 (1954).

“EQUAL ACCESS IS OUR RIGHT”: INCREASING ACCESSIBILITY AT THE EMPIRE STATE BUILDING

*Cary LaCheen**

The Empire State Building is a symbol, indeed it is *the* symbol, of New York City. Over 3.8 million people visit its observatories each year.¹ To date there have been over 120 million visitors.² Up until 1994, however, not one of these observatory visitors reached the observatory in a wheelchair. To people with mobility impairments, the Empire State Building was long a symbol of a different kind — a symbol of the exclusion of people with disabilities from mainstream public life.

Much of the discrimination faced by people with disabilities has been “the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect.”³ The longstanding failure to use accessible building design and to make modifications in existing buildings so that services are accessible to people with disabilities, is one of the more tangible results of this neglect. A Lou Harris poll published in 1986 found that the large majority of people with disabilities never went to restaurants, grocery stores, movies, theaters, sporting events, churches, or synagogues.⁴ When businesses, public transportation, and sidewalks are not accessible, people with many disabilities stay at home, perpetuating their invisibility. As a result, people with disabilities have routinely been excluded from the mainstream of public life and relegated to second class status.

In 1973, Congress enacted what would later become Section 504 of the Rehabilitation Act,⁵ which prohibits discrimination against

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1. Information Desk, Empire State Building (visited Mar. 27, 1999) <http://db.esbnyc.com/body_answers.cfm>.

2. *See id.*

3. *See, e.g.,* Alexander v. Choate, 469 U.S. 287, 295 (1985). *See also* Section 504 of the Rehabilitation Act (legislative history).

4. Louis Harris and Associates, The ICD Survey of Disabled Americans: Bringing People with Disabilities into the Mainstream 32-41, *cited in* H.R. REP. NO. 101-485 (1990).

5. 29 U.S.C. § 794 (1994).

people with disabilities in federal agencies and any entity that receives federal financial assistance. Though most state and local governments receive federal assistance for transportation, education, and other services, states and localities largely ignored Section 504, with little or no repercussions. Moreover, Section 504 did not reach one of the most pervasive problems facing people with disabilities, namely, the lack of accessibility of privately owned places of public accommodation. Restaurants, movie theaters, doctors' offices, supermarkets, concert halls and other businesses open to the public were free to do as they chose, unless they received federal funds.

People with disabilities wanted a comprehensive federal law that reached not only the conduct of federal agencies and grantees, but a wide range of services, activities and entities. After a concerted effort which brought together a coalition of disability, civil rights and other groups, the Americans with Disabilities Act ("ADA") was passed and signed into law by President George Bush on July 26, 1990.⁶ The ADA is comprehensive in scope, addressing discrimination in employment, all State and local government programs and services, telecommunications, transportation, and the activities of privately owned places of public accommodation.⁷ Its purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities."⁸

The preamble of the ADA reflects a clear understanding by Congress that discrimination against people with disabilities takes many forms, including "the discriminatory effects of architectural, transportation, and communication barriers."⁹ The ADA addresses these barriers in a number of ways. Title III defines "public accommodations" that are subject to the law broadly to include twelve categories of businesses, including retail establishments, schools, hotels and other places of lodging, social service establishments such as doctors' offices, places of recreation, places of display such as museums, and places of public gathering.¹⁰ This definition is far broader than that used in Title II of the Civil Rights Act of 1964,¹¹ the law on which Title III was modeled in

6. Pub. L. No. 101-336, 104 Stat. 327 (1990).

7. 42 U.S.C. § 12101 et seq. (1994).

8. 42 U.S.C. § 12101(b)(1) (1994).

9. 42 U.S.C. § 12101(a)(5) (1994).

10. 42 U.S.C. §§ 12181(7)(A)-(L) (1994).

11. 42 U.S.C. § 2000a(a) (1994).

part, which prohibits discrimination on the basis of race by restaurants, hotels and places of entertainment. In explaining its reasoning for adopting a broader definition, the legislative history of the ADA states "[i]t is critical to define places of public accommodation to include all places open to the public . . . because discrimination against people with disabilities is not limited to specific categories of public accommodation."¹²

Title III contains different standards for new construction¹³ and existing facilities.¹⁴ While new construction must be designed and built so that it is "readily accessible to and usable by individuals with disabilities,"¹⁵ existing facilities must remove architectural and structural communication barriers in existing facilities only where such removal is "readily achievable,"¹⁶ defined as "accomplishable and able to be carried out without much difficulty or expense."¹⁷ In determining whether a modification is readily achievable, the factors to be considered include the nature and the cost of the modification; the overall financial resources of the particular facility involved; the number of employees at the facility; and the impact of the barrier removal on the operation of the facility.¹⁸ In addition, the overall resources of the public accommodation, the number of its employees and the number of its facilities are to be considered where a public accommodation operates at multiple sites.¹⁹ Finally, the nature of the business, and its workforce, and the relationship of the particular facility to the larger public accommodation are to be considered as well.²⁰ What is "readily achievable" for a small "mom and pop" grocery store will be different than what is required of a large supermarket that is part of a nationwide chain. Nevertheless, the "readily achievable" analysis is not the end of the inquiry. Even when architectural modifications are not "readily achievable," a place of public accommodation must make its services available to people with disabilities through alternative, readily achievable methods.²¹ A mom and pop grocery store may not have to ramp its entrance or lower

12. See H. REP. NO. 101-485(I), at 36; S. REP. NO. 101-116, at 11.

13. 42 U.S.C. § 12183 (1994).

14. 42 U.S.C. § 12182(2)(b)(2)(a)(iv) (1994).

15. 42 U.S.C. § 12183(a)(1) (1994).

16. 42 U.S.C. § 12182(b)(2)(iv) (1994).

17. 42 U.S.C. § 12181(9) (1994).

18. 42 U.S.C. §§ 12181(9)(A),(B).

19. 42 U.S.C. § 12181(9)(C).

20. 42 U.S.C. § 12181(9)(D).

21. 42 U.S.C. § 12182(2)(A)(v) (1994).

shelves, but it will probably have to provide sidewalk service or home delivery to someone who cannot get in the door or lift merchandise from high shelves.²² The ADA “strike[s] a balance between guaranteeing access to individuals with disabilities and recognizing legitimate cost concerns of businesses and other private entities.”²³ The regulations even contain an order of priorities for barrier removal,²⁴ reflecting the understanding that places of public accommodation could not do everything at once. As a result, Congress gave public accommodations eighteen months after the ADA passed before requiring compliance.²⁵ Instead of using this time productively to evaluate the accessibility of its public accommodations, and make needed changes, many public accommodations did nothing.

The owners and operators of the Empire State Building were among this group. Members of Disabled in Action of Metropolitan New York (“DIA”), a local disability rights organization, informed New York Lawyers for the Public Interest, Inc. (“NYLPI”) that the Empire State Building observatory was not accessible to wheelchair users and no changes appeared to be underway in anticipation of the ADA’s effective date. It was virtually impossible for wheelchair users to purchase a ticket to the observatory because metal poles directing traffic flow made it impossible for wheelchair users to wait in line for tickets, and even if they could somehow make it to the ticket booth, the booth itself was prohibitively high and difficult to reach from a wheelchair. There were no signs indicating alternative wheelchair accessible routes to the observatory. To reach the main observatory on the 86th floor, one needed to transfer elevators on the 80th floor; however, a turnstile in the middle of the hallway on this floor made it impossible for wheelchair users to proceed further. On the 86th floor itself, visitors departing the elevators were confronted with three flights of stairs, which were the only means of getting to the outside observation deck and the souvenir and concession stands. It was not even possible to look out of the window and see the view without using the stairs. None of the stairs were ramped or had wheelchair lifts. When asked how a wheelchair user could see the view, a guard said the person would have to be carried up the stairs, a demeaning and unsafe practice that U.S. Department of Justice has said is unac-

22. 28 C.F.R. 36, app. A § 36.305 (1998).

23. 28 C.F.R. 36, app. A § 36.304 (1998).

24. 28 C.F.R. §§ 36.304(c)(1)-(4) (1998).

25. Pub. L.101-336, § 310, 104 Stat. 365 (1990).

ceptable as a method of achieving program accessibility.²⁶ Even if a wheelchair user could manage to make it up these stairs, it was necessary to use another set of stairs to reach the observation deck outside. Even if it had been possible to get to the deck, the parapet walls surrounding the deck made it impossible to see the view from a seated position. The women's bathroom was down a steep flight of stairs, and the men's room had a door that was too narrow for a wheelchair user to enter, and visitors were not permitted to use any other bathroom in the building. The public telephones on the 86th floor and the building lobby were too high to be usable by wheelchair users and lacked any assisted listening equipment required by Title III. As for entry into the building itself, the main entrance on Fifth Avenue had a revolving door — a virtual chamber of death to a wheelchair user. In short, the building and observatory were about as accessible as many other places of public accomodation — not accessible at all.²⁷

NYLPI asked a designer who worked for Eastern Paralyzed Veterans Association to pay the building a visit. After he did, he informed NYLPI that the outside observation deck could be made accessible by installing wheelchair lifts for \$13,000 each. Modifying one of the bathrooms was also possible, and removing the barriers to the ticket booth and on the 80th floor was also possible and almost cost-free. Given that the observatories received over 2.5 million visitors each year²⁸ and the regular ticket price was \$3.50,²⁹ it seemed safe to assume that these modifications could be accomplished and carried out "without much difficulty or expense."

In early December, 1991, NYLPI wrote a letter to Harry Helmsley, President of Helmsley-Spear, the managing agents for the building, requesting that measures be taken to make the observatory accessible before the approaching effective date of Title III. It was not possible to write to the owners directly, as the building had

26. See 28 C.F.R. 35, app. A § 35.150 (1998); UNITED STATES DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL § II-5.2000 (1993).

27. The Empire State Building also has a smaller observatory on the 102nd floor, from which visitors can enjoy the view from an even higher vantage point. This observatory has no observation deck or souvenir standards. The low ceiling on the 102nd floor made its windows inaccessible to wheelchair users, but no reasonable architectural modifications could have remedied this problem.

28. Mitchell J. Shields, *The Ups and Downs of New York's 60-Year Wonder*, N.Y. TIMES, Nov. 11, 1991, at C1.

29. This information was obtained by the author during visits to the Empire State building in November and December, 1991.

recently been purchased by a holding corporation,³⁰ and the identities of the owners were secret. The letter received no response.

On January 27, 1992, NYLPI filed a complaint with the U.S. Department of Justice,³¹ which has enforcement authority over Title III, concerning lack of accessibility of the Empire State Building observatory. It was the first complaint filed under Title III of the ADA anywhere in the country, on the first business day that the law went into effect.³² Title III has two private enforcement mechanisms: private lawsuits³³ and administrative complaints filed with the U.S. Department of Justice ("DOJ").³⁴ DOJ has the duty to investigate these complaints³⁵ and the authority to bring an action in court to obtain injunctive relief and civil penalties.³⁶ NYLPI chose to use the administrative complaint process, rather than file a court action, to test the administrative complaint system. NYLPI wanted to gather information about this process so that it could inform people with disabilities about whether and how to use the process, and what to expect.

NYPLI held a press conference at the Empire State Building to announce the filing of the complaint. In conjunction with the press conference, Disabled in Action held a demonstration. Wearing signs that read "Equal Access Is Our Right," "We Demand Equal Access to the Observatory," and "ESB has a Bad Point of View," DIA members, many of whom are wheelchair users, entered the building (through a side entrance) and made their way to the inaccessible ticket counter. At one point, the demonstrators decided to try to go to the observatory itself, and they made their way onto the elevators. Some got stuck on the 80th floor where the turnstile made the transfer from one elevator to the other impossible. A few managed to get to the 86th floor, where they were confronted with the stairs. The press conference and demonstration were well attended by both the television and print media, and they were featured on several news programs that night and in countless newspaper stories in mainstream, business, and legal publications.³⁷

30. Deed from Prudential Insurance Co. of America, to E.G. Holding Co. Inc., dated and recorded Nov. 27, 1991.

31. United States Dep't of Justice Complaint No. 202-51-1 (Jan. 27, 1992).

32. While the actual effective date for Title III was January 26, 1992, the 26th fell on a Sunday.

33. 42 U.S.C. § 12188(a)(1) (1994).

34. 42 U.S.C. § 12188(b)(A)(1) (1994); 28 C.F.R. § 36.502 (1998).

35. 42 U.S.C. § 12188(b)(A)(1)(B) (1994).

36. 42 U.S.C. § 12188(b)(B)(2) (1994).

37. See, e.g., Edmund L. Andrews, *Advocates of Disabled File Complaint About the Empire State Building*, N.Y. TIMES, Jan. 28, 1992, at B3; *Empire State Building is*

Before the day was over, Helmsley-Spear representatives appeared with a press release from Howard Rubenstein and Associates, the renowned public relations firm. The release, which quoted the general manager of the building, acknowledged that the building was not accessible to wheelchair users but attempted to lay the blame elsewhere. It said, "unfortunately the architects of the 1920s failed to appreciate the needs of the physically challenged in creating rather limited corridors and stairways that ring the observation deck at the Empire State,"³⁸ as if to suggest that there was nothing the management could have done in the sixty-one years that had followed to rectify this problem. Nevertheless, the press release indicated that an architectural firm had been hired to determine how to remove the physical barriers.³⁹

Following the complaint and the demonstration, the slow process of waiting for the Department of Justice to investigate the complaint. The first thing NYLPI learned was that organizations and individuals filing complaints were not officially "parties" to the matter and, under DOJ rules, would be excluded from the complaint settlement process. Nor would complainants have access to information obtained by DOJ in the course of investigating or settling a complaint. Although we were unhappy with this development, we went forward with the complaint. Fortunately, our views and preferences about various access measures were solicited by DOJ throughout the process.

Finally, on March 4, 1994, more than two years after the complaint was filed, DOJ announced a settlement. In an extremely thorough twenty-nine page agreement with a four-page rider, the owners and operators of the building agreed to make modifications to all of the barriers we had identified and even some we had not, such as curb ramps on the sidewalks near the building and the

Target of Complaint under Disabilities Act, WALL STREET J., Jan. 29, 1992, at 1; Jonathan Mandell, *A Mission of Admission: Using Lawsuits - Demonstrations - Whatever it Takes - Disabled in Action Fights to Make New York Accessible to All*, N.Y. NEWSDAY, Feb. 12, 1992; *Figuring Out the Next Step*, U.S. NEWS & WORLD REP., Feb. 10, 1992; Jay Seeman & Richard Romm, *The Americans with Disabilities Act*, N.Y. L.J., June 10, 1992; Nick Ravo, *New Federal Law for Disabled Slow to Take Hold*, N.Y. TIMES, July 12, 1992; *A Landmark for the Disabled*, CLEVELAND PLAIN DEALER, Jan. 30, 1992; Rick Pezzullo, *Federal Law Aims to Assist Disabled: Government and Businesses Make Changes First*, NORTH COUNTRY NEWS, Feb. 4, 1992, at 21.

38. Howard J. Rubenstein and Associates, Inc., *Empire State Building Seeks to Remove Obstacles from Physically Challenged*, Jan. 27, 1992 (press release).

39. *See id.*

height of the binoculars on the observation deck.⁴⁰ The owners and operators admitted in the settlement agreement that the majority of these changes were readily achievable,⁴¹ and thus that they had been in violation of the law. The settlement was the first of its kind under Title III, and it provided advocates, businesses and public accommodation with the first glimpse of how the DOJ would interpret and enforce Title III. The settlement received extensive coverage in the press,⁴² indeed, there was greater coverage of the settlement than of the complaint filing. The DOJ anticipated that interest in the agreement would be high and it held a telephone news conference to discuss the settlement.⁴³ Following the settlement, there was another round of press stories when construction work began on the building.⁴⁴

After signing the settlement agreement, the Empire State Building management claimed that the changes agreed to in the settlement would cost \$1.8 million,⁴⁵ a far cry from the \$13,000 per wheelchair lift that the designer from Eastern Paralyzed Veterans Administration estimated. However, it was evident from both the settlement agreement and the architectural plans of the proposed modifications that the owners and operators decided to spend far

40. Settlement agreement under the Americans with Disabilities Act between the United States of America and the owners and operators of the Empire State Building of New York, New York, for United States Dep't of Justice Complaint No. 202-51-1 (Mar. 3, 1994).

41. *See id.*

42. *See, e.g.,* Lindsey Gruson, *Getting to Top of Empire State: Opening the Way for Disabled*, N.Y. TIMES, Mar. 4, 1994 at B3; *Empire State Building Sets Renovations for Disabled*, WALL STREET J., Mar. 4, 1994 at A5; Liz Spayed, *A Landmark Access Overhaul at Empire State*, WASH. POST, March 4, 1994 at 4; *Today's News Update*, N.Y. L.J., Mar. 4, 1994 at 1; *Plus News*, CHICAGO SUN TIMES, Mar. 3, 1994 at 3; *Justice Dept. Hates Barriers*, ENGINEERING NEWS-RECORD, Mar. 14, 1994; Andrea Hamilton, *Empire State Bows to Disabled*, NEW ORLEANS TIMES-PICAYUNE, Mar. 6, 1994 at A17; *Empire State to be More Accessible*, ST. LOUIS POST-DISPATCH, Mar. 6, 1994 at 1A; *Empire State Building Bows to Disabilities Act Demands*, ARIZONA REPUBLIC, Mar. 4, 1994 at A8; Andrea Hamilton, *Empire State Building Renovations to Provide Better Access for Disabled*, BUFFALO NEWS, Mar. 4, 1994 at A11; Andrea Hamilton, *Empire State Building Settlement Opens New Vistas to Disabled Visitors*, FORTH WORTH STAR-TELEGRAM, Mar. 4, 1994 at 19; *Empire State Building Makes Way for Disabled*, LAS VEGAS REVIEW-JOURNAL, Mar. 4, 1994 at 9A; *National News*, MINNEAPOLIS ST. PAUL STAR TRIB., Mar. 4, 1994 at 7A; *The Nation*, USA TODAY, Mar. 4, 1994 at 3A.

43. *See* U.S. Dep't of Justice, *Justice Department Officials to Hold Telephone News Conference to Announce ADA Settlement with Empire State Building* (Press Release, Mar. 4, 1994).

44. *See* *Empire State Building Sets Renovations for Disabled*, WALL ST. J., Mar. 4, 1994 at A5D; Alex Monsky, *Empire State Bldg. Takes a New View of the Disabled*, N.Y. POST, Mar. 4, 1994; *Today's News Update*, N.Y. L.J., Mar. 4, 1994 at 1.

45. *See id.*

more than necessary to make the observatory and ticket area accessible. Striking what would become a common theme of respondents in Title III settlements, management then attempted to use its unnecessary expenditures as evidence that the ADA created an unreasonable burden on businesses. In fact, when management made the access modifications, it did so as part of an extensive capital improvements project costing \$40 million.⁴⁶ Thus, even the \$1.8 million cost of making the observatory accessible was only a fraction of the cost of renovations.

The observatory now has ramps, and the parapet wall around the observation deck has been lowered in a few areas so that visitors can see the view from a seated position. An accessible unisex bathroom and accessible telephones were installed, and access signs were posted in the lobby and telephones in the lobby were made accessible to people with hearing impairments. Some of the modifications were completed behind the schedule agreed to in the settlement, and management chose to ignore one part of the settlement altogether, by installing an automatic door in one of the side entrances, instead of the front entrance. For the most part, however, the necessary modifications were made.

In the weeks, months, and years that followed, the Empire State Building complaint was frequently mentioned in the press whenever there was a story on an ADA administrative complaint or lawsuit,⁴⁷ and became a touchstone on the issue of ADA access. On the fourth anniversary of the signing of the ADA, Attorney General Janet Reno mentioned the Empire state Building complaint in

46. See Andrea Hamilton, *Empire State Building Renovations to Provide Better Access for Disabled*, BUFFALO NEWS, Mar. 4, 1994.

47. See e.g., Liz Spayd, *Disabilities Act Sparks Lawsuits*, WASH. POST, Feb. 4, 1992, at A13; Linda Feldmann, *Disability Advisors' Preying on Businesses, Supporters of New Federal Disabilities Law Warn of Fraudulent Certifications*, CHRISTIAN SCIENCE MONITOR, Feb. 11, 1992; Deborah Kendrick, *Being Accessible to all Customers is Just Good business*, CINCINNATI INQUIRER, Feb. 23, 1992 at E12; Cynthia Durcanin, *1990 Disabilities Act Making Life Accessible*, ATLANTA J. & CONST., Mar. 8, 1992, at D1; Randall Samborn, *No Flood of ADA Suits — Yet*, NAT'L L.J., Mar. 16, 1992, at 3; Peter McKenna, *Friend or Foe? Some Think the New Disabilities Act Hurts Restaurants. Others Think it Could Help*, RESTAURANT BUS., Mar. 20, 1992; Charlotte Allen, *Disabling Business*, INSIGHT MAG., Apr. 13, 1992; Mary Lou Song, *Landlords Nail Down Rehab Plans Under ADA Regulations*, CHI. LAW., May 1992; Jay Seeman & Richard Romm, *Real Estate and Title Trends: The Americans with Disabilities Act*, N.Y. L.J., June 10, 1992, at S6; Joe Hall, *Lawyers Expect Lots of Suits with ADA in Effect*, NASHVILLE BUS. J., July 27, 1992; Steve Kerch, *Disability Act Enters 2nd Scene*, BALTIMORE EVENING SUN, July 12, 1992; *Wendy's Will Make Access Easier for the Disabled*, PORTLAND OREGONIAN, Aug. 28, 1998, at B02; Gary W. Morrison, *Straight Approach*, GRAND RAPIDS PRESS, Aug. 29, 1998, at D5; Liz Spayd, *Disability Rights Group Sues Safeway*, WASH. POST, Mar. 20, 1994, at B3.

public remarks, stating "We have no patience with those who would thumb their noses at this law that has unlocked the door for so many people."⁴⁸

Many people learned about the ADA as a result of the media coverage of the Empire State Building complaint. Shortly after it was filed, NYLPI received telephone calls from people with disabilities all over the country who wanted information about how to enforce their rights under the ADA. The case even made its way into popular culture when the network television program *Saturday Night Live* did a joke about the settlement.⁴⁹

Despite the success and impact of the Empire State Building complaint, New York City still has a long way to go to become accessible to people with disabilities. The City's own 1994 survey found that only one-third of the sidewalks had curb cuts,⁵⁰ some of which may not even be compliant with ADA safety and construction standards.⁵¹ Only thirty-five of 469 subway stations were fully accessible to wheelchair users,⁵² and under the current timetable, the New York City Transit Authority has until 2020 to make one hundred key subway stations accessible.⁵³ The ADA requires cities with fixed-route public transit systems, such as New York City, to operate paratransit systems that provide comparable service for individuals that cannot use the fixed route system; however, New York City's paratransit system is so inadequate that the City's office of the Public Advocate filed a formal complaint with the Federal Transportation Administration concerning the problem.⁵⁴ A non-exhaustive survey by the One-Step Campaign⁵⁵ of businesses

48. *Reach of Disabilities Law Expands*, BALTIMORE EVENING SUN, July 26, 1994, at 6A.

49. Kevin Nealon, the anchor on "Weekend Update", the news segment of "Saturday Night Live," announced: "In the Big Apple, New York's Empire State Building will soon be made accessible for the physically disabled. Spokesmen said, among other things, a wheelchair ramp will be installed. The ramp will begin in Central Park, leading 26 blocks up to the building's observatory."

50. New York City Dep't of Transportation, *The Americans with Disabilities Act Pedestrian Ramp Transition Plan* (May 13, 1994).

51. *See id.* Interview with James Weissman, Associate Director of Legal Affairs, Eastern Paralyzed Veterans Association (Apr. 26, 1999).

52. Interview with James Weissman, Associate Director of Legal Affairs, Eastern Paralyzed Veterans Association (Apr. 26, 1999).

53. N.Y. TRANSP. LAW § 15-b.3(b)-(c) (McKinney 1999).

54. Complaint filed by the New York City Office of the Public Advocate with the Federal Transportation Administration, Apr. 21, 1998.

55. The One Step Campaign is a coalition comprised of Disabled in Action, the six Centers for Independent Living in New York City, the Eastern Paralyzed Veterans Administration, and other organizations, to identify businesses in New York City that

located in the Business Improvement District near the Empire State Building found that over sixty businesses had one or two steps at their doorway entrances which prevented wheelchair users from entering.⁵⁶ Vigorous advocacy is still needed to ensure that New York City becomes truly accessible to everyone.

could become accessible to wheelchair users with relatively minimal effort and expense.

56. Letter from Robert L. Levine and Frieda James, Co-chairpersons, One Step Campaign, to Daniel A. Biederman, Grand Central Partnership, July 26, 1996 (on file with the author).

**WHY SETTLE WHEN YOU CAN WIN:
INSTITUTIONAL REFORM AND
*MARISOL v. GIULIANI***

*Marcia Robinson Lowry**

Introduction: Marisol's Story

Shortly after Marisol was born, her mother left her with a neighbor, until Marisol's mother would return from jail. When Marisol's mother returned, however, she decided that she did not want Marisol back. Marisol was then formally placed as a foster child with the neighbor. The neighbor turned out to be a good mother to this abandoned child and fell in love with her, telling the city agency that she wanted to adopt the little girl.

When Marisol was three-and-a-half years old, the New York City child welfare agency decided to discharge her from foster care and return Marisol to the home of her birth mother. The agency did this even though Marisol returned from the weekend visits with her birth mother filthy, unfed and describing violence in the home. Indeed, the City agency rejected repeated reports that the child was being abused in her birth mother's home, including one from the child's natural aunt. Fifteen months later, a housing inspector discovered Marisol locked in a closet, starving and bearing the scars of repeated abuse. Most of her hair had been pulled from her head and she had eaten her own feces, garbage bags and cardboard boxes to stay alive. Doctors said she would not have survived much longer.

Marisol re-entered foster care and was placed with the same foster mother who was still committed to raising her, and now to healing her. The City's child welfare agency had different plans for Marisol. The City intended to return Marisol, once again, to her mother, now in jail for child abuse. The City planned to make this feasible by offering Marisol's mother some parenting classes.

Thankfully, the City child welfare agency was not left to follow its usual course. Six months after Marisol reentered City custody, and less than a month after the well-publicized child abuse death of

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Elisa Izquierdo in late 1995, Marisol became the first named plaintiff in a class action lawsuit, *Marisol v. Giuliani*, filed in the Southern District of New York.

It would be another two years before Marisol was officially adopted by the foster mother who had raised her for most of her life. Even these two years of frightening uncertainty were an unusually rapid time period in a child welfare system where children often linger in uncertainty for years. No doubt, Marisol's case was sped up due to her status in the federal case and constant pressure by her attorneys. Despite the horrible abuse she suffered, Marisol was probably more fortunate than all too many children in the plaintiff class — her scars have had a chance to heal, and now she lives with a safe, nurturing family.

The Suit

There is nothing remote or theoretical about the issues involved in a major child welfare lawsuit or about using such a lawsuit to bring desperately needed, long overdue reforms to a huge, inept government system on which so many children depend for their very lives. *Marisol v. Giuliani*¹ is such a case. Although the case raised and resolved many important legal issues, the political context of the case significantly affected the manner in which it went forward. Moreover, *Marisol* concerned more than the life of a little girl. The case shaped and developed theories about how best to change institutional behavior, by making hard calculations about what was necessary to bring about these institutional changes in the perception-driven and complex environment that is New York City.

The *Marisol* case was ready for trial during the summer of 1998 when settlement talks suddenly began mere weeks before the July trial date. Until that point, the case had been vigorously litigated, both factually and legally, with discovery being hard fought. Plaintiffs were represented by attorneys from two public interest organizations: Children's Rights Inc., a spin-off of the Children's Rights Project of the American Civil Liberties Union, which had brought more child welfare reform lawsuits than any other organization in the country and which, at the time, had seven child welfare systems under some form of court supervision², and Lawyers for Children,

1. 929 F. Supp. 660 (S.D.N.Y. 1996).

2. *G. L. v. Stangler*, 873 F. Supp. 252 (W.D. Mo. 1994) (covering Kansas City); *Joseph & Josephine A. v. New Mexico Dep't of Human Services*, 575 F. Supp. 346 (N.M. 1983); *Juan F. v. William O'Neill*, Civ. Action No. H-89-859 (AHN) (Conn.

which represents thousands of children in the New York Family Courts on a daily basis and thus was intimately familiar with how the realities of how the system operated and affected children. These organizations were joined by senior litigation partners from the prestigious Manhattan law firms of Cahill Gordon & Reindel, and from Schulte, Roth and Zabel.

New York City and State primarily defended the case by understaffing it in the early stages. As a result, long delays occurred in responding to discovery, while the governments' attorneys complained they were working as hard as they could. From the start, the defendants challenged every possible legal theory upon which plaintiffs based their claims and attempted to narrow the case as much as possible. For example, early in the case the plaintiffs moved for the certification of a class that included all children affected by the child welfare system.³ The defendants first challenged the scope of plaintiffs' class, on the ground that a class of more than 100,000 children would be unmanageable.⁴ The defendants also challenged whether the Constitution, federal or state laws were enforceable by children at all.

Increasing Public Scrutiny

From the day it was filed, a very strong undercurrent in the case has been the public perceptions concerning the issues it addresses, and the manner in which the political powers have responded to them. Anyone familiar with child welfare in New York City at the time knew the system was in a shambles, long neglected by City government. Then, in November, 1995, the horrible death of little Elisa Izquierdo, after the City ignored clear signs that she was being abused, shocked the public as no other child abuse death had. Because this case remained in the public eye for so long, it made the problems in New York City's child welfare system impossible for the political forces to ignore. A year later in December, Mayor Giuliani and the new Child Welfare Commissioner, Nicholas Scop-

January, 1991); *Sheila A. v. Whitman*, No. 89-CV-33 (Kan., 1993); *LaShawn v. Barry*, 762 F. Supp. 958 (D.C. 1991); *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986). A settlement agreement had also been reached in Philadelphia, *Baby Neal et al. v. Thomas P. Ridge*, Civ. No. 90-2343, 1996 U.S. Dist. LEXIS 14 (January 2, 1996) and was approved by the court in February, 1999.

3. The class consisted of all children subjected to reported abuse and neglect and all children in foster care.

4. They did so, despite the fact that appropriateness of certifying precisely that class had recently been upheld by the Third Circuit. See *Baby Neal et al. v. Casey*, 43 F.3d 48 (3d Cir. 1994).

petta, issued a "reform plan" acknowledging the wisdom of twenty years worth of critical reports, that had been largely ignored. Child welfare — finally — had become an issue that was not going to go away, at least not until some very visible steps were taken.

Three weeks after Elisa's murder, Marisol's lawsuit was filed. In this context, and given the current status of the management of the child welfare system, the plaintiffs' complaint asked that control of the system be handed over to a receiver. This was an unprecedented strategy move; few public systems have been put under receiverships by the federal courts. In fact, not only did it take four years for the only child welfare system in such a status to reach that point,⁵ it also required many failed attempts at complying with the post-judgment remedy. Yet, by asking for a receivership, plaintiffs' attorneys sent a strong, clear message that the *Marisol* lawsuit was different. It signaled that plaintiffs were committed to seeking fundamental systemic reform no matter the cost, and that the plaintiffs did not trust the current administration to be responsive. Requesting a receivership put the City and State further on the defensive. Indeed, Mayor Giuliani announced that the newly established Administration for Children's Services ("ACS")⁶ was created, in part, as a response to the call for the appointment of a receiver.

As a significant footnote to these issues, highlighting the degree to which this case was playing out both in a public as well as legal forum, Court TV chose to test the federal court ban on television cameras in the courtroom, by recording the argument on the *Marisol* motions for class certification and for dismissal of certain claims. In February, 1996, Court TV filed a motion seeking permission to film the argument, represented by pre-eminent First Amendment lawyer Floyd Abrams. The application was strenuously opposed by the City defendants, for whom public perception was a critical factor and who argued that the public would get an unfairly negative view of the City's child welfare performance since, in the context of a motion to dismiss, they would not be able to challenge plaintiffs' factual allegations. In a March 1, 1996 decision, the Federal District Court Judge Robert J. Ward, to whom *Marisol* was assigned, granted Court TV's motion. Consequently, Court TV provided "gavel-to-gavel" coverage of the argument, complete with legal commentary.

5. See *LaShawn v. Barry*, 887 F. Supp. 297 (D.D.C. 1995).

6. This was the City of New York's child welfare agency's fourth name change in the last two decades.

A Very Favorable Legal Context

Four months after the argument, in June 1996, Judge Ward resolved the complicated legal issues raised. Judge Ward certified the class in a fairly straightforward decision, relying heavily on the Third Circuit's definitive, scholarly ruling in the *Baby Neal* case. Moreover, Judge Ward ruled for plaintiffs on virtually all of their legal claims raised in defendants' motion to dismiss:⁷ the most expansive children's rights decision in the country thus far. The court held, among other things, that:

- 1) Children could enforce state child welfare statutes;⁸
- 2) Children in state foster care custody have a substantive due process right to be free from harm that extends to freedom from "unreasonable and unnecessary intrusions into their emotional well-being";⁹
- 3) Children in foster care have a substantive due process right to conditions of confinement which bear a reasonable relationship to the purpose of their custody, including conditions and duration of foster care reasonably related to this goal;¹⁰
- 4) The substantive due process right to freedom from harm encompasses the right to reasonable services to enable children to be reunited with biological family members;¹¹
- 5) The state laws governing the investigation of child abuse and neglect create constitutionally protected entitlements sufficient to trigger procedural due process rights, a ruling of particular significance;¹²
- 6) Children have a private right of action to sue for violations of the Adoption Assistance and Child Welfare, and the Child Abuse Prevention and Treatment Acts, the primary federal child welfare funding statutes;¹³ and
- 7) Children in foster care with disabilities have rights under the federal disability statutes, both to non-discriminatory access to government services and to affirmative steps to ensure that the access is meaningful.¹⁴

7. *Marisol v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996).

8. *Id.* at 686, 687.

9. *Id.* at 675

10. *Id.*

11. *Id.* at 677.

12. *Id.* at 680.

13. *Id.* at 683-84.

14. *Id.* at 685.

The certification of the class was upheld on appeal in the Second Circuit. The Circuit Court, however, instructed the district court to create sub-classes for manageability purposes.¹⁵

Unassailable Facts and an Attempted Gag Order

The other major development in the case had to do with factual development. In most child welfare systems — and New York is certainly no exception — key information about the children in the system is simply not collected. Computerized information systems in use are often too primitive or too inadequate to collect reliable information. This, of course, assumes that computerized systems are in use at all. Likewise, some child welfare administrators and political authorities simply choose not to record the information that would reveal the system's failures. Unfortunately, information about the system's impact on children was critical to proving that the legal rights of children were violated.

Traditional discovery devices could not provide such data; it simply did not exist. As in many other child welfare lawsuits,¹⁶ this data had to be created during the discovery process, in what amounted to social science research. Normally, data collection is highly contentious; plaintiffs' results are challenged by the defendants' experts, each side parading studies in front of judge. In *Marisol*, however, defendants agreed to a joint, neutral data collection process, in which experts chosen by all the parties would extract information from a random sample of children's case records and produce reports. The parties all agreed that the facts established through this process could not be contested and would not be subject to challenge on methodological grounds.

This arrangement has its pros and cons. The advantages of this process are obvious: it saves time, money and, most importantly, provides key information upon which the court can rely. Consequently, this leaves the parties to argue about the legal import of the findings, rather than conducting diversionary legal battles about whose experts chose the most valid random sample, and other arcane points to which there are probably no objective answers. In addition, the findings, because they are presumed to be neutral, can have a considerable impact on the case. The main disadvantage to this arrangement is that, to the degree that any party might hope to shade an expert's conclusions, such opportunity

15. *Marisol A.*, 126 F.3d 372 (2d Cir. 1997).

16. See, e.g., *LaShawn v. Barry*, 762 F. Supp. 958, 965 (D.D.C. 1991).

would be lost, as all the parties would be bound by whatever the joint expert group found. For parties who really want to find out what is going on, there are no substantial disadvantages, which was why plaintiffs proposed this approach.

The experts' results in *Marisol* were just as plaintiffs anticipated: the expert group's reports produced evidence of widespread systemic problems and their impact on children. Below are some of the key findings.

- In child abuse and neglect investigations, the City scored only fifty-two percent in an index of the critical components necessary for a completed investigation, and forty-five percent in an index of major decisions and assessments that directly affect the lives of children and families.
- The risk of future abuse or maltreatment to children was adequately assessed in only sixty-six percent of the cases reported for abuse or neglect.
- There were inadequate assessments of safety throughout the investigation period in twenty-four percent of the cases.
- Child protective court proceedings were filed for only seventy percent of the cases that needed them.
- In twenty-one percent of the cases there were "unacceptable" gaps in necessary case activity.
- In forty-three percent of the cases, additional substantiated reports of child abuse or maltreatment were recorded after ACS protective oversight began.
- In thirty percent of the cases that had been closed, case closure was considered inappropriate for reasons that included failure to ensure the safety of the children, and in additional 27% of the cases that were closed, it was impossible to determine whether the cases had been closed appropriately.
- In twenty percent of the cases, there were no face-to-face contacts between children and their caseworkers during the entire six month period for which data was collected.
- In forty percent of the cases where services were identified as necessary to avert foster care placement, the needed services were not provided.
- Assessments of case records during the critical first ninety days after the case was opened found that one-fourth of the cases lacked plans to meet families' service needs and thirty-one percent of the cases contained no discussion of whether the child was safe.
- A large number of findings demonstrated that ACS was failing to take timely, legally required steps to secure permanent living arrangements for children at risk of spending their childhood drifting through the foster care system.

- Although efforts to reunite foster children with their natural parents were purportedly a centerpiece of ACS' foster care program, necessary services and outreach to birth parents were lacking in a large percentage of cases.
- ACS continued to maintain the goal of returning children to parents even in cases where parents' whereabouts were unknown, or where there was evidence of permanent neglect or abandonment.
- In the portion of the cases that ACS handled directly, rather than through contracts with private foster care agencies (about twenty percent of the system), the system's failings were even more pronounced, with ACS' own performance in some areas twice as deficient as that of the contract agencies.¹⁷

Throughout the case, there had been no limitations on the use of the expert findings that only contained aggregate data, absent all individually identifiable information. When the first of three reports was issued and the press reported on it, the City immediately ran to the District Court for a gag order. After Judge Ward denied that motion, the City took an emergency appeal to the Second Circuit, where their position was ridiculed and quickly rejected by that Court.¹⁸ Ironically, after the City's aggressive attempt to suppress the report, the New York Times released the report, featuring it on the front page.

The expert reports soon became the key evidence in the case. Judge Ward, repeatedly on-the-record, made clear, the likelihood he would consider these reports to constitute prima facie evidence of violations of the legal standards he had established. Indeed, his main concern was to determine the degree to which these violations had been, and were being, addressed by the "reform" administration appointed by Mayor Giuliani.

The Problem to be Solved

A year after it was created, the newly renamed and reorganized child welfare agency, ACS, issued a lengthy "reform plan."¹⁹ This

17. Reports 1 (Aug. 1997), 2 (Sept. 1997) & 3 (Dec. 1997), *Marisol v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996) (95 Civ. 10533) (original on file with author).

18. The City argued that news reports about the study's findings were demoralizing to public agency workers. One of the appeals court judges inquired during the argument how many workers had gone into therapy as a result. See *City Halls' Fragile Babies Seem to be Caseworkers*, N.Y. TIMES, Oct. 23, 1997, at B6.

19. Administration for Children's Services, *Protecting the Children of New York: A Plan of Action for the Administration for Children's Services* (Dec. 19, 1996) (on file with the author).

plan reiterated the agency's long history of serious problems²⁰ and announced a variety of new initiatives that, while lacking in detail, were bounded by deadlines for implementation. On the eve of trial, two-and-a-half years later, few of the plans were implemented, and almost none of the deadlines met. To be fair, some steps were taken, some superficial changes made and a number of energetic, committed people were brought into leadership positions in the agency. Clearly, far more attention had been paid. On the surface, it was not the same agency that had been sued.

Appearances, however, can be deceiving. ACS remained an agency with fundamental problems, many of which were still unaddressed and unacknowledged. Indeed, at the City level, even in those rare instances that problems had been acknowledged, agency administrators appeared genuinely unable to figure out solutions, save for paying lip service to many of the popular ideas in child welfare thought.

At the state level the problem was different. According to state law, the state oversees the New York City child welfare system, although it does not have direct operational responsibility to provide services to children. From time immemorial, however, the state has neglected this responsibility. Moreover, not one of the critical reports that state officials had ever issued about the City's child welfare system resulted in any changes. Amazing, considering the tone of consternation and impotence throughout the State documents produced during discovery.

As trial approached, plaintiffs' attempts to reach agreement on at least some stipulated facts with either the City or state defendants met with complete resistance. The result: with no stipulated facts at all in a complex case, there was sure to be a lengthy trial. Because of the breadth and complexity of the issues, and in response to a suggestion from plaintiffs, the court decided that each side would be limited to a total of 300 trial hours. The court had rejected a request to bifurcate the liability and remedy stages of the trial, or to freeze the evidence at any particular date, even though discovery had been closed six months before the trial date. And once again the court made clear that while no determination of liability had been made in advance of the presentation of evidence,

20. "Through most of the past twenty-five years, the city agency charged with protecting children and other organizations and government entities trying to work to the same end have worked ineffectively, sometimes hindering one another's efforts despite everyone's best intentions." *Id.* at 17.

its primary concern was the degree to which the system had improved, and whether and what kind of remedy might be necessary.

Ever since the results of joint case record review became available, taken together with legal rulings on the motion to dismiss, it seemed extremely likely to plaintiffs' counsel that plaintiffs would succeed in establishing liability. It was also clear that defendants were committed to prolonging the trial for as long as possible. The court's rulings allowing liability and remedy to be tried simultaneously, allowing an extended period for the trial, and allowing current evidence to be admitted²¹ meant we were dealing with a moving target. It seemed highly likely that the already protracted trial schedule would extend far into the future. Even after the trial concluded, if it ever did, it was clear that defendants would appeal a finding of liability, and it was possible that any substantial remedies might be stayed on appeal. While plaintiffs' claims remained strong, it seemed likely that a court, faced with energetic, articulate defendants and continuing new developments might, after a finding of liability, grant to defendants more time to implement their plans or to create an expert panel to recommend and probably to monitor additional changes.

It seemed likely that significant relief for the children who were class members was years away. Throughout the course of discovery, plaintiffs' counsel, in consultation with their experts, remained convinced that even the City's "reform" plans would not result in significant benefits for children, and because of the uncertainty of implementation might even create further chaos in an already chaotic system.

Several key markers continued to indicate that things were not getting measurably better. Child fatalities, obviously a particularly important and sensitive indicator and one on which the City administration had been particularly focused, had gone up since the "reform" administration had taken office. The number of child abuse deaths of children in foster care had also risen. Adoptions, which had risen dramatically just *before* the creation of the new child welfare agency, had leveled off and started to drop. A plan to move to a system of "neighborhood-based services" appeared con-

21. In response to plaintiffs' concern that the court's willingness to receive current evidence on which plaintiffs had not conducted discovery would put plaintiffs at a disadvantage through surprise, the court made clear that plaintiffs would have the opportunity to take additional depositions or to receive limited additional discovery as new facts were presented by defendants, but defendants only had to give plaintiffs 24-hours notice of the intent to use new facts.

tradictory and poorly thought out. Not only were children going to be further delayed in getting a better child welfare system, but things might even get worse.

It would, of course, take years to establish these points, defend a judgment on appeal, and then develop meaningful relief and have the court order it. In the process, it was entirely likely that the top management of the child welfare agency would have been paralyzed by the need to respond to the lawsuit. Even the commissioner, notwithstanding his early attractiveness to the media because he had spent several years of his childhood in foster care, was vulnerable to the revelations of a lengthy court process. He could, perhaps, be removed from office, causing further disorganization within a very shaky administrative structure.

Under this shadow, plaintiffs agreed to settlement talks with both the City and the state. These talks proceeded independently and the content of each was withheld from the other defendant until late in the process.²² From plaintiffs' prospective, as difficult as it was to give up what looked like a certain finding of liability, it was easy to recognize that the settlements moved the process forward by at least two years and offered the best, most immediate prospect of beginning to solve the problems now.²³ These factors informed plaintiffs' perspective in finally reaching the settlements that were submitted to and approved by the court. In their final form, the City and state settlements are both innovative and complementary.

State Settlement

The primary failing of the state was that it did not exercise adequate oversight to ensure that the City was following the law and

22. City and state defendants did not appear to have developed a joint strategy in the case and it appeared from the discovery material that there was a marked lack of cooperation between the city and state child welfare authorities.

23. The content of all settlement discussions are, of course, confidential. However, some background on the City settlement talks are provided by a City document produced during discovery, in which one City expert explains that the city had failed to seek top level independent expert advice to improve the system's operations because it feared that such experts would then become trial witnesses against the City. The report stated: "Because of the *Marisol* lawsuit, a suggestion by the head of the Annie E. Casey Foundation to convene an advisory council of 'super experts' to review, discuss, and advise on the agency's reform process foundered on fears that participants would inevitably become witnesses for the plaintiffs." Administration for Children's Services, *An Assessment* (May 12, 1998) (citing reports by city defendants' expert Lawrence E. Lynn) (on file with the author).

protecting children. Under the agreement, the state is obligated to take a number of concrete steps:

- to increase the staffing of a badly understaffed local oversight office, and to limit the scope of the office's responsibility to New York City (changing a metropolitan regional office to a New York City office);
- to complete the reports on child fatalities on a timely basis (all of which had been long overdue); to use these reports to determine whether there are significant, recurring problems in the City's ability to investigate child abuse complaints, and, if so, to use its authority to require the City to address and correct the failings that have contributed to these child deaths;
- to take reasonable steps to develop a long overdue computerized information system; and
- to conduct case record reviews and interviews with service recipients to document the City's full range of child welfare practices, to determine whether the City's child welfare system is improving and is protecting children and, if it is not, to require the City to address the problem while the state monitors its progress.²⁴

The state settlement allows plaintiffs to monitor the state's compliance with its obligations under this agreement, through meetings with the head of the state agency and review of relevant state documents. If plaintiffs determine that the state is failing to comply with its obligations, plaintiffs can return to court for enforcement, seeking in the first instance an order directing compliance and, thereafter, a finding of contempt and any appropriate remedies. The agreement will last for two years, unless it is extended by the court because the state has failed to fulfill its obligations. During this period new class actions by class members are barred, but individual equitable and damage actions are not.

City Settlement

The settlement with the City follows an innovative approach. Instead of the traditional settlement, where the City is obligated to take specific actions while the plaintiffs monitor the City and return to court if the City fails to comply with such an agreement, this settlement builds on ACS' stated commitment to reform. However, it recognizes ACS' need for outside help to understand the problems it faces and how to best address the problems. The settlement provides for independent expert assistance to aid ACS

24. Settlement on file with author.

in those pursuits, and also ensures rigorous monitoring of the implementation of the recommendations, with the opportunity for far more powerful court action if necessary.

A key to the settlement's success thus far is the strength and independence of the expert group. Indeed, both plaintiffs and defendants trust these experts. The members of this four-person expert panel ("Panel") were administrators in public systems. In addition, all of the costs associated with the Panel's work, including the salaries of full-time staff, will be borne by the Annie E. Casey Foundation, a major private fund raiser for national child welfare reform in the country. All of the Panel participants have a major stake in the settlement process working and producing credible results, as does the Casey Foundation, which certainly has a difficult course to negotiate and which, to some degree, is putting its reputation on the line. The Casey Foundation, as an added bonus, has a wide range of national expertise to call upon, and as a present or future grant-maker, is assured of the enthusiastic cooperation of anyone the Panel members call upon for assistance.

The Panel's specific responsibility is to assess the child welfare agency's operations in all key areas and to develop specific recommendations about what ACS needs to do to achieve good child welfare practices. The City is not obligated to implement the Panel's specific recommendations, but will be monitored by the Panel to determine whether it has adequately improved its child welfare practices, either through implementing the Panel's recommendations or by some other equally effective means. If ACS fails to make good faith efforts to achieve reform, as measured by this expert Panel with practical knowledge about what can be done in systems committed to reform, the Panel can find an absence of good faith. In this case, plaintiffs can return to court to impose liability and seek any available remedy, with the Panel as plaintiffs' witnesses and with no limitation on the duration of any relief the court may order.

The Settlement also provides the Panel and its staff with extraordinary and unprecedented access to all aspects of the child welfare agency's operations, staff, meetings and documents, in a manner that far exceeds anything that could ever be obtained through discovery or even through more traditional monitoring efforts. Thus the Panel, all experienced and skilled administrators themselves, will be in a unique position to understand not only what is, or is not, happening, but why and how.

If the Panel sets the standard too high and comes up with truly unachievable recommendations, the City could balk, resume a defensive posture, close off the access to candid discussion of the system's problems and refuse the Panel's help. If this occurs, the City thus forfeits the opportunity to make these reforms voluntarily, in which case the Panel would have the obligation to make the absence-of-good faith findings that will bring the parties back to court, with the Panel members as witnesses against the City. On the other hand, if the Panel sets the standard too low and subjects the City to anything less than tough scrutiny by demanding anything less than concrete results for children, plaintiffs will deem the process a failure and label the Casey Foundation an apologist for an inadequate system. Neither is likely to happen however. One can only assume that the Foundation and the very highly skilled Panel members put themselves in this sensitive position because they expected to demand the best that is achievable, and subject the City to appropriate consequences if it falls short of what could have been done.

This is a highly unusual construct, but one with enormous potential. Should the Panel find an absence of good faith reform, the plaintiffs need only establish legal liability to obtain a judicial remedy for the City's violation of the order. Given the legal standards employed by the district court, the Panel's testimony, which will be based on full access to all personnel and documents, will be deemed *prima facie* evidence of the City's absence of good faith to reform the child welfare system under the terms of the settlement. At the least, a finding of absence of good faith reform efforts by the experts is likely to be enormously persuasive to a court. At that point, the Panel members may testify about what *should* and *can* be done. This will make the scope of a court order far easier to determine, and, if necessary, the possibility of a receivership far more likely. These recommendations, made by experts that are trusted by the City, will provide the kind of planning, guidance and independence that the City has long been lacking. The Panel will then monitor and report on ACS' progress over the next two years in either implementing the recommendations, or in otherwise accomplishing the goals that have been set out in each of the key child welfare areas. Thus, either the City will have been required to accomplish necessary reforms within two years — in which case the plaintiff children will be the winners — or the City will make clear that even with outside help it is incapable of doing so — in

which case a court takeover, after a finding of liability, would be almost inevitable.

Because of the extraordinary access the settlement provides to the Panel, and because their findings will be reported in public documents, the settlement prohibits the filing of any new class action lawsuits during the two years the settlement remains in effect, absent further judicial action. Although new class actions are barred during this period, individual actions for either equitable relief or damages are not. Although this provision is controversial, and has drawn fire from some advocates, some respected experts and observers believe that piecemeal class action litigation, which may advance a particular interest at a particular time, can in fact be damaging to the creation of a coherent and well-managed system. Indeed, the New York City child welfare system, long-recognized to be driven by crisis management, has all too often illustrated that point, serving one interest at the expense of others, without every having had the capacity to develop a well-functioning whole.

A final, particularly important part of the City settlement is that it folds into the agreement the requirements of the consent decree in *Wilder v. Bernstein*,²⁵ a lawsuit that was settled in 1985 and governs many aspects of the City's placement system. Although that lawsuit has had a significant impact on several aspects of the child welfare system²⁶, it has still not accomplished its goals and the City has never complied with its terms.²⁷ The reason for this is that the *Wilder* settlement addresses only one aspect of a child welfare system. Of course, the child welfare system is so disorganized and ineffective in so many different ways, that it is impossible to fix only a piece of it. Faced with the overwhelming problems that a dysfunctional placement system represents, the court has not had adequate constructive alternatives.

The *Marisol* settlement incorporates the *Wilder* requirements as enforceable rights. The *Marisol* Panel, however, will make the critical difference in the enforceability of these rights and the degree to which they can be used to ensure reform. The Panel is free to modify the details of some of the *Wilder* requirements and to assess

25. 645 F. Supp 1292 (S.D.N.Y. 1986)

26. As a result of *Wilder*, the federal court enjoined a City plan to go to managed care, changed the City's method of placing foster children with relatives by employing supervisory contract agencies rather than the City's directly operated program and required the City to hire two hundred workers with master's degrees in social work. See *Wilder v. Bernstein*, 49 F.3d 69 (2d Cir. 1995).

27. *Wilder v. Bernstein*, No. 78 Civ. 957 (RJV), 1998 WL 355413 at *14 (S.D.N.Y. July 1, 1998).

the City's compliance with those requirements in the context of the overall operation of the child welfare system. Non-*Wilder* aspects of the City settlement require plaintiffs to obtain judgments on the underlying legal claims in the face of a lack of good faith finding by the Panel. This step should present only minimal difficulty given the breadth of the court's legal rulings on the motion to dismiss, as discussed above. With regard to the *Wilder* requirements, however, the legal rights have already been established, and if the Panel makes a finding of absence of good faith implementation, plaintiffs will be entitled to move immediately for contempt. At that point, the possibility of intrusive remedies, including receivership, become far more likely than they would have been in the context of the *Wilder* lawsuit.

Both the City and state settlements reflect an approach that differs substantially from the standard proscriptive settlement decree, with specific steps that must be taken within specific time periods. That is the agreements' strength. Particularly in New York, a new approach seemed appropriate, one in which a panel of trusted and skilled experts could prescribe a remedy for what ails a child welfare system in trouble, and then make sure that this remedy is actually put into place.

The Combined Impact of the Settlements

The *Marisol* approach is two-pronged. It requires the state to finally exercise its oversight responsibility toward the City, with the contempt powers of the court available if the state does not. State oversight has always been exercised through a regional office, responsible for several counties in addition to New York. The settlement requires the establishment of a New York City-only office, and an increase in staff necessary to do the work.

The agreement with the City builds on the lessons learned from other reform efforts. Although it is relatively easy to specify what is wrong in these complex child welfare systems, it is far more difficult to determine, beyond the obvious, *why* those wrongs have occurred and how to right them. The discovery process is uniquely suited to identifying the former and not the latter. The wealth of information relevant to understanding the workings of a complex bureaucracy and to shifting it in its course is difficult to obtain through the adversarial process but critical to changing how that bureaucracy functions. Thus, one of the key and early advantages to the *Marisol* City settlement is the immediate access to critical information that the *Marisol* Panel and its staff provide. Of course,

pivotal to the City agreement is the faith of both plaintiffs and defendants in the integrity, independence and skill of the Panel members, a group to which both sides agreed. Whether they can remain strong and tough enough to satisfy plaintiffs that they are making the difficult calls and the necessary determinations, without losing their free access to the internal workings of the child welfare bureaucracy and the ability to guide the City's plans, remains to be seen. It is likely that the City cooperation will disappear if and when the Panel determines that court involvement is necessary. At that point, however, the non-adversarial aspects of this agreement are likely to be over, and the process is likely to move toward legal findings and court orders. But unlike the situation now, a legal judgment and court order at that point will be based on full information from experts given a unique inside view, with a clear understanding of what can but has not been done, and of how to do it. The case will then have reached the contempt hearing stage, but a uniquely well-informed one. Should this process not work, the City will be virtually foreclosed from pleading that it deserves another chance, or the opportunity to do things its own way, since the team that the City invited in has found that the City cannot or will not.

The settlements are thus a no-lose proposition for plaintiffs, moving them to the remedy stage years earlier than after a trial and appeal. In practical terms, this settlement is likely to lead to one of two results: (1) The expertise of this Panel will provide the guidance lacking in City administration and add a behind-the-scenes pressure to address fundamental problems in a historically inadequate system; or (2) if the City resists fundamental reforms, the fact-finding will be up-to-date and based on the best possible information, from the trusted expert Panel members, who will have become intimately familiar with the agency's operations, and who can present to the court a plan to reform the agency that can be implemented under the court's control. Either way, the children are the winners.

The one thing that plaintiffs' counsel gave up in agreeing to settling *Marisol* is the personal pleasure that comes from winning at trial, and from stripping away the overblown claims of achievement that have been the hallmark of government agencies willing to acknowledge the shortcomings of their predecessors but all too committed to minimizing their own. That would have been gratifying. But that would not, in the short term, have improved the lives of our clients, our children. And one way or another, the *Marisol* set-

lements have moved us two years ahead in the process of doing exactly that, and of getting concrete results and better services and protection for children, the best kind of victory we can achieve for them.

'A' WE NOT HUMAN?

Greg Sholette*

Since becoming a father in 1990, I have been intrigued by the way children and childhood are represented within contemporary culture. There is a palpable tension between the highly sentimentalized way children are typically portrayed in art and the media — and the way we, as a society, fail them down the line. “Kids Rights 1, 2, and 3,” designed for REPOhistory’s, “Civil Disturbances: Battles for Justice in New York City” seeks to evoke this tension.

Before making my images and writing my texts I researched the legal and historical idea of childhood itself. Many scholars insist that childhood, as we understand it, emerged at about the time of the industrial revolution. Prior to that time a child was seen as a smaller version of an adult and was the legal property of its father. Yet two conflicted concepts of childhood continued to exist side by side. On one hand, following the “natural philosophy” of Jean Jacques Rousseau, the children of the bourgeoisie were perceived as belonging to a separate sphere from adult life, one uncorrupted by social customs. On the other hand the children of the working class continued to labor beside adults much as they had since the middle ages, except that factory work began to supersede agriculture. I believe that these separate versions of childhood, which divide along class lines, continue to affect our understanding of childhood today. It is this unease between a Victorian notion of the child as almost pre-human, and the actual, modern “kid” whose small body is a legal, economic, and commercial battlefield that informs the overall structure of my three part sign installation for *Civil Disturbances*.

“Kids Rights 1” deals with issues of contemporary child labor, number “2” with the Miranda Rights of young people, and number “3” with the states legal obligation to protect the welfare of all citizens including children. This last point is addressed through the class action suit *Marisol v. Giuliani*. At a historical and cultural level, *Marisol* raises the question of who is ultimately responsible for a child’s well being, by arguing that our national constitution holds the states responsible for this task. In *Marisol*, New York

* Assistant Professor, School of the Art Institute of Chicago. Founding member, REPOhistory.

failed to provide that constitutional protection to children not only in its foster care system but in general.

However with "Kids Rights 3 - Freedom from Abuse and Neglect: *Marisol v. Giuliani*" I also wanted to raise the problem of economic inequality which I believe can not be separated from the issue of child abuse and neglect. Unquestionably neglect cuts across class boundaries, yet the situation faced by a single mother on work-fare with five kids and no access to child care can not be equated with a middle class family that employs a full-time nanny. My text for *Marisol* tries to bring this social inequity into the picture by concluding with the line "... public outcry over child abuse occurs even as deep cuts in social spending and shrinking federal resources impede protection of those children most at risk."

The artistic approach I have taken in *Marisol* also exploits these conflicts and contradictions. Indeed, all three of my "Kids Rights" signs employ imagery that looks like children's book illustrations complete with cookie-dough like typography: Modeled in clay, painted in bright "candy colors," and then scanned into a computer. My custom alphabet poses a series of rhetorical questions about the contemporary status of children: "'Я' You Looking At Me?" and "'Я' We Not Human?" In other words, does the commercial representation of childhood in popular culture present kids as sentimental "objects" for our "adult" gaze, and is our looking at these images of idealized childhood not filled with a mixture of longing and compassion?

In a sense I also hoped to suggest that my own practice as an "artist-reformer," not un-like that of Jacob Riis before me, is inevitably caught-up with being an "artist-voyeur." By engaging in the very act of representing the social wrongs I am inevitably invading and exploiting another's misery, in this case a child known to the courts as *Marisol*. To the degree that any artist or concerned citizen engages these issues such contradictions must be squarely faced as well.

ROUNDTABLE DISCUSSION*

*Berkman v. City of New York*¹

*Plaintiff: Brenda Berkman***

When I first went to Laura Sager in 1978, more than twenty years ago, I could not have imagined how this case would change my life. I have been a firefighter now for the past sixteen years. Life in the firehouse has never been easy. The first seven years were extremely difficult, and I am not sure I would have enough stamina to deal with the level of harassment for twenty years. Fortunately for me, times have changed. Although the Fire Department is by no means perfect, the level of harassment, animosity and even hatred of women firefighters has abated considerably.

While there is still considerable resistance to the integration of women in the fire service, I believe this case had a dramatic impact on the New York City Fire Department. But this case not only forced New York City to finally hire women, it sent out a tremor that affected Fire Department employment practices throughout the United States and abroad.

The case also had a tremendous effect on public attitudes about the role of women in the workplace. Certainly, people still — after eighteen years— say to me “Oh, you are the first woman firefighter that I have ever seen. I did not realize that they even had women firefighters. Do you go on the truck?” Now, however, more and more, young girls come to the firehouse and they draw pictures of *themselves* driving the fire engine and climbing the ladder. To me that is a dramatic change. The idea that public opinion has changed to a degree, that girls *can* try to do anything because they have seen a woman firefighter, that has been the reward for me in terms of my participation in this case.

I am very grateful to my lawyers at the New York University Law School and Debovoise & Plimpton. I am also very grateful to

* These remarks were originally delivered at New York Law School on Nov. 17, 1998. They have been edited to remove the minor cadences of speech that appear awkward in writing.

1. 536 F. Supp. 177 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983), *later proceeding*, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd in part and rev'd in part*, 812 F.2d 52 (2d Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

** Lieutenant, New York City Fire Department. B.A., *summa cum laude*, St. Olaf College; M.A., American History, Indiana University; J.D., New York University School of Law.

my entire network of supporters. Plaintiffs such as myself cannot survive this kind of case in isolation. There is no way that an individual can endure the stress of a lengthy litigation if he or she tries to go it alone. Plaintiffs need support from many people, and I was lucky to have that.

I was a lawyer before I became a firefighter and I was in law school at the time when women were first allowed to apply to become firefighters. Consequently, because of my legal training, I started the case thinking that the law will provide the solution for past discrimination, that the law would effect social change. In many ways, the law was the answer. The court forced the City to develop a job-related non-discriminatory hiring process and stopped the City from firing me during my probationary period. The court also attempted to ensure that I received the same working conditions as the male firefighters by requiring the Fire Department to adopt anti-harassment training and procedures. Yet, despite these requirements and orders, the law could not protect me from physical and verbal assaults from co-workers and civilians alike. No judge could protect me when my co-workers telephoned death threats to my home or refused to talk to me at work.

Through this experience, I discovered that people fighting discrimination need more than the law and the talents lawyers bring to bear. Ending discrimination requires political activism. Change of this magnitude requires the efforts of the entire community — the efforts of artists, writers and the media.

I feel very good about the REPOhistory sign that memorializes my case. The sign documents something of which I am very proud. Through this sign, other will learn of the importance of the struggle to end discrimination. It reminds people that women trailblazers have worked hard and suffered for many years to make the work place better for everyone. Hopefully, this sign will inspire others to continue their work in the future.

*Attorney: Laura Sager****

In 1978 I was a professor at New York University Law School, where I still teach. In those days I taught a course called the

*** Professor, New York University School of Law. J.D., UCLA School of Law, 1968; B.A., Wellesley College, 1961. First under the auspices of the Women's Rights Clinic, and then through the Civil Rights Clinic at New York University School of Law, Professor Sager has represented plaintiffs in many employment discrimination and other civil rights cases. Her work on behalf of Brenda Berkman lasted for more than ten years.

Womens' Rights Clinic for third-year law students working under supervision on real cases in my area, employment discrimination. When Brenda Berkman came to see me that year, she was a third-year law student. She told me that she had taken the entrance exam to become a New York City firefighter, that she had passed the written part, but failed the physical part. She told me that all the women who took the test had failed the physical part. She said she thought the test discriminated against women.

This was the first time that the firefighter entrance test was open to women; the first time women even had a chance to apply for this job. Although Brenda was in law school, and intending to become a lawyer, she had always wanted to be a firefighter, and so she took the test. She did that not just for a lark, but because she truly hoped to pass the test and to get into the Fire Department. She asked me if the Clinic would take her case, challenging the validity of the physical test. I thought about it for a while and we talked a little bit. I agreed to take the case, but I had no conception of what that would mean for me, for my program or for my life over the next ten years.

Taking on the task of challenging the validity of the physical test was quite demanding, and after a year or two of litigation, the law firm of Debevoise & Plimpton joined as co-counsel in the case, at the suggestion of New York Lawyers for the Public Interest. As you may know, there are two legal theories on which a claim of discrimination can be based. One theory is intentional discrimination — that is, that an employer intentionally discriminates against a group of people, for example by intentionally constructing a physical test for the purpose of making it very difficult, if not impossible, for women to pass. The other theory is what is known as "disparate impact" discrimination. Under this theory, the plaintiff can claim that regardless of their intent, New York City in fact created a test that was much more difficult for women than for men, and that the test is not valid; that is, there is no evidence that people who score higher on the test will perform better on the job than people who score lower on the test.

When Brenda Berkman first came to see me, she explained that about 410 women had applied for the position of firefighter and that all the women had failed the physical test. We agreed that the focus of the litigation would be to show that the physical test was invalid — that passing or failing the test was not a predictor of who could do the job and who could not. Although we had some evidence of intentional discrimination by the City, the essence of the

case was a disparate impact claim. We argued that women who were strong and in very good condition (which Brenda Berkman always was) were capable of performing the physically demanding job of firefighter and could pass a valid physical test.

As an aside, I just want to mention that throughout the litigation the City seemed to think that Brenda was just a "stalking-horse" for other women. City lawyers and officials could not imagine that a woman who had graduated from N.Y.U. Law School and had become a lawyer would leave her job to go to work in a firehouse. Of course, Brenda really meant it and, as you can see, she achieved her childhood dream of becoming a firefighter. Besides winning this case, I was gratified to be able to show the City that this person meant what she said.

The first phase of the litigation consisted of our challenge to the validity of the physical test. Did the test in fact measure whether a person could perform the physical requirements of the job? After a trial that extended over several weeks in the Eastern District of New York, Judge Sifton found conclusively that it did not. He ruled that the test was invalid and he ordered the City to devise a new interim measure to test the fitness of Brenda and the other class members, and to develop a new test for future use. In 1982, the new interim test was given and Brenda and many other women passed. In a very emotionally stirring ceremony, Brenda and the other women were sworn in as the first women firefighters in the history of New York City.

Unfortunately, the case did not end there, because, after the standard one-year probationary period for all Fire Department personnel, the City determined that all of the women except for two should be granted tenure. Those two women were Brenda Berkman and Zaida Gonzales. Brenda Berkman, as you know, was the lead plaintiff in the case, and had been the subject of a lot of publicity. Zaida Gonzales also had been the subject of a lot of publicity because she was featured on the cover of *New York Magazine*. During their probationary year in the firehouses, both Brenda and Zaida Gonzalez had a lot of very bad things happen to them. Both of them were denied training that other probationary firefighters were given. Both of them were subjected to abusive treatment by men in the firehouses. Some of the harassment was sexual in nature, and some was abusive in other ways. For example, both Brenda and Zaida were "put out of the meal." In the firehouse, firefighters eat collectively: they buy the food collectively, they cook and they eat it. But both Brenda and Zaida were

told that they could not eat with the other firemen. That gives you some idea of what life was like for them in the firehouses. And then, at the end of their probationary year, the City announced that these two women, out of all the women who had now joined the Fire Department, would be terminated.

So, a year after we had won what we thought was a victory in the case, we were back in court with a second case claiming that the termination of Brenda and Zaida Gonzales was unjustified and constituted retaliation against them. Once again, Judge Sifton heard the case and he ruled that by denying these two women the training that was given to other probationary firefighters, and by permitting them to be subjected to egregious harassment in the firehouses, the Fire Department had not treated them fairly. The judge ordered the City to give Brenda and Zaida Gonzalez the training they had been denied and then test them on their ability to perform fire-fighting tasks. After several weeks of such training, the women passed their tests with flying colors and became tenured members of the Fire Department.

The lawsuit, however, continued. The City developed another physical test that was so demanding that at least one person died from heart failure while taking it. We challenged that test in another round of litigation, but the courts held that new test was valid. Subsequently, however, the City gave up on that test, and has developed yet another test. Hopefully, women will be able to pass the physical tests that the City gives in the future and there will be more women firefighters.

Before I close, I want to say a few words about Brenda Berkman. Brenda performed the role of named plaintiff in a class action as well as anyone could possibly do. She did not merely lend her name to the case, but provided real leadership and support to the other women who wanted to be firefighters, the class members. This case went on for a long time, and Brenda was subjected to an extraordinary degree of animosity and hatred, even receiving death threats. But she never wavered in her determination to see the case through and to become a firefighter.

Looking back, I believe that this case accomplished a great deal. Brenda Berkman is now a Lieutenant in the Fire Department. Beyond that, however, there are many other women in the New York City Fire Department, including one woman who is about to become a Captain. Who knows, the second Captain may be Brenda Berkman. What these women have demonstrated through their commitment, courage and dedication is that gender is not the bar-

rier that it was once for highly demanding physical work for women. Working on this case was a wonderful experience for me, and I am especially happy that Brenda and I have remained friends through all these years.

*Artist: Susan Schuppli*****

As an artist I think you always work with a specific image, but then translate it, transform it, into something a little more general is capable of reaching a broader audience. My own work has always dealt with the relationship between women and institutional structures — predominantly around issues of violence against women. Brenda's case provided an opportunity for me to continue the work I already do and am committed to as an artist.

In most of my past projects, I have inserted a female protagonist into a type of prototypical masculine narrative. This case was interesting because of the subject, a sort of heroic figure, yet largely masculine figure, the firefighter. Also, the opportunity to work with a very specific case was appealing. This was not fiction. Thus, I created a chronology of this very protracted struggle that Brenda Berkman endured over the course of fifteen or twenty years. And while the battle in the court may be over, the struggle continues in her daily life working in the Fire Department. So, this was a very important opportunity for me to actually work with a very kind of particular case. So there was no longer the kind of fictionalizing element that I often used in my work.

At the same time, the challenge for me, and I suspect for a lot of artists, is to change something that is so complex and enormous as this case into a sign that conveys the importance of the issues behind it. The first trial alone lasted twenty-two days and produced more than 3,500 pages of transcripts debating one particular exam in the court. How do you take all of that information and reduce it to the form of a sign so it relates to the case, provides information, but still captures the struggles of what was a very lengthy battle? As a result, I produced a sign that actually has quite a lot of language that had a relationship to the case, words like inflammatory and ignite.

**** Susan Schuppli is a Canadian visual artist and educator. She has participated in numerous exhibitions in Canada, the United States and Great Britain, and has also produced and curated commissioned public art projects in Seattle, Vancouver and San Diego. She received her MFA from the University of California San Diego and is currently on the art faculty at the University of Lethbridge, Alberta.

What was interesting to me actually about the relationship between art and law is that people who are engaged in those activities are often quite removed from the effects of their work. Artists and lawyers often fail to understand the relationship that their activities have to people's everyday lives. Individuals that are often seen as doing something that isn't always or understood to be useful, quite an interesting kind of parallel.

As it has been a point of contention between Brenda and I, I wanted to conclude by saying that the woman in the sign that I created is not Brenda Berkman. It is a symbol. I always worked with visual images that have a symbolic presence. So, for me the woman in the sign becomes a kind icon, one representing women of strength. It relates back to that point I made at the beginning about transforming very specific ideas into general ones, because, like the final line in the sign says, we need to ignite on-going awareness about all of the issues that impact upon women's everyday lives. For me what was most important, in a sense, was that women could project themselves into that kind of masculine narrative. That is the very heart of the sign.

*McCain v. Koch*²*Attorney: Steven Banks*[†]

In 1982, Yvonne McCain became homeless as a result of domestic violence. She and her three children went to a New York City shelter due to this abusive relationship. Because she was sent to the City after leaving her mother's home, where she had been living in a crowded one-bedroom basement apartment, the City denied her and her children shelter. The City officials denied her shelter because she was living with a relative; the City denied Yvonne help on account of her not telling them she was fleeing from domestic violence. Yvonne, like so many women, had not come to grips with the domestic violence issues in her life at the time and yet she was turned away, despite the fact that her mother would not house her anymore.

Yvonne ended up sleeping on the floor with her kids at a City Welfare Office. Ultimately, when she was finally provided with shelter, she was sent to the Martinique hotel, among the most notorious of the welfare hotels. The four of them lived there, sleeping on a urine stained mattress bare on the floor. They had no towels, sheets, or operable plumbing. The room was infested with mice and cockroaches. Yvonne was forced to hang the children's milk out the window, trying to keep it cold in a box hung outside the window, because, of course, there were no refrigerators. There were no window guards either so, it was not very difficult to put the box outside the window. Ironically, it is a Holiday Inn now. She and I were actually there a few months ago for an interview she was doing with a news organization. I think she particularly enjoyed the fact that there is a REPOhistory sign that is going to be posted out in front of the Holiday Inn, right near Macy's.

Yvonne went to a community group called the "Redistribute America Movement," an outgrowth of the Downtown Welfare Advocacy Center. She went looking for help because she could not get help from legal services offices or Legal Aid. Yvonne did not have a housing problem, she had no housing at all; she did not have a benefits problem because shelter was not a benefit. So she went to a community group looking for help. I knew someone at that

2. 511 N.E.2d 62 (N.Y. 1987).

[†] Deputy Attorney-in-Charge, Civil Division, Legal Aid Society; Coordinating Attorney, Homeless Rights Project, Legal Aid Society. Mr. Banks has been counsel in the *McCain* litigation on behalf of homeless families for sixteen years and now serves as counsel to the Coalition for the Homeless in litigation on behalf of single adults.

community group who called me and let me have it. How could it possibly be that I could not help a person such a Yvonne, one who needed so much help. At that time, I was a staff attorney in our Staten Island office and because Yvonne McCain's last address was in Brooklyn, I couldn't represent her.

Eventually, she ended up being represented initially by a lawyer named Marcella Silverman, who is now a professor at Fordham Law School, a colleague of Matt Diller's. I remember calling Marcella about this case and explaining the problem. Marcella interviewed Yvonne and then Marcella and I spoke about the case. I remember being unsure about whether the law would help her. Some things just cannot be solved through legal means, I thought. Still unsure of what to do, Legal Aid lawyers pressed on working weekends and getting others involved, such as Ann Moynihan and the other neighborhood office of Legal Aid Society lawyers.

That was about fifteen and-a-half years ago and I wish that I could say that the litigation has come to a conclusion. Unfortunately it has not. The *McCain* litigation, however, has been a lightening rod for a lot of changes affecting homeless people. There are some terrific court orders and decisions: orders requiring the City to provide safe, suitable and adequate shelter and there are very significant orders that provide for what those conditions have to be. As a result of that, the Martinique Hotel was closed.

The struggle involving homeless people, however, continues to be a struggle, now though three mayoral administrations. Unfortunately, the court cannot be with every plaintiff twenty-four hours a day, and that is part of the problem of fighting this struggle during so many different mayoral administrations: trying to get compliance with court orders or trying to enforce court orders in litigation. During the Koch years, the administration initially failed to acknowledge the legal rights of the homeless, but once court orders were issued, that administration ultimately complied. During the Dinkins Administration, there was an acknowledgment that this is a terrible problem and that they should comply with the orders. That administration, however, did not comply with the orders. The current administration, however, has no desire to be bound by anything other than what the administration decides. This is a very difficult environment to litigate a case in, but that is what we are currently attempting to do.

Yvonne's problems were resolved during the first phase of litigation, but she has remained involved throughout these fifteen-and-a-half years. She testified before the Congress. She has testified in

a number of other settings about the needs of homeless people and she currently serves on an advisory board in the Legal Aid Society. I think she stays involved because no one has answered her original question yet: Why can the government spend thousands of dollars to put people in shelters and only give them a couple hundred dollars a month as their rent allowance? We may have to litigate this in pieces, but Yvonne continues to press on to have that question answered and continues to hold our feet to the fire.

Currently, Yvonne is doing well with her life. She is working in a community organization. Her batterer died and, predictably, that was a major event in her life. Her kids are doing well also. Thinking about the sign and thinking about what she thought about the case reminds me of when I accompanied her to the Welfare Fair Hearing with her daughter. The State Administrative Law Judge asked, "Excuse me, are you the Yvonne McCain?" Her daughter turned and said proudly, "That's my mom." Yvonne cared a lot about her children and it meant a lot to her that they viewed her as someone that would not quit. The fact that the government said it was tough luck, or that you had to sleep on the floor of an office or the Martinique Hotel. She did not want that for her kids, herself or any one else, and so, she wanted to change the system.

*Goldberg v. Kelly*³

Attorney: Henry A. Freedman††

Almost thirty-one years have passed since *Goldberg v. Kelly* was filed here in New York City. The issues it raised and the problems it addressed then are still with us today. The importance of these issues has only grown since the case was decided.

When the case was first filed, it seemed revolutionary from both a legal and human point of view. The U.S. Supreme Court held that welfare benefits could not be terminated without advance notice of the reason for the proposed termination and an opportunity for a hearing before termination, so that the individual could contest the correctness of the termination. The decision by Justice William Brennan contained powerful language to which all law students and all persons concerned about the fair treatment of the powerless should be exposed. Brennan wrote "there is one overpowering fact which controls here by hypothesis: a welfare recipient is destitute without funds or assets. Suffice to say that the cut-off of welfare recipient in the face of brutal need without a prior hearing of some sort is unconscionable unless overwhelming considerations justify it."

Why was this revolutionary from a legal point of view? Well, for one thing, neither the Supreme Court nor lower courts ever said any thing like this before until this case was filed. Plaintiffs' lawyers relied on the Due Process Clause: "nor shall any state deprive any person of life, liberty or property without due process of law."

Creative law professors, led by Charles Reich at Yale, had written extensively about the reality of the modern welfare state and welfare as a property right. Well-being, indeed even the survival of many individuals, these professors said, depended on benefits con-

3. *Goldberg v. Kelly*, 397 U.S. 254 (1970), *aff'g sub nom. Kelly et al. v. Wyman*, 294 F. Supp. 893 (S.D.N.Y. 1968) ("We hold that a pre-termination hearing for welfare recipients is constitutionally required and that the procedures set forth above for such hearing are the constitutional minimum.").

†† Executive Director, Welfare Law Center (formerly the Center on Social Welfare Policy and Law), 1971-present. While a Reginald Herber Smith Fellow at the Center in 1967, he participated in drafting the papers and filing the complaint in *Goldberg v. Kelly*. Freedman was awarded the 1998 New York State Bar Association Public Interest Law Award and the 1981 National Legal Aid and Defender Association Reginald Herber Smith Award for Dedicated Service. Before becoming Executive Director at the Center, Mr. Freedman had been in private practice in New York City and taught at Catholic University Law School in Washington D.C. Mr. Freedman has also taught at Columbia and New York University Law Schools, and Columbia and Fordham Schools of Social Work. He is a graduate of Yale Law School and Amherst College.

ferred by the state, whether they be driver's licenses, pilot licenses or food stamps. Since there were rules on who was eligible for benefits, Reich argued, these benefits had become a new type of property, property that the government could not take away without due process of law. The Supreme Court accepted this analysis in *Goldberg v. Kelly*.

It was particularly exciting to see these new ideas transformed into the law of the land. To see the courts empathize with the plight of persons who needed public assistance was exciting and moving; it was emotional. Indeed, Justice Brennan understood what it was like to be desperate and without resources and in need of government aid.

I was fortunate to be involved in this case from the very beginning. I was working at the Center on Social Welfare Policy and Law (currently the Welfare Law Center). The Center was established in 1965 by a great man, Edward Sparer. He was trying to duplicate, in the area of poverty, the approaches that had been used in the Civil Rights Movement. I was a new lawyer at the time and I was helping develop the theories and papers for this kind of suit.⁴

As fate would have it, I met up with David Diamond, then at MFY Legal Services on the lower Eastside, at the City Bar Library for a meeting. There I said, "David, you have many people coming into your office at MFY, why don't you see if anybody comes in who presents this problem. We have the papers; we can go into court." He called me two days later, ready with six plaintiffs.

I was surprised; I still did not appreciate how common place it was for eligible recipients — and all six of them were eligible — to get denied benefits without a hearing. We filed the case, and did a lot of the work on it. Eventually the senior, more experienced attorneys took the case over. Needless to say, as a young lad I greatly resented that, but I can tell you there is a reason for having experienced people do things; that is something that one learns over the years.

Goldberg v. Kelly made a profound difference in the way welfare programs are administered in New York City, New York State and around the country. Here in New York State since *Goldberg* was

4. There had actually been one suit filed in the South. Marion Wright Edelman, founder and President Children's Defense Fund, was a lawyer in a case in Mississippi, in the first prior hearing case filed. The State of Mississippi folded and agreed to grant a prior hearing. So, while Mississippi didn't give benefits that were worth anything, the state was willing to continue aid until there was a hearing.

decided, millions of hearings have been provided. As a result, millions of people have obtained the assistance they so desperately need.

The bad news is that Welfare Administration in this City and State continues to be a bastion of arbitrariness. Ten years ago, a New York State Bar Association Task Force concluded that the most serious threat to the fair hearing system in this state is that local agencies "appear to have made a cynical cruel choice. Decisions are allowed to be made wrongfully to deny, reduce or terminate benefits, knowing that many decisions will not be challenged and therefor money will be saved." Currently, our office is engaged in class action litigation against the City and State for not processing appeals in a timely fashion. We are suing the City for repeatedly failing and refusing to implement binding hearing decisions rendered by the State.

There is much to be discouraged about. In today's mail, I got the City Project's Analysis of the Mayor's most recent Management Report showing that, according to the City's own statistics, the percentage of public assistance applications rejected went from 26% in 1993 to 57% in 1998. People have not been losing eligibility over the last few years; the City has just changed the way those applications are processed. Indeed, Fair Hearing requests have increased by 70% because many more wrong decisions are being made. How do we know there are so many wrong decisions? Because when you look at the Fair Hearing results in 1998, the City won only 13% of the hearings. That is appalling. These problems are compounded by the City's explicit policies to make it difficult for persons to collect benefits, regardless of the fact that they meet all legal requirements.

Today, New York City turns away needy people from Welfare Offices without being allowed to file applications. At best, the poor are told to search for a job and come back another day. Every day we hear that people, are told incorrectly, that they are ineligible. If they filed an application, they are told to sign a form withdrawing their application, just in case they have second thoughts about pursuing it. New York City's poor are repeatedly denied due process. This problem is compounded by public and agency officials who thumb their noses at court orders, thus creating more work for the few lawyers available to bring class actions and seek systemic change.

It is frustrating that these battles must be waged constantly. I went to law school to help achieve social and economic justice, or

to at least make a difference in the lives of others those who are weak, powerless and in enormous financial need. I am delighted to have been able to do that and get paid for it.

I am particularly thrilled to see the type of recognition that the REPOhistory Project brings to these issues. It is so important that this information be put out on the streets of our City where people who are affected can see it and can know that these battles are being fought on their behalf. The signs and the stories behind them have inspired me. I hope that it will encourage everyone here to continue in the struggle and to have those struggles recorded in many more beautiful signs posted all over our City.

Artist: Mona Jimenez†††

My personal history, beyond this sign and my artistic life, has afforded me a real connection to welfare rights and welfare issues. I had my first experience with the "system" when I was about nineteen and pregnant, when my partner and I received Medicaid to help pay the medical expenses. Later, while a single parent, I was on assistance for a couple of years, including a job-training program called the WIN Program. In subsequent years, I learned a lot about Welfare and public assistance by living and working.

In 1976, I began to do welfare organizing as a founding member of the Geneva Women's Resource Center in Geneva, New York. Many of the founding members were single mothers who had experience with welfare, so the issues of women with low incomes were important to us and we wanted to help others. In fact, one of the first components of the Center was walk-in counseling and advocacy on issues of housing and welfare rights.

In 1980, I was hired by Legal Services, and worked there until 1986 as a paralegal. I worked in five rural counties in upstate New York doing welfare advocacy (including many fair hearings) and community legal education. Later, I worked as an welfare rights organizer in Wayne County, a rural county located between Syracuse and Rochester, New York. We did a lot of great work there,

††† Mona Jimenez is a visual artist who uses electronic tools to make both time-based work and prints. Her work often involves retelling stories about lost or little known historical, cultural and personal history. Jimenez has been an artist in residence at Yaddo, the Millay Colony, and Light Work, and was the recent recipient of an Artist Fellowship in Computer Arts from the New York Foundation for the Arts. Her work is held in several video and photographic collections, and has been published in *Light Work's Contact Sheet*, *CEPA Quarterly*, and *Felix: A Journal of Media Arts and Communication*. As a media arts consultant, she assists non-profits with their Internet, multimedia and video projects.

using tactics that worked, like organizing a free lunch in the welfare office to get media attention about the welfare department's unconstitutional denials of emergency food stamps.

I remember the day that Mark O'Brien called and asked me to work on the REPOhistory project. Mark described the project - to produce signs about landmark court cases - and asked if I wanted to work on *Goldberg v. Kelly*. I was stunned; I said it would be an honor to work on the case, as *Goldberg v. Kelly* is so fundamental to welfare rights and has had such a profound impact on so many people's lives.

While an organizer, I had always wanted to do a series of posters that spoke about the skills, knowledge and perseverance that welfare recipients must have to get through the system and continue to live and raise children with self-respect. A couple years ago, I had done a piece for *Felix: A Journal of Media Arts and Communication* that dealt with the issue of fingerprinting welfare recipients. This sign project was along that line - a public expression of the welfare rights issue.

As an artist, it was a real challenge for me to do the sign. While in my artwork I often combine text and image, I usually don't use many words, and my work tends to be very personal. I tried very hard to make the language non-technical and to remain, as Henry Freedman suggested, celebratory of the case, rather than to focus on complaining about the system. But the real challenge was figuring out what I wanted to say, because there are so many different aspects to the case.

I first thought about the audience for the sign. I thought that people who would casually walk by the sign may or may not believe some of the myths about welfare and low income people that are so prevalent now. It was important to deal with some of these myths, and to also assume that some of the people may not know basic facts about welfare. I also assumed that part of the audience would be those seeking welfare or those already on welfare that may not know about their right to a fair hearing. So it was important to address both groups.

In creating the sign, I asked myself: what is it that is so essential about this case, in terms of reality of dealing with the system on a day to day basis? The image of the hands holding papers came from the importance paper plays while asserting your rights within the welfare department. You are constantly saving papers, providing documentation, writing things down, and telling the welfare workers to put papers in your case file about your needs or actions

you have taken. All the paper is so important - it is really the only way you can prove your side of the story.

That's essentially what the eligibility process is all about, and what welfare hearings are all about - being able to prove your case. The flip side of the sign describes what welfare hearings are and why we need them - that before *Goldberg*, you could be cut off arbitrarily, without a chance to tell your side of the story. I also explained that welfare is not a charity, it is an entitlement for those who qualify. I gave facts about hearings in New York City, including estimates by the Welfare Law Center about how often the City loses fair hearings, because so many people are being wrongfully denied welfare benefits. This serves as a sad reminder of how far we have to go before the vision of *Goldberg v. Kelly* is finally realized.

DOROTHY DAY, WORKERS' RIGHTS AND CATHOLIC AUTHENTICITY

David L. Gregory*

Introduction

Several years ago, I kept a personal resolution to reread all of the material written by and about Dorothy Day¹ and *Catholic Worker*, the newspaper and the movement she, with Peter Maurin, co-founded in 1933. I first read this wonderful literature during high school in the late 1960s. The impact this body of work had on me was enormous; it compelled me to study philosophy and theology throughout college seminary and contemplate entering the Roman Catholic priesthood. Although I discerned my vocation was to teach,² rather than to become a priest, my initial immersion into the writings of Dorothy Day and *Catholic Worker* strongly influenced my personal and academic work. Since 1982, I have taught the entire labor and employment law curriculum, as well as constitutional law and jurisprudence, at St. John's University School of Law, while also teaching periodically at the University of Colorado, Brooklyn, Hofstra and New York Law Schools.

* Professor of Law, St. John's University. B.A., The Catholic University of America, 1973; M.B.A., Wayne State University, 1977; J.D., University of Detroit, 1980; LL.M., Yale University, 1982; J.S.D., Yale University, 1987. Constantine Dean Pourakis, (B.A., Cornell University School of Industrial and Labor Relations, 1997; J.D. candidate, St. John's University School of Law, 2000) provided excellent research assistance in the preparation of this article. Mr. Pourakis is also the inaugural Dorothy Day Memorial Scholar for Excellence in Labor and Employment Relations at the St. John's University School of Law, and the Secretary of the School's Labor Relations and Employment Law Society during the 1998-99 academic year. I thank everyone who generously commented upon earlier drafts of this paper, during presentations at the University of Dayton Graduate School of Education on October 29, 1998 and at the Catholic Worker Maryhouse in New York City on November 6, 1998. I was especially honored by the opportunity to present this paper in the Colloquium on the Catholic Tradition at the University of Dayton. Rev. James L. Heft, S.M., Chancellor of the University of Dayton, Professor Charles Russo and Jane Sammon of *The Catholic Worker* provided special guidance and inspiration.

1. There is voluminous primary and secondary literature on Dorothy Day and the Catholic Worker movement. See, e.g., David L. Gregory, DOROTHY DAY'S LESSONS FOR THE TRANSFORMATION OF WORK, 14 HOFSTRA LAB. & EMPLOYMENT L.J. 57, n.4 (1996) (extensive citation of those many primary and secondary sources).

2. See David L. Gregory, *The Discernment of Vocation in Law*, 66 FORDHAM L. REV. 1425 (1998).

A significant portion of my academic publications have explored various themes of Catholic social justice³ in labor and employment law,⁴ and the impact of Catholic social justice on the labor move-

3. See POPE LEO XIII, *RERUM NOVARUM* (The Condition Of Labor) (1891)); POPE PIUS XI, *QUADRAGESIMO ANNO* (Forty Years) (1931); POPE PIUS XII, *SERTUM LAETITIAE* (Crown Of Joy) (1939) POPE JOHN XXIII, *MATER ET MAGISTRA* (Mother And Teacher) (1961); SECOND VATICAN COUNCIL, *GAUDIUM ET SPES* (Pastoral Constitution On The Church In The Modern World) (1965); POPE PAUL VI, *OCTOGESIMA ADVENIENS* (A Call To Action); (1971) POPE JOHN PAUL II, *LABOREM EXERCENS* (On Human Work) (1981); POPE JOHN PAUL II, *SOLICITUDO REI SOCIALIS* (1987); POPE JOHN PAUL II, *CENTESIMUS ANNUS* (On The Hundredth Anniversary Of Rerum Novarum) (1991). See also GREGORY BAUM, *THE PRIORITY OF LABOR* (1982); GEORGE G. HIGGINS, *ORGANIZED LABOR AND THE CHURCH REFLECTIONS OF A "LABOR PRIEST"* (1993); *CO-CREATION AND CAPITALISM: JOHN PAUL II'S LABOREM EXERCENS* (John W. Houck & Oliver F. Williams, eds.) (1983); *CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* (David O'Brien & Thomas Shannon, eds.) (1992). Catholic social teaching is an evolving body of ecclesiastical documents and a rich tradition of particular, heterogeneous applications. Pope John Paul II was a powerful champion of the Solidarity movement, a labor union political initiative that brought down the Communist government of Poland. The Canadian and United States Bishops also have been eloquent spokespersons for the rights of workers. U.S. NATIONAL CONFERENCE OF CATHOLIC BISHOPS *PASTORAL LETTER ECONOMIC JUSTICE FOR ALL* (1986); *CATHOLIC FRAMEWORK FOR ECONOMIC LIFE* (1996). The most influential early work on the Catholic social teachings on labor in the United States was that of Monsignor John A. Ryan, one of Monsignor George Higgins' intellectual mentors at the Catholic University of America. See JOHN A. RYAN, *A LIVING WAGE* (1906); *DISTRIBUTIVE JUSTICE* (1916). I extensively discuss Catholic social teaching on labor in David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119 (1987); David L. Gregory, *Catholic Social Teaching On Work*, 49 LAB. L.J. 912 (1998); David L. Gregory, *Dorothy Day's Lessons for the Transformation of Work*, 14 HOFSTRA LAB. L.J. 57 (1996); David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 119 (1988); David L. Gregory and Charles Russo, *Overcoming NLRB v. Yeshiva University by the Implementation of Catholic Labor Theory*, 41 LAB. L.J. 55 (1990). Catholic social teaching on the rights of workers became popularized in the Academy-Award winning film, *On the Waterfront* (1953), inspired by Jesuit priest John "Pete" Corridan's work against labor racketeering on the New York City shipping docks. The Nobel Peace Prize for 1996 was awarded to Catholic Bishop Carlos Belí, the apostolic administrator of Dili, the Capital of East Timor, for his social justice advocacy for the persecuted populations of Indonesia.

4. See generally, David L. Gregory, *Br(e)aking the Exploitation of Labor?: Tensions Regarding the Welfare Workforce*, 25 FORDHAM URB. L.J. 1 (1997); David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119 (1988); David L. Gregory, *Catholic Social Teaching on Work*, 49 LAB. L.J. 912 (1998); David L. Gregory, *Dorothy Day's Lessons for the Transformation of Work*, 14 HOFSTRA LAB. L.J. 57 (1996); David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992); David L. Gregory, *Introduction to the Welfare Workforce Colloquium*, 73 ST. JOHN'S L. REV. (forthcoming 1999). David L. Gregory and Charles J. Russo, *Overcoming NLRB v. The Yeshiva University By the Implementation of Catholic Labor Theory* 41 LAB. L.J. 55 (1990); Charles J. Russo and David L. Gregory, *Reflections on the Catholic University Tenure Prerogatives*, 43 LOY. L. REV. 181 (1997); David L. Gregory and Charles J. Russo, *The First Amendment and the Labor Rela-*

ment.⁵ Surprisingly, in almost two decades of teaching law, I have not encountered one law review article focusing primarily on Dorothy Day and *Catholic Worker*, despite the numerous passing references. This inexplicable vacuum stunned me. My personal resolution thereafter became a professional project, leading me to ultimately publish the first extensive law review article on the subject, *Dorothy Day's Lessons For the Transformation of Work*.⁶

The winter of 1999 marks the fiftieth anniversary of a defining moment in the history of *Catholic Worker*. During the crucible of that post-World War II winter, then-Archbishop of New York Francis Spellman broke a strike by Catholic cemetery workers at the largest Catholic cemetery in New York City. Dorothy Day, *Catholic Worker*, and the Association of Catholic Trade Unionists all unequivocally supported the strike.

Ultimately, more important than the labor "battle" of 1949 is the positive example Dorothy Day provided. The 1949 incident allows us to reflect upon, and appreciate, the authenticity of the Catholic tradition and the way in which any Catholic can, and should, communicate directly with his or her Bishop. Dorothy Day offered us a model of how to communicate within the Church and about how to call to witness the Church's professed commitments to social justice.

Part I of this Article examines the background of the labor dispute of 1949. Indeed, at the time *Catholic Worker* and Cardinal Spellman could not have been more diametrically opposed than they were during this bitter and tragic labor strike. Part II discusses Dorothy Day and the example she provides for all Catholics, and persons of all faiths. This Part also discusses the eventual resolution of the strike and the role *Catholic Worker* took in bringing about the end of the dispute. Part III then applies the lessons of Dorothy Day to current issues of dialogue in Catholic life.

tions of Religiously Affiliated Employers, 8 B.U. PUB. INT. L.J. (forthcoming, 1999); David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C.L. REV. 135 (1988); David L. Gregory, *The Role of Religion In The Secular Workplace*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 749 (1990).

5. I have been especially blessed to co-author several articles with Dr. Charles J. Russo. In addition to several of our co-authored labor and employment law review articles cited in footnote 4, see also, David L. Gregory and Charles J. Russo, *Let Us Pray (But Not 'Them')! The Troubled Jurisprudence of Religious Liberty*, 65 ST. JOHN'S L. REV. 273 (1991); David L. Gregory and Charles J. Russo, *The Supreme Court's Jurisprudence of Religious Substance and Symbol*, 28 LOY. U. CHI. L.J. 419 (1997).

6. 14 HOFSTRA LAB. L.J. 57 (1996).

I. Background: The 1949 Strike

Tragedy, as Guido Calabresi⁷ reminds us, is not the choice between a right and a wrong, but between a right and a right.⁸ By this definition, the 1949 cemetery workers' strike was indeed a tragedy. There, the need for the performance of a Corporal Work of Mercy — to bury the dead — was in tension with the dignity and rights of workers. It is to the 1949 strike that we now turn.

A. The Sides

The Calvary Cemetery ("Employer") of Middle Village, Queens, is the largest Catholic cemetery in New York City.⁹ More than one and a half million persons were buried there in the last century alone. In addition, the Calvary Cemetery employed the largest number of unionized cemetery workers in the New York Metropolitan area — 240 to be exact. The United Cemetery Workers, Local 293 of the Congress of Industrial Organizations ("Union") provided the manual labor services for the Cemetery and represented the labor interests of those who buried the dead there.

By December 1948, the Union had operated under a collective bargaining agreement for two years. Under that contract, workers received \$59.40 for a six-day, forty-eight hour week, which typically ran from Monday through Saturday. On December 14, 1948, the Union, with close to 1,000 members, presented its demands for the successor contract, specifically seeking a five-day, forty-hour week for the same \$59.40 weekly rate of pay.¹⁰ In addition, the Union asked for overtime pay for working more than eight hours in one day and for any Saturday work. On January 4, 1949, four days after the collective bargaining agreement expired, the Archdiocese rejected all of the Union's demands and offered a wage increase consonant with the 2.6% annual cost of living increase measured by

7. Mr. Calabresi served as Dean of the Yale School of Law from 1985 to 1994. Currently he sits as a judge on the United States Court of Appeals for the Second Circuit, a position he has held since 1994.

8. GUIDO CALABRESI, *TRAGIC CHOICES* (1978).

9. The Trustees of St. Patrick's Cathedral operated both the Calvary Cemetery and the Gate of Heaven Cemetery near Hawthorne, New York.

10. The average wage for a gravedigger at Calvary Cemetery was somewhat less than \$3,100 in 1948. The Bureau of Labor Statistics estimated \$4,064 (family of five); \$3,579 (family of four); \$3,035 (family of three) necessary for "frugal comfort" in New York City. And, while the cemetery workers were well paid, relative to other cemetery workers, they earned considerably less than the average \$59 weekly industrial wage (for a forty-hour week) in New York State in 1948. See John Cort, *The Calvary Cemetery Strike*, *COMMONWEAL* Feb. 18, 1949, at 471-72.

the Bureau of Labor Statistics.¹¹ Forty-eight hours after receiving this letter, the rank-and-file voted overwhelmingly to strike.¹²

B. The Winter of Our Discontent

On January 13, 1949, the Union established a sixteen-man picket line at the major entrance to the 400-acre Calvary Cemetery.¹³ As a result of the walkout, the cemetery could not proceed with the thirty-five burials scheduled that day.¹⁴ Coffins were placed in temporary graves under tarpaulins, awaiting permanent burial upon the conclusion of the strike.¹⁵ The strike's conclusion, however, was nowhere in sight.

The contentiousness of the strike became its most identifiable feature. Immediately, the Employer characterized the Union's demands as seeking a 30% increase in their compensation rate.¹⁶ Monsignor George C. Ehardt, the Managing Director of the Calvary Cemetery and Archdiocese Co-Chancellor, in an attempt to demoralize the union members, wrote letters to each striker stating that the Union leadership was "poor and unprincipled," and "did not fairly represent you."¹⁷ He continued, threatening that "if the strikers did not return to work by 7:30 a.m. on January 31, 1949," "we shall understand that you intend to sever your relationship with us."¹⁸ In a showing of solidarity, not a single striker returned

11. John Cort, *The Calvary Cemetery Strike*, COMMONWEAL, Feb. 18, 1949, at 471 [hereinafter Cort, *Cemetery Strike*]. Moreover, the negotiations, such as they were, were bizarre. Monsignor George C. Ehardt reportedly told the Union negotiators that the Passionist priests, who wrote pro-labor literature, were "a bunch of bandits," and the Monsignor rhetorically asked the devout, and dumbfounded Union negotiator, "Don't you know then that there is no God?" JOHN COONEY, *THE AMERICAN POPE: THE LIFE AND TIMES OF FRANCIS CARDINAL SPELLMAN* 89 (1984).

12. See Cort, *Cemetery Strike*, *supra* note 11.

13. See *id.*

14. See *id.*

15. See *id.*

16. *Strike Suspends Calvary Burials*, N.Y. TIMES, Jan. 14, 1949, at A48; *Cardinal to Help Bury Dead Today and Seminarians Replace Strikers*, N.Y. TIMES, Mar. 3, 1949, at A1, A26. According to Archbishop Spellman, much of the grave preparation work required weekend work. Therefore, according to the Cardinal, the union workers were demanding a new wage scale of \$77.22 for a six-day week. Monsignor George C. Ehardt reiterated similar sentiments: "We are confronted with a staggering payroll for our employees and every dollar of the cemetery expense must come out of the pockets of our Catholic people, who, we feel, are now subjected to enough expense, in their hour of sorrow." *Strike Suspends Calvary Burials*, N.Y. TIMES, Jan. 14, 1949, at A48.

17. *Id.*

18. Cort, *Cemetery Strike*, *supra* note 11.

to work on January 31, 1949.¹⁹ Likewise, fifty employees, and fellow union members from the Gate of Heaven Cemetery, joined the striking Calvary Cemetery workers.²⁰ The Association of Catholic Trade Unionists ("Association"), a satellite initiative flowing directly from the Catholic Worker movement, also supported the strike.²¹ Support for the strikers, who were primarily Irish, Italian and Polish Catholics, and their Catholic leaders, Union President Joseph Manning and Union attorney John J. Sheehan,²² began to mount.

By this time, the scenario had reached macabre proportions. Over 1,020 bodies lay unburied at the Calvary Cemetery, with sixty additional bodies arriving daily.²³ In addition, another one hundred burials were deferred at the Gate of Heaven Cemetery. New York City Deputy Commissioner of the Department of Health Matthew A. Byrne suggested that the situation would soon become a violation of the City's sanitary codes.²⁴ The sides, however, were far from resolution.

C. The Strike Intensifies

With no end in sight, the sides became more frustrated and bitter. Five weeks into the Calvary strike, and one week into the Hawthorne strike, the Employer took to strikebreaking. Lay brothers from the Maryknoll Seminary began digging graves at the Hawthorne Cemetery at the request of Archbishop Spellman.²⁵ The Association accused the management of the cemeteries of "strikebreaking and union-busting."²⁶ "It is regrettable," Roger K. Larkin, an Association official, said, "[t]hat Catholics should find themselves on opposite sides of this issue."²⁷ Predictably, the polarized situation rapidly deteriorated. Attempts at reconciliation seemed more futile by the day; Cardinal Spellman's attempt to

19. *See id.* Later, the 240 Calvary Cemetery employees would unanimously reject a management order of February 8, 1949 to return to work or face the loss of their jobs. *See id.*

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *Cardinal to Help Bury Dead Today and Seminarians Replace Strikers*, N.Y. TIMES, Mar. 3, 1949, at A1. The City's code required that the dead be buried within ten days, except in the case of special permission granted by the City.

25. *See id.*

26. *Unions Score Cemeteries, Management's of Two Accused of Strikebreaking Activities*, N.Y. TIMES, Feb. 19, 1949, at A3.

27. *Id.*

meet with the strikers on February 28, only left everyone frustrated.²⁸ The strike continued, now with cemetery workers carrying various placards pacing back and forth in front of the Chancery Office of the Archdiocese of New York, on Madison Avenue at 51st Street in Manhattan, near St. Patrick's Cathedral.²⁹

Then, on Ash Wednesday, March 2, 1949, Cardinal Spellman announced that he and his Archdiocesan seminarians would serve as replacement workers starting March 3rd, at both the Calvary Cemetery and at the Gate of Heaven Cemetery.³⁰ The Cardinal characterized his seminarian "volunteers" from St. Joseph's Seminary as engaged purely in the corporal work of mercy of burying the dead.³¹ On the same day the Cardinal's "volunteers" replaced the strikers, Cardinal Spellman ostentatiously proclaimed that the strike was "Communist-inspired," and that he was "proud and happy to be a strikebreaker."³² The Cardinal said, "this resistance to the strike was the most important thing I have done in my ten years in New York."³³ Cardinal Spellman also contended that the parent Union of Local 293, the Food, Tobacco and Agricultural Workers, Congress of Industrial Organizations, was "strongly Communist-dominated"³⁴ and the Cardinal "made it plain that he would be willing to deal with the employees again if they became affiliated with another CIO parent group."³⁵

In response, John Sheehan, the attorney for the strikers, called the Cardinal's invocation of Communism a "red herring"³⁶ (a somewhat ironic metaphor for the Union attorney to use in characterizing the Cardinal's rhetoric). Sheehan further denounced the Cardinal as a strikebreaker, stating: "'The action of the Cardinal, in the opinion of the Union' is 'high-handed, arbitrary and sugges-

28. John Cort, *The Cemetery Strike II*, COMMONWEAL, Mar. 18, 1949, at 563, 564; COONEY, *supra* note 11, at 191-193.

29. *See id.*

30. *See id.*

31. The works of mercy of the Roman Catholic Church are: to feed the hungry, clothe the naked, give drink to the thirsty, visit the imprisoned, care for the sick, and bury the dead. The Catholic Worker, incidentally, directly counterposes the works of mercy with, as they term them, the "works of war," which they suggest are: destroy crops and land, seize food supplies, destroy homes, scatter families, contaminate water, imprison dissenters, inflict wounds, and kill the living.

32. WILLIAM D. MILLER, DOROTHY DAY: A BIOGRAPHY 404 (1982).

33. *Cardinal to Help Bury Dead Today and Seminarians Replace Strikers*, N.Y. TIMES, Mar. 3, 1949, at A1.

34. *Id.*

35. *Id.*

36. *Id.*

tive of the tactics used by anti-union employers ten years ago.’”³⁷ Indeed, days before the March “volunteering,” the Cardinal addressed 200 cemetery workers, asking them to return to work as individuals “without any Union.”³⁸ The Cardinal also previously appealed to the workers through several direct letters and a telegram, actions the Union attorney characterized as an attempt to “break the union.”³⁹

The Cardinal pled his case in the *New York Times*. “There are men who would permit themselves to be led into an unjustified and immoral strike against the innocent dead and their bereaved families, against their religion and human decency, and even against themselves and organized labor.”⁴⁰ He said that, as of that time, nothing in his ten years as Archbishop of New York had caused him “more thought and pain, than the strike,” and he characterized his action of strikebreaker “as a moral issue, transcending legalities.”⁴¹ The Cardinal further denounced as a “half truth” the workers’ continuing demand for a five-day, forty-hour week:

[T]he strikers themselves have told me that Saturday is the heaviest day in our cemeteries; that there are more interments on Saturday than on any other day; and that, in addition, the graves to be used on Monday must be opened on Saturday. They told me they wanted six days’ work for seven and one-half days pay, and their agent demanded a new wage scale of \$77.22 for a six-day week.⁴²

Union officials characterized the strike differently. John Harold, counsel to the Union and to the Association of Catholic Trade Unionists, said, “With all reverence and respect for the Cardinal, it is more important to recognize the right of workers to organize and barter collectively in unions of their own choosing and to pay a living and just wage than to bury the dead.”⁴³ Edward Ruggieri, Chairman of the local Union’s negotiating committee said, “to allow the seminary to take bread and butter out of our mouths is wrong. They are strikebreakers. I think the Cardinal has the wrong approach on this. He has given labor a black eye.”⁴⁴ Mean-

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Cardinal to Help Bury Dead Today as Seminarians Replace Strikers*, N.Y. TIMES, Mar. 3, 1949, at A1.

42. *Id.*

43. *Id.*

44. *Id.*

while, the Archdiocese threatened to go to court to enjoin the strike, due to the growing safety and health hazard from the accumulating number of coffins that the strikebreaking seminarians were not able to relieve.⁴⁵

II. Dorothy Day and *Catholic Worker*

Throughout her life, Dorothy Day remained theologically and liturgically traditional, though radical in her Catholic social justice activism. She once said, "When it comes to labor and politics I am inclined to be sympathetic to the left, but when it comes to the Catholic Church, then I am far to the right."⁴⁶

A. Criticizing the Cardinal

Predictably, Dorothy Day, along with *Catholic Worker* and ACTU, closely monitored and supported the strike. Because of Day's insistence that the strike was justified, members of *Catholic Worker* even joined the picket lines at the cemetery.⁴⁷ On March 4, 1949, Dorothy Day wrote a very eloquent letter to Cardinal Spellman:

I am deeply grieved to see the reports . . . of your leading Dunwoodie seminarians into Calvary Cemetery, past picket lines, to "break the strike" . . . of course you know that a group of our associates at *The Catholic Worker* office in New York have been helping the strikers, both in providing food for their families, and in picketing . . . You have been misinformed. I'm writing to you, because the strike, though small, is a terribly significant one in a way. Instead of people being able to say of us "see how they love one another," and "behold, how good and pleasant it is for brethren to dwell together in unity," now "we have become a reproach to our neighbors, an object of derision and mockery to those about us." It is not just the issue of wages and hours as I can see from the conversations which our workers have had with the men. It is a question of their dignity as men, their dignity as workers, and the right to have a union of their

45. *See id.*

46. *See VOICES FROM THE CATHOLIC WORKER* 63, 75, 80, (Rosalie Riegle Troester ed., 1993). "That was a very funny thing about Dorothy. For all her radicalism politically, Dorothy had a profoundly conservative streak in her makeup. She was a very conservative Catholic, theologically." *Id.* at 75. "Dorothy was an extremely orthodox Catholic, not at all theologically a dissident. She certainly would not at all favor abortion. She would, I think, take a dim view of homosexual behavior." *See id.* at 80. *See also* Alden Whitman, *Dorothy Day, Outspoken Catholic Activist Dies* at 83, N.Y. TIMES, Nov. 30, 1980, at A45.

47. MILLER, *supra* note 32, at 404-5.

own, and a right to talk over their grievances. It is no use going into the wages, or the offers that you have made for a high wage (but the same work week). A wage such as the Holy Fathers have talked of which would enable the workers to raise and educate their families of six, seven and eight children, a wage would enable them to buy homes to save for homeownership, to put by for the education of the children, certainly the wage which they have in these days of high prices and exorbitant rents, is not the wage for which they are working. Regardless of what the Board of Trustees can afford to pay, the wage is small compared to the men represented on the Board of Trustees. The way the workers live is in contrast to the way of living of the Board of Trustees Regardless of rich and poor, the class antagonisms which exist between the well-to-do, those that live on Park Avenue and Madison Avenue and those who dig the graves in the cemetery, — regardless of these contrasts which are most assuredly there, the issue is always one of the dignity of the workers. It is a world issue.⁴⁸

Day's letter emphasized the dignity of all persons, especially, laborers. The letter stressed peace, conciliation and the imperative of charity, decency and kindness toward everyone. It also urged Cardinal Spellman to negotiate with the graveyard workers, rather than break their union. The letter poignantly summarized her labor theory, completely symmetrical with the spirit of Pope Leo XIII's great labor encyclical in 1891, *Rerum Novarum*, and Pope Pius XI's labor encyclical in 1931, *Quadragesimo Anno*.

Day continued:

You are a Prince in the Church, and a great man in the eyes of the world, and these your opponents are all little men, hardworking, day laborers, hard handed and hard headed men, filled with their grievances, an accumulation of their grievances. They have wanted to talk to you, they have wanted to appeal to you. They felt that surely their Cardinal would not be against them. And oh, I do beg you so, with all my heart, to go to them, as a father to his children some might call it. Do not go to a court, do not perpetuate a fight, for ages and ages. Go to them, conciliate them. It is easier for the great to give in than the poor. They are hungry men, their only weapon has been their labor, which they have sold for a means of livelihood, to feed themselves and their families. They have indeed labored with the sweat of their brows, not lived off the sweat of anyone else.

48. Letter from Dorothy Day to Francis Cardinal Spellman, Archbishop of New York (Mar. 4, 1949) (on file with the author). This document was obtained courtesy of the Marquette University Library's *The Catholic Worker* archives.

They have truly worked, they have been poor, they are suffering now. Any union organizer will tell you that it is not easy to get men out on strike and it is not easy to keep them out on strike. But the grievance has grown, the anger has grown here. If there was only some way to reach peace. I'm sure that the only way is for you to go to them. You've been known to walk the streets among your people, and to call on the poor parishes in person alone and unattended. Why could not you go to the union, ask for the leaders, tell them that as members of the mystical body, all members are needed and useful and that we should not quarrel together, that you will meet their demands, be their servant as Christ was the servant of his disciples, washing their feet.⁴⁹

Despite her fervent plea, the Cardinal decided not to meet with the workers.

B. The Collapse of the Strike

The only conciliatory steps taken came from the Union. While the Cardinal continued to supervise the seminarians' grave digging, the striking members of Local 293 publicly took an anti-Communist oath and voted unanimously to disaffiliate with the Food, Tobacco and Agricultural Workers of America, the parent Union that the Cardinal attacked as "Communist dominated."⁵⁰ The workers consequently affiliated with the American Federation of Labor, the much less militant labor wing preferred by employers (prior to the AFL-CIO merger several years later).⁵¹ This vote to re-affiliate was ultimately unanimous.⁵² Although the Cardinal said that he "heartened by the cemetery workers action in quitting their 'Com-

49. *Id.*

50. Although union members insisted that "Communism was not a real issue in the strike," the Cardinal arrogantly responded, "They say Communism is not the issue. The issue is this morally unjust strike that leaves all of these people unburied. If they think that's decency, I don't." Harold Faber, *Gravediggers Take Anti-Red Oath: Move to Split from Parent Union*, N.Y. TIMES, Mar. 5, 1949, at B1. The Cardinal went on to say:

I admit to the accusation of strikebreaker and I am proud of it. If stopping a strike like this isn't a thing of honor, then I don't know what honor is. The reason I considered trying to break the strike is because I think it is an immoral strike, an unjustifiable strike. I don't know about the legality of this because it is none of my business. And I've had a problem confronting me for several weeks and know of no other way to solve it. I wish I did.

Id.

51. *See id.*

52. *Gravediggers Break with the CIO to Lay Charge of Communist Link*, N.Y. TIMES, Mar. 9, 1949, at A1.

munist parent union,'” there was no effective positive response from the Archdiocese.⁵³

Meanwhile, the strikers continued to meet at the Anoroc Democratic Club, in Sunnyside, Queens.⁵⁴ The strikers opened their union meetings with prayers, reciting the Our Father, the Hail Mary and the Workers' Prayer of the Association of Catholic Trade Unionists,⁵⁵ beginning with these words: “Lord Jesus, Carpenter of Nazareth, you are a worker as I am.” The Cardinal, however, was not appeased; “[t]hey're getting repentant kind of late” he commented.⁵⁶ He also equivocated and dodged, saying, “[a]ctions speak louder than words. I didn't say they were Communists; I never did, but their tactics were certainly communistic.”⁵⁷

On March 7, the Cardinal summarily rejected a request to appoint a third party to mediate the strike, as presented by five wives of striking workers.⁵⁸ The women indicated their willingness to accept as mediator any priest that he would appoint.⁵⁹ The Cardinal was adamant, promising nothing other than that the strikers could return to work with a small increase, and not as union men.⁶⁰ The women left the meeting with Cardinal Spellman “discouraged and disgusted.”⁶¹ The strikers' wives' delegation dejectedly reported that “[h]e, the Cardinal, wants the men to go back to work as individuals, not as Union men, and [he] said he would not allow members of the Strikers Committee to go back to work, because they are ringleaders.”⁶² “‘He wants no part of the Union. We got no place,’ stated Mrs. Sigmund Czack of Maspeth, Queens, who led the delegation.”⁶³ The Cardinal replied, “I feel as badly for them — the wives — as if it were your own mother in the same circumstances. I spoke with them for over two hours. They had nothing to offer me and I had nothing to offer them.”⁶⁴

53. *Cemetery Strike Still Deadlocked*, N.Y. TIMES, Mar. 10, 1949, at A22.

54. *See id.*

55. *See id.*

56. *Id.*

57. *Id.*

58. *Wives Ask Arbiter for Burial Strike, Plead with Spellman for Two Hours for a Priest to Mediate, but He Sees Nothing Offered, Ban On Union Maintained*, N.Y. TIMES, Mar. 8, 1949, at A27.

59. *See id.*

60. *See id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. He further explained his actions:

I feel that I am doing something for proper organized labor. Just because a Union exists doesn't mean that it is a good Union. Because a strike is called,

By this time, the entire 200-member student body of the Archdiocese's St. Joseph's Seminary actively engaged in the strikebreaking, doubling the 100-student "volunteers" who originally accompanied the Cardinal.⁶⁵ The Trustees of St. Patrick's Cathedral increased their original 3% wage increase offer to 8%.⁶⁶

Having exhausted all possible avenues without any good faith gestures from the employer, the strike was settled on Friday, March 11th.⁶⁷ The union acquiesced to the Archdiocese's demands and accepted the 8% wage increase, and returned to working the 48-hour, 6-day work week — essentially the terms that the Archdiocese offered in January.⁶⁸ The gravediggers employed by Calvary Cemetery and the Gate of Heaven Cemetery returned to their jobs following the settlement of the strike, and set to work digging the 1,000 backlogged needed graves.⁶⁹

C. *The Catholic Worker*, April, 1949

The April 1949 issue of *The Catholic Worker* featured a front-page article titled, "Cardinal Brings to End New York Strike." The article crystallized the issues:

[T]he demands were for a 40-hour week for the same pay as the 48-hour week at time and a half for overtime. The Trustees of the St. Patrick's Cathedral did not see these demands as justified, feeling, so they said, that they would put an undeserved burden on the public who owned graves in the Calvary Ceme-

it doesn't mean it is a good strike. Several labor leaders have contacted me and confirmed my beliefs. Some say it is a shame.

Id.

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *Gravediggers Back on Job*, N.Y. TIMES, Mar. 13, 1949, at A21. Cardinal Spellman, ever the showman, publicly sent a \$65 check to each of the strikers after they returned to work. These "gifts to the families" of the strikers totaled \$17,875. He also wrote to each striker "undoubtedly the period of unemployment has caused you and your families many hardships. I am therefore enclosing a gift of \$65 to help in relieving this situation. Praying God's blessing upon you this Eastertide and always, I am devotedly yours in Christ." 275 *Gravediggers Get Gifts from Cardinal*, N.Y. TIMES, Mar. 19, 1949, at A12. With a final public relations flourish, the Cardinal treated his 200 seminarian and priest strikebreakers to a "sightseeing trip" to Baltimore, Philadelphia, Annapolis, and Washington, D.C. at the Cardinal's expense, they visited among other sites, the United States Naval Academy during the Easter season of 1949, a particularly ironic and eerie harbinger of the Cardinal's enthusiastic support two decades later for the United States military position in the Vietnam War. *Burial Aides Rewarded, 200 Priests and Seminarians Start on 3-Day Tour*, N.Y. TIMES, Apr. 21, 1949, at A27.

tery. That was the problem, in essence. From there on until the settlement of the dispute, it became a classical lesson in how not to deal with the strike. Eighty-five percent of the membership of the Local and 100% of the membership of the Calvary strikers were Catholic. The peculiar slant this gave the strike became more apparent as the dispute went on.⁷⁰

The newspaper article went on to say that the Cardinal had no involvement in the early stages of the strike. Only after the situation became "totally incapable of resolution by the Trustees, the Trustees thrust it into his lap. Only then did the Cardinal enter into the picture."⁷¹ *Catholic Worker* dismissed as specious the Cardinal's view that the strike was "Communist-inspired."⁷² *Catholic Worker* poignantly reprinted the Cardinal's most outrageous public comments: "I am proud and happy to be a strikebreaker. This is the most important thing that I have done in my ten years in New York."⁷³ Cardinal Spellman's outrageous statements completely backfired; *Catholic Worker* pointed out that the Communist Party's *Daily Worker* leaped gleefully into the fray: "Let Catholic men and women notice carefully the words of their Cardinal and realize that here, as in the case of Cardinal Mindzenty, the issue is not religion but the economic and political misuses it lends itself to."⁷⁴

Catholic Worker, in alliance with the ACTU,

stuck by the strikers through thick and thin, giving them unsparingly of their time, funds and legal aid — convinced that the striker's demands were just. *The Catholic Worker* supplied pickets, direct relief, and encouragement wherever possible. We say it without shame. We went among them, into their homes, attended their meetings, were on their strike relief committee, listened to their grievances and formed our opinion. Our opinion: the strike was justified. We say it still.⁷⁵

One commentator summarized: "Dorothy Day was one of the few who publicly supported the Union. She and some of her staff from *Catholic Worker* passed out leaflets in front of the Cardinal's residence and were arrested. The police forbade the gravediggers to picket Spellman's house."⁷⁶

70. *Cardinal Brings to End New York Strike*, CATHOLIC WORKER, Apr. 1949, at 1.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. COONEY, *supra* note 11.

Catholic Worker maintained that the strike could have been entirely avoided:

The Trustees could've shown the books to the workers if justice is on their side, proving in black and white that they were incapable of paying what the strikers asked. The strikers were not unreasonable or dishonest people. They were hardworking, simple people driven by what they considered intolerable conditions to strike. The dispute would have been settled there and then instead of becoming a fratricidal war, looked on with glee and contempt by the non-Catholic population.⁷⁷

The article detailed the misery of the strikers' families during the strike. The article also highlighted the poignant and fundamental longer-term negative ramifications of the strike, as one striker's picket sign suggested: "Is Calvary the Graveyard of Catholic Social Justice?"⁷⁸

Catholic Worker also noted that, in light of the Cardinal's anti-Communist rhetoric, not even the workers' new union affiliation could settle the strike:

Responsible labor leaders feel, and justly, that by forcing the strikers to do this, the Cardinal has dealt a hard blow to the CIO, in particular, and to labor in general. Hereafter, whenever an employer comes to the conclusion that its workers' demands are unjust, it can use the Cardinal's action as a precedent to refuse to deal with their demands unless they give up their allegiance to what he can term a Communistic union. Today it is a local in the CIO, but tomorrow it might be any labor organization at all.⁷⁹

The article then concluded,

It's old stuff now, except for those of us who went through it. And it will be a long time before we lose that nagging sense of shame and bewilderment that filled us when we first realized that there were eminent Catholic laymen surrounding Cardinal Spellman, advising him out of their own weakness, greed and lack of diplomatic ability to follow a course that must inevitably lead him to a loss of dignity and humiliation. And all because they, the lay trustees of St. Patrick's Cathedral, could not treat Catholic working men as human beings and brothers.⁸⁰

77. *Cardinal Brings to End New York Strike*, CATHOLIC WORKER, Apr. 1949, at 1.

78. *Id.*

79. *Id.*

80. *Id.*

Dorothy Day stated her feelings unequivocally in the pages of *Catholic Worker* as well: "A Cardinal, ill-advised, exercised so overwhelming a show of force against the union of poor working men. There is a temptation of the devil to that most awful of all wars, the war between the clergy and the laity."⁸¹

Cardinal Spellman was outraged with the critical Catholic press coverage of his conduct during the strike. "'I'll never forgive *Commonweal*,' Spellman said. 'Not in this world or the next.'"⁸² Other critics of the Cardinal, however, were not nearly so generous, or gentle, as was John Cort in his articles for *Commonweal*. Novelist Ernest Hemingway, for example, wrote to the Cardinal:

My dear Cardinal, in every picture that I see of you there is more mealy mouthed arrogance, fatness, and overconfidence . . . as a strike breaker against Catholic workers, as an attacker of Mrs. Roosevelt I feel strongly that you are overextending yourself . . . you will never be Pope as long as I'm alive.⁸³

Cardinal Spellman concluded that the strike was "one of the most difficult, grievous, heartbreaking issues that has ever come within my time as archbishop of New York."⁸⁴

D. Post-Strike: *Catholic Worker* and the Cardinal

Years after the strike, Dorothy Day discussed at some length her complex and problematic, though essentially respectful, relationship with Cardinal Spellman:

I didn't ever see myself as posing a challenge to church authority. I was a Catholic then, and I am one now, and I hope and pray I die one. I have not wanted to challenge the Church, not on any of its doctrinal positions. I try to be loyal to the Church — to its teachings, its ideals. I love the Church with all my heart and soul. I never go inside a Church without thanking God Almighty for giving me a home. The Church is my home, and I don't want to be homeless. I may work with the homeless, but I have no desire to join their ranks.

. . .

Well, that brings us back to the Cardinal[] . . . I have my own way of disagreeing with him. Anyway, the point is that he is our chief priest and confessor; he is our spiritual leader — of all of us who live here in New York. But he is not our ruler. He is not

81. ROBERT COLES, *DOROTHY DAY: A RADICAL DEVOTION* 81 (1987); MILLER, *supra* note 32, at 404-5.

82. COONEY, *supra* note 11, at 191.

83. *Id.*

84. *Id.* at 195.

someone whose every word all Catholics must heed, whose every deed we must copy. . . . The Catholic Church is authoritarian in a way; it won't budge on what it believes it has been put here to protect and defend and uphold. The Church has never told its flock that they have no rights of their own, that they ought to have no beliefs or loyalties other than those of the Pope or one of his cardinals. No one in the Church can tell me what to think about social and political and economic questions without getting a tough speech back; please leave me alone and tend your own acreage; I'll take care of mine. It is true that Cardinal Spellman had no great love for some of the things we wrote in *The Worker* or said in public. I am sure, sometimes, he became annoyed with us, or maybe he really never knew much about us and cared less I know very well that Cardinal Spellman didn't like *The Worker's* politics. He wasn't the only one. Lots of Catholics were angry with us If he did pay close attention to us, then he knew how loyal we were to his Church, to our Church, how loving of it. He used the word 'challenge'; well, I have never wanted to challenge a Church, only be part of it, albeit, in return, receive its love and mercy, and the mercy and love of Jesus.⁸⁵

On March 3, 1951, two years to the day that Cardinal Spellman led strike breakers into the Calvary cemetery, Monsignor Edward Gaffney asked Dorothy Day to appear at the New York Archdiocesan Chancery office. At that meeting, Dorothy was told that *Catholic Worker* would have to cease publication, or change the name of the newspaper by deleting the word "Catholic" from the title.

Several days later, Dorothy Day responded respectfully by her letter to Monsignor Gaffney: "First of all, I wish to assure you of our love and respectful obedience to the Church, and our gratitude to this Archdiocese, which has so often and so generously defended us from many who attack us." She continued, "[b]ecause we do no wish to take advantage of such kindness, nor count on the official protection which the name 'Catholic' brings to us, we would change the name rather than cease publication." After the meeting with *Catholic Worker* staff, however, Day advised Monsignor Gaffney that "[n]o one . . . wishes to change the name. All feel that *Catholic Worker* has been in existence for 18 years . . . under that name, and that this is no time to change it so late in the day." Dorothy went on to remind Monsignor Gaffney that, for example, "the Catholic War Veterans who also use the name Catholic represent

85. COLES, *supra* note 81, at 81-85.

their own view, not to be confused with the view of the Archdiocese any more than the view of *The Catholic Worker* presumes to speak for the Archdiocese of New York.” Dorothy Day continued, “we cannot simply cease the publication of a review which has been built up, with its worldwide circulation of 63,000 over the last 18 years. This would be a grave scandal to our readers and would put into the hands of our enemies, the enemies of the Church, a formidable weapon.”⁸⁶

Monsignor Gaffney did nothing. There was no censoring of *Catholic Worker* nor further initiative by the Archdiocese, or any of its agents, to close the newspaper or to remove the term “Catholic” from the title. Years later, Dorothy Day reflected upon this episode:

I never believed that the Monsignor who wanted to shut us down or to delete the word ‘Catholic’ from our paper acted on his own. I’m sure at least a few monsignors were in on the act. Maybe his eminence the Cardinal. Maybe not. I think they realized we were going to pray very hard, to pray and pray: in churches and in homes and even on the streets of our cities. We were ready to go to St. Patrick’s, fill up the Church, stand outside it in prayerful meditation. We were ready to take advantage of America’s freedoms so that we could say what we thought and do what we believed to be the right thing to do: seek the guidance of the Almighty We did pray a long time for Cardinal Spellman. We prayed that we would not be presumptuous in so praying, but we kept praying. If he had ordered us close, we might’ve gone right to St. Patrick’s Cathedral and continued our praying there, day and night, until the good Lord took us — or settled the matter.⁸⁷

Today *Catholic Worker* continues to sell, at its original price of one penny per copy, almost 100,000 copies, seven issues per year, from its New York City offices.⁸⁸

Conclusion – Dorothy Day’s Influence Today

The 1949 cemetery workers’ strike clearly focuses on the attempt of Dorothy Day and *Catholic Workers* to engage in responsible dialogue with the Church hierarchy. The relationship between Dorothy Day, committed lay Catholic, and Cardinal Spellman, the most

86. MILLER, *supra* note 32, at 427-28.

87. COLES, *supra* note 81, at 84-85.

88. See David L. Gregory, *Dorothy Day’s Lessons for the Transformation of Work*, 14 HOFSTRA LAB. L.J. 57, 91 n. 306 & 307 (1996).

powerful leader among the American Catholic hierarchy, was both very simple and very complex. Because everyone in the Church is called by God to consider actions and their consequences, Dorothy Day called the leadership of her Archdiocese to account for its actions in breaking the strike in 1949.⁸⁹

The examples of Dorothy Day and Cardinal Spellman continue to resonate today. There are serious questions for some within the Church as to the appropriate role and contour of principled dissent. This debate, however, misperceives the more basic issue, the need to mutually remedy sometimes poor communication between the hierarchy and the laity, a problem often exacerbated by political factionalism. Again, Dorothy Day offers the best example. If the Archdiocese had closed *Catholic Worker* newspaper, Dorothy Day would have complied. She would have also led thousands of Catholic Workers in peaceful prayer at St. Patrick's Cathedral. In other words, Dorothy Day would submit to the Magisterium of the Church respectfully out of faith, but simultaneously would call the Church to prayerful witness.

How these examples might apply in the Catholic University is worthy of consideration. In the Catholic University, we are all called, as members of the University community, to embrace enthusiastically, and to effectuate vigorously, the letter and spirit of John Paul the Great's Apostolic Letter, *Ex Corde Ecclesiae* ("Born from the Heart of the Church"), promulgated on August 15, 1990. Within the Catholic University, Pope John Paul's June 30, 1998 Apostolic Letter, *Ad Tuendam Fidem*, further binds those called to the teaching of theology, ("To Defend the Faith"). The Pope said that his June 30, 1998 letter had the purpose "to protect the Catholic faith against errors arising on the part of some of the Christian faithful, in particular among those who studiously dedicate themselves to the discipline of sacred theology." The 1989 Profession of Faith, promulgated by the Vatican Congregation for the Doctrine of the Faith, was modified to include a clause concerning teachings proposed "definitively." It says, "I also firmly accept and hold each and everything that is proposed by that same Church definitively with regard to teaching concerning faith or morals."

Each and every person within the Catholic University is called to fidelity to the spirit and the letter of *Ex Corde Ecclesiae*, and theologians, in particular, are bound to honor the Pope's most recent Apostolic Letter. We are called to give witness to the teachings of

89. See COLES, *supra* note 81, at 85.

the Church, within our Church-affiliated colleges and universities. Dorothy Day's complex relationship with Cardinal Spellman, especially in the crucible of the 1949 cemetery workers strike and its aftermath, provides opportunity for reflection and assessment. It is one example by which we might call the Church to faithful fulfillment of its mission in the realm of Catholic higher education.

We live in an era where seemingly few heed, in good faith, the late Cardinal Bernadin's call for common ground. The Church is afflicted by politicized factions, quick to disregard the faith-based core and heritage of our common ground — that the Church is One, Holy, Catholic and Apostolic. It was Dorothy Day who so powerfully re-invoked the Communion of Saints and the Mystical Body of Christ. Even her conservative critics recognized Dorothy Day's model for lay-hierarchy interactions as worthy of respectful emulation.

The October, 1998 issue of the generally conservative intellectual journal *First Things*, edited by Father Richard John Neuhaus of the Archdiocese of New York, offers these synopses of Dorothy Day's direct action. As the correspondents recalled:

Indeed, my first acquaintance with the Catholic Worker movement came from a chance encounter with Catholic workers . . . who were picketing St. Patrick's Cathedral on a Sunday morning. They carried signs condemning the Church for what they regarded as the Church's complicity in the military-industrial complex and for the Church's own accumulation of wealth rather than the case of the poor. Afterwards we all went to Spring Street for lunch with her [Dorothy Day]. She not only "countenanced" the action but also commended it.

. . .
Dorothy's style of criticizing the Church did not . . . involve "condemning." She pointed out frequently that the institutional Church had great wealth and that many bishops and priests lived in great comfort and security. She called for the empty rooms in rectories, seminaries and monasteries to be filled with the poor; at the least, each parish should have a hospice for the poor.

Too often today the style of criticizing the Church has taken on ways repugnant and abhorrent to Dorothy Day. Last year outside St. Patrick's Cathedral, Catholic school teachers protested so loudly Mass was disturbed; Act-Up in 1989 invaded the Cathedral and desecrated the Holy Eucharist; and the Women's Ordination Conference has "alternative liturgies" as well as protests in churches during Mass. Such behavior . . . Dorothy would not "countenance." Dorothy did picket, for instance with

the Catholic cemetery workers in 1949; quietly, prayerfully, quoting scripture and papal social teaching — far different from the style of many critics of the Church today.⁹⁰

Over the course of the past several months, Catholic Workers have asked the hierarchy to rethink institutional distribution of wealth, by their divine obedience (peaceful civil disobedience). For example, should The Catholic University of America spend multi-millions of dollars ostentatiously on a magnificent building to honor Pope John Paul II, rather than address the pressing needs of the poor and homeless populations in Washington, D.C.? Should the Cardinal Archbishop of Philadelphia continue to live alone in a mansion — and a mansion that he constantly expands and polishes to rival the palace of any Medici — and establish a new seminary well outside the City of Philadelphia — while continuing to close inner-city schools and parishes, and to seemingly avoid any continuing serious engagement with the poor of the Archdiocese of Philadelphia? Why not, instead, follow Peter Maurin's recommendation, and turn the Archbishop's mansion into the Archdiocese's Christ House? Moreover, should the Cardinal Archbishop of Los Angeles put \$163 million to construct a new Cathedral, in light of the pressing social and economic problems afflicting the poor of the Los Angeles Archdiocese? In each of these situations, Catholic Workers have engaged in divine obedience/peaceful civil disobedience, and have, by their words and examples, urged alternative priorities in accord with the life and example of Jesus.

The laity should always take heart, even when some members of the hierarchy may seem contrary. The ordained clergy operates with the Sacrament of Holy Orders, and that sanctifying grace will, over time, have its salutary influences. St. Francis of Assisi, one of the Church's greatest saints, was not an ordained priest. He was in awe of all priests, because the priest alone has the power to consecrate bread and wine into, through the miracle and the mystery of transubstantiation, the Body and the Blood of Christ. Remember, for example, that it was an Archbishop who paid Dorothy Day's modest expenses to come to Flint, Michigan, in order to join in solidarity with the sit-down strikers, as the autoworkers formed their union in the crucible of the Depression. She was, with the support of the Archbishop, one of the few journalists reporting from within the factories during the UAW sit-down strike at Gen-

90. Correspondence, *FIRST THINGS*, Oct. 1998, at 7-8.

eral Motors Corporation. It is also most exquisite that Cardinal O'Connor, directly within the line of Cardinal Spellman's succession as Archbishop of New York, has joined the call for the canonization of Dorothy Day.

In my working life within the largest Catholic University in the United States, at St. John's University with almost 20,000 students, I am very encouraged by the 1990 Apostolic *Letter Ex Corde Ecclesiae*. By the express terms of the Apostolic Letter, the Bishops are centrally situated internally within the life of the University.⁹¹ Therefore, if any University bureaucracy should ever become indifferent to the authenticity of the Catholic tradition and to the Catholic charism of the University Mission, every Catholic can take great heart and inspiration in knowing that the Bishops and the Cardinals can be asked to direct their attention to remedy actions at odds with the Catholic element of the Catholic University's Mission.

Dorothy Day's letters in early March of 1949 to Cardinal Spellman, in the context of the cemetery workers' strike, can serve as a model. The Catholic Workers who picketed outside St. Patrick's Cathedral and outside the cemeteries, in solidarity with the strikers in 1949, continue to serve as worthy examples for the even more direct Catholic action of divine obedience today. The ordained hierarchy is infused, and bound, by the Sacrament of Holy Orders, and by Jesus' injunction — it would be better for one within the clergy to have a millstone wrapped around the neck and thrown to the bottom of the lake than to lead one of the least astray. The example of Jesus prompts dialogue; the laity may write and demonstrate. Jesus also prompts, through the Sacrament of Holy Orders, the hierarchy to read, to listen, to speak, and to lead. If laity and hierarchy do not engage in this often difficult, but indispensable, dialogue, the "alternative" for us all is the millpond.

91. David L. Gregory, *The Bishop's Role in the Catholic Law School*, 10 REGENT L. REV. (forthcoming 1999).

1998 SURVEY OF ETHICS IN LAND-USE PLANNING

Patricia E. Salkin*

Introduction

The activities currently taking place in Washington, D.C. remind the American public of the importance of public sector ethics. From the appointment of an independent counsel to unprecedented decisions by the federal courts,¹ it is clear there is heightened media and citizen attention to questions related to ethics. Despite the sensationalism with which they are often handled, these scandals involving public officials actually help to open the door for greater governmental scrutiny and reform efforts.²

Meanwhile, what happens on the national scene clearly has implications for activities at the local government level, including situations surrounding land-use planning and zoning decision-making. This impact is evident by the increase in the number of land-use ethics cases reported in 1998.³ When considering the range of ethics issues that may confront land-use lawyers,⁴ it is no surprise that 1998 yielded a number of reported decisions and published opinions from across the country. The issues these opinions address can be divided into several major categories: 1) conflicts of interest, 2) compatibility of office, 3) bias and prejudice and 4) miscellaneous.

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1. See, e.g., *In re Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998); *In re Grand Jury Subpoena Duces Tecum*, 122 F.3d 910 (8th Cir. 1997).

2. See JOSEPH ZIMMERMAN, *CURBING UNETHICAL BEHAVIOR IN GOVERNMENT* (1994).

3. This author conducted a similar survey last year that included a review of all land-use ethics cases and opinions in the 1990s. See Patricia E. Salkin, *Legal Ethics and Land-Use Planning*, 30 URB. LAW. 383 (1998), reprinted in MATTHEW BENDER, *THE TWENTY-EIGHTH ANNUAL INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN* (1998).

4. Arising issues include questions of professional ethics under professional codes of responsibility, local and state ethics laws and judicial decrees that bear on the moral conduct of public sector attorneys. See *id.*

II. Conflicts of Interest

The amount at stake, from both a financial standpoint and a quality of life perspective, when planning and zoning boards make land-use decisions places these actions under increased scrutiny, including an intensive search for possible violations of ethical standards.⁵ Conflicts of interest cases most often arise where there is potential of financial gain for oneself, a family member or a business associate.

A. Personal Financial Gain

Several 1998 cases illustrate how individuals perceive the use of land-use decisionmaking to personally profit. For example, a California citizen challenged a zoning board's development decision, claiming that a board member owned real property in the vicinity of where the proposed project was to be located.⁶ Although the court decided the case on procedural grounds — that the longer statute of limitations under the California Political Reform Act⁷ did not apply to an appeal of a zoning decision — the litigation illustrates the type of ethics-related allegations that may be employed to overturn an unpopular decision.⁸

Similarly, a Connecticut appellate court upheld a challenge by abutting property owners to a zoning commission's decision to grant a permit allowing a skeet shooting range on a sporting club's property. The court rationalized that an *ex officio* member of the commission failed to disqualify himself from the proceedings.⁹ Connecticut statutes specifically prohibit member participation on zoning boards when a direct or indirect conflict of interest exists, stating that "No member of any zoning commission or board . . . shall participate in the hearing or decision of the board or commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense."¹⁰

5. See Patricia E. Salkin, *Ethics and the Land-Use Lawyer*, 5 LAND-USE L. & ZONING DIG. 3 (1997).

6. See *Ching v. San Francisco Bd. of Permit Appeals*, 60 Cal. App. 4th 888 (Cal. Dist. Ct. App. 1998).

7. The Political Reform Act provides that, "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." CAL. GOV'T CODE § 87100 (West 1993).

8. See *Ching*, 60 Cal. App. 4th at 888.

9. See *Nazarko v. Conservation Comm'n*, 717 A.2d 850 (Conn. App. Ct. 1998).

10. CONN. GEN. STAT. § 8-11 (1989). With respect to conservation commissions, Connecticut legislation provides, in part, that: "[n]o member or alternate member of such board or commission shall participate in the hearing or decision of such board or

Although the relevant statute did not specifically mandate application to *ex officio* members of commissions, the court resolved the ambiguity in adopting the "more reasonable construction" of the statute and "repeatedly emphasized that '[n]eutrality and impartiality of members are essential to the fair and proper operation of . . . [zoning] authorities.'"¹¹ Further, while the *ex officio* member of the commission only attended two of the three hearings and did not participate in the voting, the court concluded his mere presence constituted a prohibited conflict of interest because he held a membership in the sporting club and owned the only gun shop in town.¹²

In another 1998 Connecticut case, a plaintiff, after being denied site plan approval by the zoning commission, argued the decision should be null and void based on alleged conflict of interest and predisposition of certain board members.¹³ In this situation, a board member owned a campground across the street from the plaintiff's proposed bituminous concrete manufacturing site. The member questioned the legality of the proposed use under the zoning code, initiated conversations regarding such with the town planner and the town attorney, procured an engineering firm to review the application and participated in one meeting. Despite these zealous efforts, the member later withdrew from the commission and did not personally participate in the hearing on the site plan application.¹⁴ The court found nothing in the statute that prohibits a member not participating in a matter from presenting their own view on the subject.¹⁵ Accordingly, the court concluded that

commission of which he is a member upon any matter in which he is directly or indirectly interested in a personal or financial sense." *Id.* § 22(a)-42(c) (1995).

11. *Nazarko*, 717 A.2d at 852 (quoting *Fletcher v. Planning & Zoning Comm'n*, 264 A.2d 566, 571 (1969)).

12. *See id.* The court reiterated that "[t]he decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case." *Id.* at 853 (citing CONN. GEN. STAT. §§ 8-11, 8-21). The court also noted "the appearance of impropriety created by a public official's participation in a matter in which he has a pecuniary or personal interest in is sufficient to require disqualification . . ." *Id.* at 852. "Public policy requires that members of public boards cannot be permitted to place themselves in a position in which personal interest may conflict with public duty." *Id.* at 853 (citing *Zeigler v. Thomaston*, 654 A.2d 392, 397 (Conn. Super. 1994)).

13. *See Phillips v. Town of Salem Planning & Zoning Comm'n*, No. 113120, 1998 WL 258332 (Conn. Super. Ct. 1998).

14. *See id.* at *2. She was, however, represented by counsel at the hearing on the matter.

15. *See id.* at *10 (citing *Massimo v. Planning Comm'n*, 564 A.2d 1075-76 (Conn. Super. Ct. 1989)).

although the board member had a direct personal, and possibly financial, conflict of interest, she did not violate the statutory provisions because she withdrew from the board on the matter.¹⁶

B. Family Relationships

Cases from 1998 also show that the public is concerned that individuals use zoning decisionmaking to assist financial prospects of close family members. Two New Jersey cases involved alleged conflicts of interest based on familial relationships, yet the courts reached opposite conclusions based upon the facts therein. Both cases involved benefits of a proposed siting to a board member's elderly parents.¹⁷ In one case, plaintiffs alleged that a board member could not remain impartial in considering a site application because he would personally benefit from the proposed supermarket construction. The alleged benefit was that the board member would no longer have to assist in or complete his parent's grocery shopping because the new supermarket would be located closer to where his elderly parents live. Furthermore, plaintiffs argued there was a conflict of interest because his parents signed a petition that was presented to the board in favor of the proposed store.¹⁸ The board member argued that his parents did their own shopping and that he saw them briefly only once or twice a week. The court found no conflict of interest nor any appearance of impropriety, concluding that these facts did not indicate that the member was conflicted by desires of aiding himself or his parents on one hand and serving the needs of the Cranford community on the other.¹⁹

In a second case, the court invalidated the board's variance and site plan approval for a supermarket because a member's eighty-three year old mother owned a commercial enterprise within fifty feet of the proponent's property.²⁰ The ownership constituted a

16. See *id.* at *11.

17. See *Lincoln Heights Ass'n v. Township of Cranford Planning Bd.*, 714 A.2d 995 (N.J. Super. Ct. Law Div. 1998); *Ex. rel. Tenaflly, Inc. v. Tenaflly Zoning Bd. of Adjustment*, 704 A.2d 1032 (N.J. Super. Ct. App. Div. 1998).

18. See *Lincoln Heights*, 714 A.2d at 998.

19. See *id.* The court stated:

Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, "Universal distrust creates universal incompetency."

Id. at 1001-02 (citing *Van Itallie v. Franklin Lakes*, 146 A.2d 111 (1958)).

20. See *Tenaflly*, 704 A.2d at 1032.

disqualifying conflict of interest. In relying on the Local Government Ethics Law,²¹ the court found that "potential for psychological influences" existed because his mother needed the income derived from her property to subsist. In addition, the value of her property would definitely be influenced by the board's decision.²² Although the supermarket applicant argued that this conflict of interest should not nullify the granted approvals based upon equity,²³ the court found no authority allowing them to ignore a conflict of interest based upon equitable factors.²⁴

C. Conflicts of Interest Based Upon Alleged Political Pressure

Political pressure may also be cited as a disqualifying conflict of interest. In one 1998 New Jersey case, the applicant alleged that all of the zoning board members had a conflict of interest when the township attorney appeared before them to oppose the application.²⁵ The alleged conflict, the applicant argued, was that zoning board members are appointed by the township council, who also directed the attorney to appear before the zoning board. The New Jersey court applied the four-part test articulated in *Wyzykowski v. Rizas*,²⁶ concluding that no conflict existed when the township at-

21. This statute reads:

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

N.J. STAT. ANN. § 40A:9-22-5d (West 1991)

22. See *Tenaflly*, 704 A.2d at 1038.

23. See *id.* at 1039. A&P argued that the nullification remedy was harsh because 1) they were not made aware of the alleged conflict of interest until almost three weeks after they had been granted approval; 2) the Grand Union and other objectors had not raised the allegation of the conflict; 3) the issue was raised for the first time by Care in its appeal to the governing body; and 4) they (A&P) had already spent \$1.2 million in approval costs. See *id.*

24. See *id.* at 1040. The court concluded by stating,

Protecting the public interest in the integrity of the quasi-judicial process is the key. Applying estoppel when the objectors have made a timely challenge to the approvals diminishes that protection. The purpose of the conflict of interest statute is "prophylaxis against misconduct and its effect can be exerted fully only if it is applied without discrimination where applicable."

Id. (quoting *Zell v. Borough of Roseland*, 125 A.2d 890 (App. Div. 1956)).

25. See *Paruszewski v. Township of Elsinboro*, 711 A.2d 273 (1998).

26. 626 A.2d 406 (1993). The following four circumstances will constitute a conflict of interest:

(1) "Direct pecuniary interests," when an official votes on a matter benefiting the official's own property or affording a direct financial gain; (2) "Indi-

torney appeared on behalf of the public, not himself, and when the township committee had no authority to review the decision of the zoning board.²⁷

D. Conflicts of Interest for the Attorney/Public Official

Attorneys must also be careful to avoid conflicts of interest when they concurrently hold a public office and maintain a private law practice. A 1998 Maryland case illustrates one type of conflict that may arise when an attorney serves as a member of the county planning and zoning commission while representing clients on real estate matters in the county.²⁸ In this case, the attorney represented clients who had business before the county. During the course of the representation, the attorney-commissioner recused himself from the public proceedings when his client's request first came to the commission.²⁹ After the commission approved the initial request, the attorney-commissioner proceeded to represent his clients in the next phase of their land development project by preparing and filing an application with another public department, not the county commission. Two weeks later, the attorney-commissioner participated in a discussion at a county commission meeting regarding proposed amendments to his client's plans, moving and voting for the approval of the plan.³⁰ According to the court, it was the latter two acts that constituted a violation of the county ethics law. While the attorney argued that the application to another department did not violate the conflicts of interest provision in the local law,³¹ the court held that these applications may sometimes

rect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member; (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or a close friend in a non-financial way, but a matter of great importance . . . ; and (4) "Indirect Personal Interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.

Id. (citing Michael A. Pane, *Conflict of Interest: Sometimes a Confusing Maze*, 2 N.J. MUNICIPALITIES 8-9 (March 1980)).

27. See *Paruszewski*, 711 A.2d at 273.

28. See *Carroll County Ethics Comm'n v. Lennon*, 703 A.2d 1338 (Md. Ct. Spec. App. 1998).

29. See *id.* at 1340. Specifically, the clients needed to extend water service to their property, an issue to be decided by the County Commission.

30. See *id.*

31. See *id.* at 1346. The relevant provision of the Carroll County Ethics Ordinance states that county officials and employees who are subject to this ordinance shall not: be employed by a business entity that; has or is negotiating a contract of more than \$3,500 with the County or is regulated by their agency; except as

be referred to the county commission for action, and while that was not the case in the present situation, the event's mere possibility was enough to satisfy the conflict of interest standard. The attorney's participation at the last county commission meeting also violated the ethics law because his clients were regulated by the commission of which their attorney was a member.³²

III. Compatibility of Office

Individuals must also be careful while concurrently holding public offices that affiliation with one office does not constitute a conflict with one's duties to the other. In 1998, the Arkansas Attorney General, among others, presented poignant commentary on potential problems with an individual's dual role.

A. Incompatible Offices

The Arkansas Attorney General opined that although nothing in state statutes specifically prohibited a member of a county quorum court from serving on the county planning board, the dual appointment should constitute an "incompatibility of office" as it would under the common law.³³ In reaching this conclusion, the Attorney General noted that the two positions are incompatible based upon their respective statutory powers and functions.³⁴

B. Offices Found Compatible

In other 1998 commentary, the Arkansas Attorney General concluded that although there is no inherent conflict of interest for an acting city attorney to also serve as chairman of the city's zoning

exempted by this Commission pursuant to Section 6 of this ordinance[] . . .
[or] hold any outside employment relationship that would impair
impartiality.

Id.

32. *See id.* at 1348.

33. The Attorney General stated that two positions are incompatible when "there is a conflict of interest" or "where one office is subordinate to the other." 98 Op. Ark. Att'y Gen. 226 (1998) (citing *Byrd v. State*, 402 S.W.2d 121 (1966)).

34. *See id.* The Attorney General points out that "A majority of the quorum court must approve creation of the planning board, and the quorum court must confirm appointments to the board." *Id.* In addition, "[m]embers of the planning board are subject to removal upon recommendation by the county judge and confirmation by the quorum court." *Id.* Additional statutory reasons were cited including the quorum court's authority to accept, modify or reject the board's recommendation or to initiate its own planning and zoning laws, and the procedures for adoption of the official plans. *See id.*

commission, the potential for incompatibility existed.³⁵ Finding no constitutional, statutory or common law prohibition against holding dual office, the Attorney General warned that if a conflict ever arose between the two positions, the attorney-chairman may have to recuse himself or herself from involvement in either role.³⁶

Throughout 1998, officials from other states also presented similar opinions on this topic. For example, the New York Attorney General opined that the dual positions of planning board director and member of the county industrial development agency ("IDA") were compatible because one was not subordinate to the other, and after a review of the job description for planning board director and the functions of the IDA,³⁷ there appeared to be no conflict of duties.³⁸

Case law from 1998 also presents evidence that holders of dual public offices are not always precluded from such service based upon incompatibility. In a Connecticut case brought by abutting property owners challenging the zoning commission's granting of subdivision approval, the plaintiffs claimed that one of the commission members held a salaried municipal office, thereby precluding his participation in the matter.³⁹ By statute, the zoning commission in Connecticut is to consist of five people who hold no salaried municipal office.⁴⁰ The presiding court, however, found that the commission member was not a salaried employee,⁴¹ and held that because the subject applications were unanimously approved by all six voting members of the commission, his participation did not require the court to invalidate the subdivision approvals.⁴²

35. *See id.* In analyzing the common law surrounding compatibility of office, the Attorney General concluded that the two positions at issue did not present a situation where one was subordinate to the other. *See id.*

36. *See id.* The Attorney General also noted, "In the event of a case-specific conflict . . . the city attorney should, as always, be cognizant of the various provisions of the *Model Rules of Professional Conduct* for attorneys, concerning conflicts of interest." *Id.*

37. *See* N.Y. GEN. MUN. LAW § 858 (McKinney 1986).

38. *See* 98 Inf. Op. N.Y. Att'y Gen. 45 (1998); N.Y. GEN. MUN. LAW § 856(4).

39. *See* Smith v. Deep River Planning and Zoning Comm'n, No. CIV.A.96-80581, 1998 WL 345399 (Conn. Super. Ct. 1998).

40. *See* CONN. GEN. STAT. § 8-19 (1989).

41. Oddly, the court stated, "Even if this court were to determine that he is, in fact, a salaried municipal officer, this court cannot conclude that his minimal participation constituted 'material prejudice . . .'" *Id.* at 4.

42. *See id.* The court stated "his presence and vote will not invalidate the result and further that a majority vote need not be invalidated where the interest of a member is general or of a minor character." *Id.* (quoting Murach v. Planning & Zoning Comm'n, 491 A.2d 1058 (1985)).

IV. Bias and Allegations of Prejudgment

Bias and prejudgment are issues that also may disqualify individuals from making land-use decisions. These allegations, however, are often difficult to prove. For example, a 1998 Connecticut court found that two zoning board members were not required to recuse themselves from participating in the plaintiff's appeal because the plaintiff failed to meet the burden of proving bias or prejudice on the part of the board members,⁴³ although one of the board members was a police officer who was responsible for having the plaintiff's car towed, and the other board member had erroneously instructed the plaintiff that a fee was required to appeal the orders of the zoning enforcement officer and further misinformed the plaintiff to post a sign on the property at issue, notifying the public of the appeal.⁴⁴ The court, however, found little or no opportunity for the board members to exercise any bias against the plaintiff. The court reasoned that both members had been subject to cross examination by the plaintiff, had plausible explanations for the contested meeting with the plaintiff and had little discretion in this matter.⁴⁵

In another 1998 Connecticut case, where a board member questioned throughout the lengthy proceedings whether the proposed activities were permitted under the local regulations, the presiding court found these expressions did not rise to the level of bias or prejudgment necessitating disqualification.⁴⁶ The fact that a board member may have taken a tentative position on a matter does not prove predetermination of the subsequent questions nor commitment to denial of the application. Rather, the court urged future plaintiffs to produce more tangible evidence of bias, but found none here.⁴⁷

43. *See A & M Towing & Recovery, Inc. v. Zoning Bd. of Appeals*, No.CIV.A.97-0568209, 1998 WL 516158 (Conn. Super. Ct. 1995) (citing *Rado v. Bd. of Education*, 583 A.2d 102 (1990)). The presumption of impartiality attaches to administrative determinations, and the burden is on the party seeking disqualification to prove otherwise.

44. *See id.* At various times during the pendency of the action before the zoning board, both board members had resolved to recuse themselves, but then later decided to participate in some of the proceedings.

45. *See id.*

46. "The law does not require that members of zoning commissions must have no opinion concerning the proposed development of their communities. It would be strange, indeed, if this were true." *Phillips v. Town of Salem Planning & Zoning Comm'n*, No. 113120, 1998 WL 258332 (Conn. Super. Ct. 1998) (quoting *Furtney v. Zoning Comm'n*, 271 A.2d 319, 323 (Conn. 1970)).

47. *See id.*

Oftentimes, allegations of prejudgment arise when a pre-elected land-use official makes campaign statements that arguably reflect a position relevant to a subsequent application. In 1998, for example, where two planning board members actively supported a new supermarket for the township during their pre-application campaign as candidates for the township committee, the presiding court found insufficient evidence to indicate that the members prejudged the application before them, stating, “[e]xpression in support of a general proposition during a prior political campaign does not invalidate a subsequent decision by the campaigners acting in their official capacity as planning board members.”⁴⁸

Comments made by officials also become ammunition for opponents of board actions in a 1998 New Mexico case concerning the siting of a shelter for abused and homeless youth. Opponents of the project challenged the decision of the city council to annex the tract of land and to establish special-use zoning for the property to allow for the proposed shelter. The opponents alleged, based on statements a member of the council made, that the member was biased in favor of youth issues such as these and that she prejudged the matter,⁴⁹ creating an appearance of impropriety and abolishing any chance for the petitioner to receive a fair and impartial hearing during the process.⁵⁰ Although the court noted Siesta Hill’s assertion that “a public officer sitting in a quasi-judicial capacity is normally disqualified if an objective observer would entertain reasonable questions about the judge’s impartiality,”⁵¹ it believed the petitioner presented no evidence that the Councilor had prejudged the matter, finding that the statements were, in fact, made after the counselor heard the petitioner’s arguments.⁵² In finding no conflict of interest and no appearance of impropriety, the court further stated that council members need not be so insu-

48. *Lincoln Heights Ass’n v. Township of Cranford Planning Bd.*, 714 A.2d 995, 1004 (1998).

49. *See Siesta Hills Neighborhood Ass’n v. City of Albuquerque*, 954 P.2d 102 (1998). The petitioner cited to comments made by the Councilor that the issue was “real cut-and-dried” and that she would “always vote in favor of youth issues.” In addition, the Councilor’s children had attended a seven-week program run by the agency requesting the zoning change. *See id.* at 108-09.

50. *See id.* at 108.

51. *Id.* at 109 (quoting *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 888 P.2d 475, 486 (1994)).

52. *See id.* The Court also noted that members of administrative tribunals are entitled to hold views on policy matters, even if they may be relevant to the case before the board. *See id.*

lated from their community to the point that they must be detached from every issue that comes before them.⁵³

V. Miscellaneous

Several miscellaneous issues arose relating to land-use ethical situations in 1998.

A. Who is the Client of the Government Lawyer?

Determining "who is the client" of a government lawyer is not an easy task.⁵⁴ Often, one may conclude that the client is the body that retains the attorney, and it is to this body where the duties owed by a lawyer to his/her client attach. Therefore, it is no surprise to see bitter battles between executive and legislative branches of local government who desire their own independent legal counsel.⁵⁵

A 1998 Pennsylvania court clarified that a zoning board itself, not the borough solicitor, has the statutory authority to retain legal counsel for the board.⁵⁶ The court stated:

[t]he fact that counsel for a zoning board must be an attorney other than a municipal solicitor underscores the importance of permitting the board to select and employ its own legal representation. Very often, conflict-of-interest considerations arise where the governing authority of the municipality and the zon-

53. *See id.*

54. *See* REPORT OF THE D.C. BAR SPECIAL COMMITTEE ON GOVERNMENT LAWYERS (1988); Schnapper, *Legal Ethics and the Government Lawyer*, 32 REC. 649; Fed. Bar Ass'n Prof'l Ethics Comm. Op. 73-1, 32 FED. B.J. 71 (1973).

55. The disputes arise when the chief elected official claims that the corporation counsel or municipal attorney represent the municipality as a whole, obviating the need for the legislative branch to retain their own counsel. This argument is further polarized and made to be political when the counsel is hired and fired by the chief elected official, not by the legislative body, and further, where the legislative body needs executive budget approval to retain their own counsel.

56. *See* Zoning Hearing Bd. v. City Council, 720 A.2d 166 (1998). The court easily distinguished this case from *Borough of Blawnox Council v. Olszewski*, 477 A.2d 1322 (1984), finding that *Blawnox* involved board members retaining unauthorized independent counsel for their own personal goals, and hence was an ultra vires act. *See id.* at 167. Furthermore, the court relied on the Pennsylvania Municipal Planning Code that provides, in part:

the governing body shall make provision in its budget and appropriate funds for the operation of the zoning hearing board The zoning hearing board may employ or contract for and fix the compensation of legal counsel, as the need arises. The legal counsel shall be an attorney other than the municipal solicitor.

PA. STAT. ANN. tit. 53 § 10617.3 (West 1997).

ing board, have a different opinion, and the municipality is forced to appeal the zoning board's decision.⁵⁷

Planning and zoning boards in rural municipalities often face the greatest hardship in securing legal representation from a fiscal perspective. In 1998, although the Ohio Attorney General was mindful of, and sympathetic to, this circumstance,⁵⁸ she commented that a county prosecuting attorney may not provide official representation to a township board of zoning appeals.⁵⁹ Reasoning that there was no statutory duty for the county prosecutor to perform this function, the Attorney General said that the prosecutor may not assume the task voluntarily, "thereby devoting public resources to a function not delegated to the prosecutor by statute."⁶⁰ The "conflict of interest" issue was raised in the context that the prosecuting attorney could be called upon to serve as counsel in a matter where a legal duty of representation exists that could conflict with a representation assumed for a board that is, in fact, not empowered to call upon the attorney for representation.⁶¹

B. Resignation of Local Position As Part of State Ethics Agreement

An interesting agreement was reached between the New York State Ethics Commission and a state employee in 1998 that required the employee to resign his seat on a local planning board, in addition to paying a fine, for receiving compensation in a private engineering practice and appearing on behalf of clients before state agencies.⁶² The agreement raises a unique question because the State Ethics Commission's jurisdiction is limited to state employees and activities relating to their state employment. Although the re-

57. *Zoning Hearing Board*, 720 A.2d at 168.

58. The Ohio Attorney General stated specifically:

You have stated that requiring the local boards of zoning appeals to hire outside counsel when a decision is appealed to common pleas court could present a financial hardship While we are sympathetic to your expressed concerns, this is a matter that cannot be resolved by means of an Attorney General opinion but, instead, must be addressed directly by the General Assembly.

98 Op. Ohio Att'y Gen. 025 (1998).

59. *See id.*

60. *Id.* Members of planning and zoning boards are not township officers since they are elected and not appointed. *See id.* (citing OHIO CONST. art. X, § 2). Also, Ohio county prosecuting attorneys are under a duty to provide representation to township officers. *See id.* (citing 92 Op. Ohio Att'y Gen. 080 (1992)).

61. *See* 98 Op. Ohio Att'y Gen. 025.

62. *See In re Cukrovany* (Disposition Agreement Jan. 20, 1998) (on file with New York State Ethics Comm'n, Albany, N.Y.).

signing individual was employed by the State Department of Environmental Conservation, it is not apparent from the discussion in the published agreement why the State Ethics Commission or the Department should be concerned with his membership on a local planning board. The situation begs the question whether state employees working for agencies involved in some aspect of the land-use planning or regulatory process should serve on local planning and zoning boards at all.

C. Appearances by a Governing Body of a Municipality Before a Zoning Board

Generally, members of planning and zoning boards are appointed by either the chief elected official of a municipality, by a local legislative body or by a combination thereof. Therefore, applicants before the zoning board may believe that the municipal legislative body or the chief elected official is exerting undue influence or pressure over the zoning board with respect to a particular application. The suspicion of influence is especially strong where the municipal attorney appears before the zoning board to oppose an application on behalf of the local government. Such was the case in a 1998 New Jersey decision in which the applicant sought a certification that his airstrip was a valid non-conforming use.⁶³ The township committee directed the town attorney to appear before the zoning board to oppose the application and to present evidence that the use was *not* a valid pre-existing, non-conforming use.⁶⁴ The presiding court concluded that the governing body had standing to oppose the application and that the appearance before the zoning board did not present a reversible conflict of interest. The court reasoned that the governing body had no power to review the zoning board's determination, that a professional planner engaged by the township had concluded that the proposed use would be contrary to the public interest and a detriment to the township and that, in appropriate cases, the appearance of the township's attorney on behalf of the municipality, "provides a means by which the

63. See *Paruszkewski v. Township of Elsinboro*, 711 A.2d 273 (1998).

64. See *id.* at 275. The court noted that the Municipal Land-Use Law provides direct authority in at least two situations for a township to appear before a zoning board: 1) when the development of municipal property is at issue; and 2) when an application involves land situated within 200 feet of municipally owned land. See N.J. STAT. ANN. § 40:55D-12 (West 1998).

public interest is represented in proceedings of substantial public importance."⁶⁵

Conclusion

The foregoing cases illustrate that legal and municipal ethics in land-use planning continue to play a pivotal role in challenges to land-use decision-making. The examples provided also serve to remind municipal attorneys of the critical need for the continued education of municipal officials and the municipal bar concerning these important ethical considerations. It is the continued education, as well as stringent regulation by the judicial system with respect to occurrences of conflict of interest, incompatibility of office and bias, that will ensure land-use officials are faithfully serving their communities (and not themselves) when making zoning and planning decisions.

65. *Id.* at 279 (quoting *Township of Berkeley Heights v. Bd. Of Adjustment*, 365 A.2d 237, 238 (1976)).

A MAN FOR ALL DECADES

*Honorable John F. Keenan**

When the Editors of this distinguished publication contacted me requesting that I consider writing an article, they asked that the subject be “(1) What decision, person, event or occurrence had the greatest significance (legal or otherwise) to urban society in the twentieth century? Or, in the alternative, (2) What is the greatest challenge facing urban society in the twenty-first century?”

The answers to Question #1 would seem to be *Brown v. Board of Education*; Fiorello LaGuardia, Robert Moses, Richard Daley, Edward I. Koch or Alfred E. Smith; World War II and, as to Question #2, one might answer race relations or transportation. I thought I would let others write articles responding to the two questions, however, and for me to write a piece about a remarkable man who has contributed more towards the improvement of our laws as they relate to urban society than any other person I know. He is a colleague of mine and his name is Whitman Knapp. He is a United States District Judge for the Southern District of New York.

Judge Knapp's life spans all the decades of the century and his distinguished legal career has extended for more than six decades. He has done more for the law in this City and for law enforcement here than anyone I have known. Whitman Knapp graduated from Yale College in 1931 and from Harvard Law School in 1934. From 1937 to 1950, he was an Assistant District Attorney in the New York County District Attorney's Office under Thomas E. Dewey and the legendary Frank S. Hogan. While in the District Attorney's Office, he prosecuted important felony cases and became head of the Appeals Bureau where he argued the appeals and wrote the briefs in some of the most important cases of that era.

Among the successful appeals argued by Judge Knapp were: *People v. Doubleday & Co.*,¹ *Fay v. New York*² and *People v. Perez*.³ The legal doctrines in those landmark cases may have been changed over the following years, but they were three of the most important cases of the mid-century.

* United States District Judge, Southern District of New York.

1. 77 N.E.2d 6 (N.Y. 1947), *aff'd*, 335 U.S. 848 (1948).

2. 332 U.S. 261 (1947).

3. 90 N.E.2d 40 (N.Y. 1949), *cert. denied*, 338 U.S. 952 (1950).

The conviction in *Doubleday* rested upon a finding that the story, "The Princess With The Golden Hair," in a collection entitled *Memoirs Of Hecate County*,⁴ was obscene within the meaning of the relevant New York statute. Judge Knapp successfully defended the conviction in the Appellate Division and the New York Court of Appeals. This was a major First Amendment case and the Supreme Court granted certiorari.

Judge Knapp's opponent in *Doubleday* was a most distinguished leader of the New York Bar who argued for fifty minutes and reserved ten minutes for rebuttal. Judge Knapp, on the other hand, delivered this brilliant but brief argument:

May it please the Court. The statute upon which this judgment rests is valid. A reading by the Court of the book will demonstrate that the factual finding of obscenity was reasonable. I therefore submit that the judgment should be affirmed.

He said this and sat down. An equally divided Supreme Court, Justice Frankfurter abstaining, affirmed the unanimous New York Court of Appeals decision after listening to Judge Knapp's argument. Apparently brevity is not only the soul of wit — it appears also to be the essence of successful appellate advocacy.

The *Fay* case dealt with labor racketeering and extortion and the *Perez* case was a murder trial with major issues relating to the admissibility of custodial statements made by the accused and arrest to arraignment delay. These are subjects which have impacted upon and continue to affect the lives of citizens in our urban areas up to the last year of the millennium.

After leaving the District Attorney's Office and becoming a prominent private practitioner, Judge Knapp continued to make great contributions to the public weal. From 1953 until 1954, he served as Special Counsel to the Waterfront Commission of New York Harbor. The Waterfront Commission did more to clean-up corruption on the New York docks than anyone imagined could be done. The Academy Award-winning film, *On The Waterfront*,⁵ starring Marlon Brando, provides some idea of how rampant crime was in the New York Harbor before the Waterfront Commission.

After his successful stint at the Waterfront Commission, he became a member of the Commission that revised the New York Penal Law and Code of Criminal Procedure. The work of that Commission resulted in the substantive and procedural statutes of

4. EDMUND WILSON, *MEMOIRS OF HECATE COUNTY* (Doubleday 1946).

5. Columbia Pictures Corp. (1954).

the State of New York that define our criminal laws and the rules that govern those laws to this day. While in private practice during the 1950s, 60s and early 70s, he was a partner in the distinguished firm of Barrett, Knapp, Shapiro & Simon but, as illustrated above, he never abandoned the public sector.

In 1970, it had become apparent that there was a corruption problem in the New York City Police Department and Mayor John Lindsay concluded that it was necessary to create a Commission to determine the extent and nature of police corruption in the City and to examine procedures for dealing with corruption and recommending changes and improvements in the procedures.⁶ The Mayor appointed Whitman Knapp as Chairman of this "Commission To Investigate Allegations Of Police Corruption."⁷ "The Knapp Commission," as it came to be known, with a small but elite staff and with limited funding, uncovered more systemic corruption in the New York City Police Department than the most cynical citizen or newspaper reporter ever dreamt existed.

On August 3, 1972, after public hearings, the Commission issued its initial Report.⁸ The first sentence of the Knapp Commission Report summed it all up. "We found corruption to be widespread." In a carefully-documented follow-up Report, dated December 26, 1972, the Commission called for an overhaul of the Department's methods of dealing with corruption.⁹ This overhaul created institutional methods for dealing with corruption, which have largely freed the New York Police Department of the types of graft and shakedown so common in other local law enforcement agencies throughout the country and the world.

None of this could have been accomplished without the intelligence, efforts and honesty of Judge Knapp. There are still "rotten apples" in the New York City Police Department as there are in all human institutions, but knowledgeable observers believe that the New York City Police Department is largely free of the systemic corruption which existed in 1970 when the Knapp Commission was formed.

Whitman Knapp was appointed to the United States District Court for the Southern District of New York by President Richard Nixon on June 30, 1972. Because of his devotion to the cause of

6. See Rep. Of the Comm'n to Investigate Allegations of Police Corruption and the City's Anti-Corruption Proc. (Dec. 26, 1972) (Whitman Knapp, Chair).

7. See *id.*

8. See *id.*

9. See *id.*

cleaning-up police corruption and his attention to that important issue, however, he did not assume his judicial duties until September 20, 1972. From then until today, Judge Knapp has been, and continues to be one of the brightest jewels in the crown of the Southern District. He has presided over all manner of complicated commercial, tort, employment and criminal litigation. Two of the most important cases over which he presided were: *United States v. Coonan*¹⁰ and *United States v. Friedman*.¹¹

Coonan involved a murderous Irish-American gang that associated itself with the Mafia. The gang was known as "The Westies" and they were responsible for scores of murders in this City. *Friedman* revolved around bribe taking by high-ranking City officials, including the Borough President of Queens and the Chairman of the Bronx Democratic Committee who had been a Deputy Mayor. No cases tried during my time on the Southern District have been more important to urban affairs than *Coonan* and *Friedman*. Both cases were extremely complex and involved difficult legal issues. Competent, but highly-charged, counsel represented the parties in both cases. It is rare for the Court of Appeals for the Second Circuit to praise a trial judge. But now Chief Judge Winter wrote in affirming *Friedman*, "Given the length of the trial, the complexity of the issues, and the vigor with which it was prosecuted and defended, Judge Knapp conducted a remarkably fair and error-free trial."¹²

Whitman Knapp was a great lawyer and he continues to be a great judge. His contributions to the law and to urban life have made New York a better place for all that live here. It is an honor to serve with him.

10. 938 F.2d 1553 (2d Cir. 1991) (affirming conviction), *cert. denied sub nom.*, *Kelly v. United States*, 503 U.S. 941 (1992). *See also* *United States v. Coonan* 664 F. Supp. 861 (S.D.N.Y. 1987) (original order denying empanelment of anonymous jury); *United States v. Coonan*, 671 F. Supp. 959 (S.D.N.Y. 1987) (revised order sequestering jury); *United States v. Coonan*, 839 F.2d 886 (2d Cir. 1988) (affirming Judge Knapp's decision not to use special verdicts in an ongoing racketeering trial).

11. 854 F.2d 535 (2d Cir. 1988) (affirming Judge Knapp's trial rulings).

12. *Friedman*, 854 F.2d at 541.

URBAN HOLISM: THE EMPOWERMENT ZONE AND ECONOMIC DEVELOPMENT IN ATLANTA

*Honorable William Campbell**

After experiencing decades of escalating crime and population loss, Atlanta is undergoing a renaissance. The rate of violent crime is the lowest it has been in many years and, for the first time in thirty years, the city has experienced a positive growth in its population.¹ There are several reasons for Atlanta's turn-around. First, Atlanta's holistic approach to development has improved the city on a variety of fronts. Second, by using its Empowerment Zone, Atlanta has leveraged private sector dollars to redevelop areas that have been slow to rebound from decades of decline. Third, Atlanta's community policing program has brought police closer to citizens, consequently lowering crime. Lastly, by reinventing public housing in Atlanta, the city has developed many mixed income communities.

I. Holistic Approach

Atlanta uses a holistic approach to urban development. In other words, no singular method or strategy dominates our plan to revitalize our inner city communities. In particular, this approach focuses on the interplay of public and private sectors in our City,

* Mayor, Atlanta 1993-present. Chair, United States Conference of Mayors' Transportation and Communications Committee; Atlanta City Council, 1981. J.D., Duke University; B.A., *cum laude*, Vanderbilt University. Recipient, Bridges to Tomorrow Award, 1998. All sources cited are available by contacting the Mayor's Office at 55 Trinity Avenue, Suite 2400, Atlanta, Georgia 30335.

1. See, e.g., Research Atlanta, Inc., *A Population Profile of the City of Atlanta: Trends, Causes and Options*, May 1997, at iii.

Many large cities have lost population and employment over the last 25 years and the composition of the remaining population has changed. Many of the problems of cities result from the fact that cities are losing their middle class while poverty is becoming more concentrated The population of the City of Atlanta declined by almost 19 percent from 1960 to 1994 even as the region's population grew by over 154 percent, a pattern hardly unique among American cities.

Id. See Atlanta Regional Commission ("ARC"), *1998 Atlanta Region Outlook Report* (noting that the population of the City of Atlanta in 1990 was 416,397. In 1998, the population of the City was 430,111).

remaining cognizant of the effect of one upon the other. For example, consider the resurrection of the Martin Luther King Drive corridor in Southwest Atlanta, near the Atlanta University Center (the largest complex of private Black educational institutions of higher learning in the world). The City, through the Atlanta Development Authority ("ADA") and the Atlanta Empowerment Zone ("AEZ"), will build the "Historic Westside Village" on fifteen acres near downtown in mid-summer of 1999. This \$130 million mixed-use development will contain a movie theater, business offices, housing that includes three-story townhouses (ranging in price from \$95,000 to \$175,000), a grocery store and a 136-room, six-story hotel. Crucially, this project will create 2000 jobs for the area.

Had the city attempted just a single development — a grocery store for example — it might have failed because of a lack of factors necessary for development, such as a sufficient population base, public safety and complementary businesses and services. By taking a holistic approach, we are able to marshal the entire resources of the city and create excitement for the development of a new Atlanta for the Twenty-first Century.

II. The Atlanta Empowerment Zone

In 1994, President Bill Clinton created an exciting new initiative known as Empowerment Zones. Central to the Empowerment Zone concept is the notion of community involvement. The four goals of the Empowerment Zone are to: (1) expand employment and investment opportunities; (2) create safe and livable communities; (3) lift youth and families out of poverty; and (4) provide adequate housing for all residents. In the five years since we started implementing this program, the process of involving citizens has not always been easy, but by staying the course we've created something that reflects a shared vision.

A snapshot of Atlanta's AEZ² looks like this: The AEZ represents 9.29 square miles near the heart of the City of Atlanta. The working poor in these areas, barely make ends meet and have under-utilized skills. Over one-fourth of all housing and business facilities remain vacant and more than a half of the residents within the AEZ are under-educated. In addition, AEZ youth are not obtaining high school diplomas at the same rate of non-AEZ youth. In fact, only forty-four percent of the adults have a high school

2. See, e.g., City of Atlanta, *Atlanta Empowerment Zone, 1994 Strategic Plan*.

education. AEZ's unemployment is seventeen percent, higher than in surrounding communities. Median income is less than \$11,000 per year. Social problems, although similar to the larger community, seem to escalate within the AEZ and resources are often times inaccessible.

To positively impact this situation, we knew that it would take more than the \$250 million in grants and tax incentives the federal government had slated to give us over a ten-year period. Through leveraging, Atlanta transformed the federal grants into private loans and grants. To date, we have leveraged close to a billion dollars, created close to 800 jobs and provided \$6.3 million in loans. In the next three years, the zone is expected to create 4345 jobs through a total of \$39.4 million of investment in projects.

One of the City's most significant collaborations is the contract with United Water Services of Atlanta for the private contract management of Atlanta's water system. The concept of privatization has been around for many years and so, after careful consideration and analysis, Atlanta decided to privatize its water system and soon will do the same for its sewer system. Privatizing the water system not only created needed capital to reinvest into our infrastructure, but it also helped hold down water rate increases for our 1.5 million customers. In the process we also were able to enhance minority participation (minority investors own thirty-five percent of the company). In addition, this agreement provides more than thirty businesses with the chance to train and provide employment opportunities in the Empowerment Zone, thus protecting city workers.

The commitments made by United Water Services to both the City of Atlanta and to the residents of the AEZ illustrate how privatization can serve to stimulate and facilitate economic development in urban areas. These commitments include hiring workers from the Zone, providing incentives for workers to live there and funding a water institute at one of Atlanta's historically black colleges in that area.

III. Community Policing

In Atlanta, we are building a city where people feel secure, supported and affirmed. We have done this best by bringing our police close to our people in a concept called community policing. Key to our return to community and renaissance is the progress we've made in public safety.

We have put a significant portion of our city budget into public safety. Public safety accounts for forty-nine percent of the General Fund budget.³ In 1999, the city spent \$195 million on public safety, a four percent increase over 1998.⁴ This funding goes toward increased patrolling in high crime areas as well as investments in youth programs. In fact, we more than doubled the number of children served by our recreation programs, serving some 35,000 children in 1999.

In 1998, our homicide rate was down to the lowest levels in thirteen years and the fifth lowest in thirty years.⁵ In addition, we have decreased juvenile arrests by thirty percent.⁶ Fire deaths are down by an amazing fifty percent since 1995 as a result of more fire prevention education and the distribution of more than 70,000 smoke detectors.⁷

We are enforcing all the City laws, because there are no victimless crimes. Last year I toured a neighborhood in Southeast Atlanta and could see that prostitution and drug trafficking were operating in full disregard for the law. I immediately issued an executive order to impound the vehicles of those using cars while engaging in criminal activity. Since we launched this crackdown, we have impounded hundreds of cars and made more than five hundred arrests. But more importantly, we communicated to residents that if they stay in the city, we are willing to do all that is possible to enhance the quality of in-town living.

IV. Mixed Income Communities

Five years ago, Atlanta had one of the worst housing authorities in the country. For the fiscal year ending on June 30, 1994, the Atlanta Housing Authority's ("AHA") Public Housing Management Assessment Program ("PHMAP") score, as assigned by the U.S. Department of Housing and Urban Development, was 36 out of 100. For the fiscal year ending June 30, 1998, the AHA's PHMAP score was 97 out of 100, earning HUD's High Performing Agency Designation. This was largely due to our reinvention of public housing by building new mixed income communities on the land where public housing once existed and adding middle income

3. See, e.g., City of Atlanta, *1999 Budget*.

4. See, *id.*

5. See, e.g., Federal Bureau of Investigation, *Uniform Crime Reports*.

6. See, *id.*

7. See, e.g., City of Atlanta, *1999 Budget*.

amenities like central air, dishwashers, swimming pools and new schools and community centers.

Public/Private Partnerships form the core of the Atlanta Housing Authority's ("AHA") Olympic Legacy Program, a program designed to revitalize neighborhoods and stimulate reinvestment in the community. The Olympic Legacy Program repositioned five of AHA's most distressed public housing communities into mixed income communities with a full array of amenities and services. Centennial Place, formerly Techwood/Clark Howell, the first mixed income, mixed finance community in the country, includes apartment homes reserved for public housing-eligible families. One thousand and eighty-one public housing units were replaced with nine hundred mixed income, mixed finance apartment homes. In 1998, Centennial Place received the John Gunther Blue Ribbon Award for Best Practices from HUD.

The \$42 million HOPE VI Grant was leveraged into \$125 million of public and private investment. This enabled a new public elementary school, a new YMCA, a community center, a branch bank, a hotel and a corporate suites facility to be built. Using HOPE VI funds, AHA developed and implemented the nationally acclaimed Work Force Enterprise Program designed to prepare public housing families for work, in some cases for the first time, and for fuller employment and careers. As of February 1999, there are eighty-six active trainees, forty-three of whom are currently working at an average hourly wage rate of \$7.24, and an average annual salary of \$14,087, for a gross annual salary of \$605,751 with \$63,604 generated in taxes. Fifty-four private and public employers participate in the program.

Conclusion

Much of Atlanta's success is due to the holistic approach to development. By understanding that redevelopment is complex and must be approached on all public and private fronts, Atlanta has been transformed. Indeed, the political, economic, and social sectors of society are inseparable, each with an obligation to help our cities. As mayor, I felt the moral obligation to help the hundreds of thousands of residents who have not forsaken the city. By staying the course, they have inherited a city that is safer, more dynamic and, more importantly, a city that has returned to its citizenry a renewed sense of community.

SMART GROWTH: A CATALYST FOR PUBLIC- INTEREST INVESTMENT

*Honorable Norman B. Rice**

Looking back, my leadership as mayor of Seattle was shaped by three core principles: social equity, economic opportunity and environmental stewardship. These principles, the result of an extraordinary community collaboration, guide the development of the Seattle into the twenty-first century. I believe the greatest challenge facing urban society is maintaining our commitment to these ideals as we seek to manage the significant growth in urban America, while limiting the effects of the flight to suburbia, commonly termed "sprawl."

From 1990 to 1997, I had the honor of serving as Mayor of Seattle, one of America's greatest cities. Seattle earns international acclaim on so many fronts: quality of life, economic vitality, recreation opportunities and cultural life, to name but a few. It has topped multiple lists in recent years of "America's Most Livable Cities" and "Best Cities for Business."

The overall quality of life in Seattle has resulted in steady population growth. Predictably, accompanying this population increase has been traffic congestion, skyrocketing housing prices and a scarcity of open space. And like many other urban centers, extensive development on the city's outer fringes, coupled with slower investment in the urban core, threatens to jeopardize Seattle's future. A solution to this problem is emerging in the "smart growth" movement and the strategies it sets forth for sustaining the livability of large urban centers into the twenty-first century.

I. Smart Growth

The overarching mission of this program, "smart growth" is to create viable urban neighborhoods that address a multitude of community needs in a convenient, cost-effective and environmentally conscious way. Urban government can attain this goal

* Norman B. Rice was mayor of Seattle from 1990 to 1997. Recipient of the National Neighborhood Coalition's 1999 Award for Outstanding Leadership on Behalf of Neighborhoods, he is now President and Chief Executive Officer of the Federal Home Loan Bank of Seattle.

through increased citizen participation in development decisions, and a constructive dialogue about overall regional development and its impact on individual neighborhoods. The results of implementing these changes are compact, mixed-use urban development, pedestrian and public-transit friendly neighborhoods, mixed-income communities and open spaces.

Smart growth seeks to attract new investment, residents and jobs to our urban neighborhoods by making these areas attractive to work and live in, thus combating the decentralization of economic and residential life away from city centers. Because smart growth demands that society sacrifice many of the benefits afforded by sprawl, such as low-density residential neighborhoods, dependence on the automobile and the ability for middle- and upper-income households to separate themselves from the problems of poverty commonly found in city centers, it can foster social equity. Indeed, by lessening the physical distance between rich and poor, smart growth makes everyone partners in the prosperity of their urban community. Consequently, the economic disparity between rich and poor will lessen as well.

A. International District Village Square

Over the past two decades, Seattle's International District, which is home to a large Asian population, was bruised by a number of civic projects including the construction of sports stadiums and highways. The neighborhood's perimeter had been particularly hard hit. One notable eyesore was an empty lot where the county's public transit authority once kept buses. Following extensive community dialogue, negotiations with city and county officials and the resulting development of a complex financing package, this vacant lot was transformed into International Village Square, a 112,000 square-foot, mixed-use facility.

The building combines seventy-five apartments for low-income elderly, retail business and community organizations providing multilingual and culturally appropriate services including health-care and childcare. The site is easily accessible by public transportation. In addition, the site employs more than two hundred health and human service professionals who speak forty-three different languages and dialects. International Village Square is the largest multi-ethnic project in the Pacific Northwest.

The importance of International Village Square is the example it serves of community cooperation and smart growth. Sue Taoka, executive director of the Seattle Chinatown International District

Preservation and Development Authority captured the significance of the project:

We want to reclaim this neighborhood's history of support for individuals and families who immigrate to this country, by providing culturally familiar sights and sounds, goods and services. Most of all, we want to ensure that the basic necessities — education, health care, jobs and homes — that enable us all to live in dignity, remain available regardless of a person's income

B. Holly Park

Holly Park was a public housing community built in the 1940s to provide housing for defense industry workers during World War II. The community spanned 110 acres and consisted of nine hundred housing units laid out in a disjointed street grid that separated it from the surrounding neighborhood. By the early 1990s, it had become the city's most distressed public housing community, harboring severe poverty and crime and offering little hope of better lives for the families who lived there.

In 1993, the Department of Housing and Urban Development awarded a planning grant that energized the city government, housing authority, neighbors and residents to transform Holly Park into a vibrant, mixed-income community. Emerging from their collaboration was a plan to create NewHolly, an area of 1200 homes, various community facilities, learning centers, a library and a new college campus. In addition, there will be a Head Start program, childcare, job training programs, small business loan funds and employment opportunities that will allow residents to earn living wages.

Many of the principles of smart growth are represented in NewHolly: mixed-income and mixed-use development, an increased population density and accessibility to public transportation. The homeownership units are next to, and indistinguishable from, the public rental housing. The apartments will be priced for very low-income residents, as well as those with moderate incomes. With the additional three hundred units of housing, as well as the many other facilities sited on the property, this redevelopment increased the density of land use. NewHolly also is located adjacent to a proposed new regional transit center, which is convenient for residents and a magnet for new development in the surrounding neighborhood.

II. Public-Interest Investment

Both of these projects demonstrate how the most successful neighborhoods are those in which everyone accepts responsibility and in which everyone is willing to invest money and time. The innovation and community cooperation behind International District Village Square and NewHolly were very inspiring, but what was equally noteworthy was how these two housing developments were financed through public/private partnerships. Government funding was absolutely essential in both projects, but so too was the private investment provided through grants, low-income housing tax credits and loans.

For example, the enormity and complexity of NewHolly required a blend of public and private financing. The anchor funding for the redevelopment was a \$48 million grant from the Department of Housing and Urban Development. The Seattle Housing Authority is currently leveraging this grant with funding from state and local government and extensive private investment from financial institutions, including loans, grants and tax credit equity. When the redevelopment effort is complete, the Seattle Housing Authority will have leveraged the federal grant with more than \$160 million.

The International Village Square, too, serves as an example of the power of using various funding sources. The Seattle Chinatown International District Preservation and Development Authority developed the \$19.5 million building. City, county and federal government contributed the bulk of the \$7.1 million in public dollars supporting the project. Tax-exempt bonds backed by the city will provide another \$9 million and the remaining \$3.5 million was raised through private donations.

Two decades ago, developments like these would have been financed solely through government funds. Now, local governments and local citizens and businesses alike can share in these endeavors. The most exciting dynamic emerging from public/private partnerships today is the role of local financial institutions in community change and development. Communities are engaging local banks in the planning process and presenting them with sound investment opportunities that benefit their business interests. Financial institutions, long the cornerstones of their communities, are embracing the opportunity to help their cities and towns thoughtfully manage their development.

By recognizing the positive impact the project would have on the neighborhood, a number of financial institutions supported International Village Square with donations to the capital gifts cam-

paign. Local banks invested heavily in NewHolly, providing construction financing and permanent mortgages for families who would become the first homeowners in the neighborhood's history. Tax credit equity and grants from Fannie Mae and the Federal Home Loan Bank of Seattle leveraged the sizable investments from the local financial institutions.

Financial institutions also enrich these partnerships in other ways. They provide fiscal reason and analysis to ensure that smart growth developments make economic sense as well as fulfill a community's goals. The fundamental mission of smart growth is to build sustainable communities, a goal plainly compatible with a business whose profitability — and survival — hinge on making long-term financial investments.¹

Conclusion

The role of local financial institutions will evolve as we enter the twenty-first century. Communities will rely more than ever before on private sector investment, and local banks will be looked to provide financial support for community-inspired smart growth development. The wave of consolidation among financial institutions in recent years only heightens the importance of local lenders in planning for overall community development and participating in public/private financing partnerships.

Building communities and successful cities requires that citizens understand what they value most, define their own collective future and actively participate in creating it. Smart growth and the public-interest investment opportunities it generates foster this style of community building and provide the tools to help our cities manage urban sprawl, the biggest challenge now facing urban society. It also enables communities to tap the full potential of their citizenry — government, residents, businesses, banks and others — in an effort to build prosperous partnerships for the twenty-first century.

1. As communities seek out greater private investment for neighborhood redevelopment, however, they must overcome the one great myth about public/private partnerships, namely, that the private sector foots the bill and the public reaps the benefits. All partners in these endeavors must prosper, albeit at different levels, to be a "partnership."

REFORMING THE URBAN WORKPLACE: THE LEGACY OF FRANCES PERKINS

*Honorable Jeanine Ferris Pirro**

"I came to Washington to work for God, FDR, and the millions of forgotten, plain common workingmen."¹

Introduction

Growing up in Elmira, New York during the 1950s and 60s, people frequently asked me about my plans for the future. From the earliest age, I remember replying that I wanted to grow up to be an attorney. Invariably, that answer led to another question: "But don't you want to be a mommy?" While I was not averse to marriage and parenthood, I possessed an innate sense that having both a family and a career were not mutually exclusive. Looking back, many young girls, not so many generations before me, believed that life did not hold such possibilities for them.

Over the course of this century, many developments occurred to change how society views women and how women view themselves. Not so many years before my birth, the nation recruited women for the work force in large numbers to assist the war effort during World War II. Only a few decades earlier, women won the ability to vote in national elections.²

At the beginning of this century, individual laborers had little control over their work environment; nor did most urban workers have the financial means necessary in case of disability or retirement. Well into the second quarter of this century, many urban workers, particularly women and children, endured up to eighty-hour work weeks for sweatshop-level pay, often under filthy, dangerous conditions. The issues of the day, particularly to women, were education, social services and working conditions for the poor. Fittingly, an extraordinary woman championed many of these issues: Frances Perkins a woman driven by the dogged con-

* Judge Pirro is a former Westchester County Court Judge, and is currently serving her second term as District Attorney of Westchester County, New York.

1. *Frances Perkins – Pioneer of Social Security* (visited June 3, 1999) <<http://www.ssa.gov/history/fperkins.html>>.

2. See U.S. CONST. amend XIX (1920).

viction that the welfare of workers — especially women and children — was a matter of governmental concern.

Perkins not only became a role model for women, but she also changed the work place for every American by leading a revolution that challenged the way government cares for its citizens. Moreover, by the late 1930s, the legislation she helped enact, such as the Social Security Act and the laws regulating working conditions, changed the lives of urban children and women significantly. Today, these laws are so long established and familiar to us as to have become an unnoticed and unremarkable aspect of our society. The safety net these laws provide protects workers from exploitation and provides for them well into old age. Due to the breadth and fundamental nature of Perkins' changes to the urban workplace, she is, consequently, the most influential person to urban America in the twentieth century.

I. Francis Perkins: Her Early Work

At the time of her appointment as labor secretary in 1933,³ Perkins had been investigating urban working conditions and making strides towards improving the lot of workers for almost three decades. Her phenomenal success in effecting the changes she sought was largely the result of the fact that, in whatever area she happened to be seeking change, Perkins conducted first-hand investigations in the field. These personal investigations became her trademark and provided the basis for the detailed and vivid reports she prepared that were strikingly effective in convincing city and state officials to act on her findings.

Perkins initially encountered the technique of field investigation while at Mount Holyoke College, where she attended from 1898-1902.⁴ As part of a course in American colonial history, Perkins visited textile and paper mills,⁵ thereby observing first-hand the conditions under which the workers labored. She was horrified at her discovery: long hours, inadequate compensation and safety hazards. Upon investigation, Perkins was appalled that there were no effective laws regulating these conditions.⁶

3. See, e.g., *Frances Perkins: Women's History — The Quest for Equality* (visited June 3, 1999) <<http://www.worldbook.com/fun/whm/html/whm086.htm>> (“[Frances Perkins] served as secretary of labor under President Franklin D. Roosevelt from 1933 to 1945.”).

4. See GEORGE MARTIN, *MADAM SECRETARY FRANCES PERKINS* 46 (1976).

5. See *id.* at 50.

6. See *id.*

After graduation, Perkins lived at Hull House and spent time working at Chicago Commons, the first of Chicago's famous settlement houses offering social and educational opportunities to the underprivileged.⁷ To obtain reliable information about social conditions, she personally visited the tenements and sweatshops that comprised the everyday environment of the vast majority of those living in the urban settings surrounding her.⁸

In 1907, Perkins left Hull House and took charge of a group in Philadelphia that protected immigrant ministry girls who were arriving daily in Philadelphia to seek work.⁹ These girls were often preyed upon, cheated, robbed or led into prostitution.¹⁰ Not content with simply housing these young women, Perkins acted to end the oppressive conditions they faced. Perkins posed as a girl who had just arrived in the city and was looking for a room and a job. Based on her undercover experiences, Perkins filed reports chronicling the working conditions of young women supporting themselves in a major American city.¹¹ Despite encountering frank indifference from politicians and vigorous opposition, including a physical attack on her by men who exploited the young women,¹² Perkins managed to close down many of the worst offenders and get protective local legislation passed.¹³

In 1910, Perkins came to Manhattan where she served as executive secretary of the Consumer's League.¹⁴ There, she investigated the working conditions in varying shops and small service industries and lobbied for a fifty-four-hour work week for women. Her detailed reports and testimony at public hearings about the deplorable state of affairs she discovered led to new regulations that eliminated some sweatshops and improved sanitary conditions.

II. The Consummate Reformer

While Perkins was studying the causes of industrial accidents and fires, a factory fire occurred that stunned the national conscience

7. See MARTIN, *supra* note 4, at 63-65.

8. See, e.g., Gordon Berg, "Be Ye Steadfast" *The Life and Work of Frances Perkins* (Nov. 27, 1998) <<http://www.dol.gov/opa/public/frances/frances.htm>>.

9. See MARTIN, *supra* note 4, at 65-68.

10. See *id.*

11. See *id.*

12. See *id.* at 66.

13. See, e.g., Gordon Berg, "Be Ye Steadfast" *The Life and Work of Frances Perkins* <<http://www.dol.gov/opa/public/frances/frances.htm>>.

14. See MARTIN, *supra* note 4, at 77-103.

into awareness of the deplorable working conditions faced by women. On March 25, 1911, a fire broke out in the Triangle Shirtwaist Factory in New York City.¹⁵ Perkins, at a friend's house in nearby Washington Square,¹⁶ watched in horror as six hundred young women, some as young as thirteen, were trapped by the fire in the upper floors of the factory.¹⁷ One hundred and forty-six women died in the fire; many jumped to their deaths to escape the flames and others perished in stairwells and elevator shafts. Once the flames were extinguished, others were found piled near the doorways that had been kept locked.¹⁸

The deaths stimulated a concern by officials over factory safety. Consequently, New York City formed the Committee on Safety.¹⁹ Because of her experience in the field, the Committee hired Perkins and appointed her its executive secretary in 1912.

While on the Committee, Perkins became an expert on factory safety, an expertise she on which drew throughout her career.²⁰ In Albany, Perkins, along with State Senators Robert Wagner and Al Smith, successfully urged the state legislature to create a New York State Factory Commission.²¹ The Commission appointed Perkins its director of investigations. In that role, Perkins led Commission investigators and members to sites where they viewed first-hand the deplorable conditions of working women and children.²² These surprise visits uncovered widespread violations of the child labor

15. *See id.* at 84-90.

16. *See id.* at 84-85. Perkins later called the incident a "never-to-be-forgotten reminder why I had to spend my life fighting conditions that would permit such a tragedy." *See, e.g., Workers' Plight Was Perkins' Priority* (visited June 3, 1999) <<http://www.naswdc.org/PiecesNASW/perkins.htm>>.

17. *See* MARTIN, *supra* note 4, at 84-86.

18. Ironically, one year earlier, workers from the company went on strike, as members of the Garment Worker Union, seeking more sanitary and safer working conditions, including unlocked doors and sufficient fire escapes. The factory responded by locking out the strikers and hiring replacements — the same young women who died in the fire.

Tragically, the factory owners were not held responsible legally. The factory owners collected \$64,925 from their insurance company for property damage in the lawsuit filed after the fire. Almost three years to the day of the fire, the owner of the building, Joseph J. Asch, settled with the twenty-three individual suits for lives lost in the fire, at a rate of \$75 per life. *See id.*, at 86.

19. *See id.* at 88.

20. *See id.* at 103-121.

21. *See id.* State Senators Wagner and Smith served as co-chairs of the investigating commission of the New York State Factory Commission.

22. Perkins once said: "No one except the man who has been exposed to noxious gasses, dust, and fumes in a factory really knows what the dangers of factory life can be." *Bio of Frances Perkins by SSA* (visited June 3, 1999) <<http://www.ssa.gov/history/fperkins.html>>.

laws. Investigators often caught employers who denied hiring young children trying to hide them when they arrived. Both Senators Wagner and Smith, based on their observations during these surprise visits, became vigorous advocates for new labor and welfare legislation.

The Commission soon proposed, and the New York State legislature passed, a broad range of remedial legislation. Moreover, due to her assistance, the Commission recommended reforms that resulted in the passage of thirty-five laws in just two years.²³ Although Perkins spent most of her time directing the Safety Committee's work in New York, she made frequent trips to Albany and elsewhere in New York State on behalf of the Factory Commission. During this period, there were no federal laws regulating labor, industrial standards of health and safety or welfare. As a result, New York's legislation resulting from Perkins' investigations eventually became the model for federal law on these subjects.

In 1918, Perkins' colleague from the Factory Commission, Al Smith, became the governor of New York. He immediately appointed Perkins as a member of the New York State Industrial Commission.²⁴ From this post, Perkins served as the de facto head of the state labor department. In 1929, after Al Smith unsuccessfully ran for president, New York's new governor, Franklin Delano Roosevelt, officially conferred this title on Perkins, immediately naming her the New York State Industrial Commissioner, a post she held until 1933.²⁵

III. Madame Secretary

When Franklin Roosevelt became president in 1933, he took Perkins to Washington with him as his Secretary of Labor, making her the first woman to hold a cabinet post.²⁶ As a member of the Cabinet, Perkins instituted dramatic changes. During her first hundred days in office, in addition to reorganizing the Labor Department and increasing its efficiency and effectiveness, she oversaw the creation of a number of programs to provide immediate relief to desperate citizens unable to find work. These included the Civil-

23. See, e.g., *Workers' Plight Was Perkins' Priority* (visited June 3, 1999) <<http://www.naswdc.org/PiecesNASW/perkins.htm>>.

24. See MARTIN, *supra* note 4, at 144.

25. See *id.* at 206. While serving in that capacity, Perkins was largely responsible for expanding New York state's employment services, data-gathering operations and investigating of factories. See, e.g., *Workers' Plight Was Perkins' Priority* (visited June 3, 1999) <<http://www.naswdc.org/PiecesNASW/perkins.htm>>.

26. See MARTIN, *supra* note 4, at 242.

ian Conservation Corps and the Federal Emergency Relief Administration.²⁷ Congress enacted the Fair Labor Standards Act of 1938 and the National Labor Relations Act also due to Perkins' unflagging efforts to protect labor organizations and make minimum wage, maximum hour and child labor laws a national concern.²⁸ To Frances Perkins, however, the highlight of her career came in 1935 with the passage of the Social Security Act.²⁹ This Act changed the economic and social structure of American life by assuring benefits for those retired, unable to work and temporarily unemployed.³⁰

Conclusion

Over the course of her illustrious career, Frances Perkins changed the urban American landscape with her visions of fair, safe and humane working conditions. When she died in 1965, Perkins left a legacy of labor reform. To publicly minded women, she left a special legacy — an inspirational lifetime of personal success, based entirely upon her unfailingly exemplary performance without regard to her gender. That is why Frances Perkins was the person most influential to the development of urban America in the twentieth century.

27. *See id.* at 249 (Civilian Conservation Corps); *id.* at 257-58 (Federal Emergency Relief Administration).

28. *See id.* at 387-95 (Fair Labor Standards Act), 381-86 (National Labor Relations Act).

29. *See id.* at 340-56.

30. Interestingly, Perkins doubted the constitutionality of the new Social Security scheme. As she grew worried over the fate of the proposed legislation during the closing days of 1934. As fate would have it, she attended an afternoon tea party held by then-Associate Justice of the Supreme Court, Harlan F. Stone. At one point during that afternoon Perkins found herself seated next to Justice Stone and, during their small talk, he inquired as to the progress of her proposed Social Security bill. She explained her concerns over the constitutionality of the proposed law, to which he whispered, "the taxing power of the Federal Government, my dear, the taxing power. You can do anything under the taxing power." Three years later, the Supreme Court upheld the constitutionality of the Social Security Act of 1935 under the federal taxing power. *See Frances Perkins, The Roots of Social Security* (speech delivered at the Social Security Administration Headquarters, Baltimore, Maryland, Oct. 23, 1962) reprinted in *Essay by Frances Perkins* (visited June 3, 1999) <<http://199.173.225.3/history/perkins5.html>>.

A TRIAL JUDGE'S PERSPECTIVE — PROMOTING JUSTICE AND FAIRNESS WHILE PROTECTING PRIVILEGE*

*Honorable Marian Blank Horn***

Let me start this evening by saying how happy I am to be here with you tonight. I feel fortunate to have been chosen to follow in the proud tradition of Maureen McNamara and to deliver this lecture in her honor. I take my place behind Ms. McNamara and the other distinguished women who have preceded me.

Unlike some of my predecessors, however, I am made even more humble by having to walk up the front steps into this building, the same way I did on my first day of law school as a terrified 1L. All my old insecurities flooded back into my consciousness. In the audience are a number of my law school classmates, and my husband who graduated two years ahead of me, also from the law school. I suspect not one of us would have guessed I would be lucky enough to be a federal judge and to be standing here with you tonight. I also want to acknowledge one of my daughters, who is in the audience. Of all the jobs I have held, and the brochure announcing tonight's program is far too flattering, the most important and the most enjoyable job on my resume is that of mother to my three accomplished daughters.

For the students in the audience, I have to tell you, based on everything I have seen and heard — and I have visited the law school from time to time in the intervening years — this is a far more user-friendly place than it used to be. I believe the strength of today's Fordham Law School is due in large part to the leadership of your Dean, John Feerick. I am proud to call him a friend

* The following lecture was presented at the Fordham University School of Law as the Annual Maureen E. McNamara Memorial Lecture on October 6, 1998. The goal was to offer an audience of students, faculty and practitioners a judge's perspective on litigation, and also to discuss from a somewhat more academic perspective a related legal issue. As a speech, it was never intended as an exhaustive legal treatise, but rather as a way to spark interest in the topics covered and to lay a foundation to further the practice of law. Moreover, to promote the delivery of her remarks, the lecturer did engage in extemporaneous additions and deletions during the course of the evening's presentation.

** Judge, United States Court of Federal Claims, Washington, D.C. The lecturer, an alumnus of the Fordham University School of Law, acknowledges and is grateful for the assistance of her law clerk, Andrew M. Goldfrank, a member of the New York Bar and a 1996 Fordham University School of Law graduate.

and one whom I admire. John Feerick exemplifies the best in law school leadership. His commitment to the school, to the individual student, to the community, and to the improvement of the practice of law through teaching and doing is a model for all of us.

I am a judge on the United States Court of Federal Claims, which is a federal trial court located in Washington, D.C.¹ I love my current job, in part because each day is different and each day is a combination of the practical and the academic. You never know what will happen in the courtroom or in any phase of litigation. To sit on the court, one has to be appointed by the President and confirmed by the United States Senate.² It is a federal trial court with nationwide jurisdiction, which handles civil suits brought against the United States — no criminal matters. Many of the cases involve large dollar claims and complex litigation. Our cases include contract,³ tax⁴ and patent⁵ cases, takings cases under the Fifth Amendment to the Constitution,⁶ Native American claims,⁷ military and civilian employee pay cases,⁸ and vaccine compensa-

1. Pub. L. No. 97-164, ch. 7 § 105(a), 96 Stat. 27, 28 (codified at 28 U.S.C. § 171 (1994)). The court's name was changed in 1992 to the "Court of Federal Claims" by the Federal Courts Administration Act of 1992, Pub. L. No. 105-572, 106 Stat. 4506 (1992).

2. 28 U.S.C. §§ 171(a), 172 (1994).

3. The principal statute governing the jurisdiction of the Court of Federal Claims is known as the Tucker Act, 28 U.S.C. § 1491 (1994 & Supp. III 1997). Pursuant to this statute, the court possesses jurisdiction to entertain any suit for money damages against the United States which does not sound in tort and which is founded upon the United States Constitution, an act of Congress, an Executive Order, a regulation of an Executive Department or any express or implied-in-fact contract with the United States. *See id.*

4. *See supra* note 3. This jurisdiction is concurrent with the jurisdiction that is possessed by United States District Courts, pursuant to 28 U.S.C. § 1346(a)(1) (1994), to entertain tax refund suits. In order to obtain jurisdiction a taxpayer is required to file a claim for a refund with the Internal Revenue Service. *See* 26 U.S.C. § 7422(a) (1994).

5. The court possesses exclusive jurisdiction to entertain a suit against the United States by the owner of a United States patent to recover compensation for the unauthorized use by or for the United States of a patented invention. *See* 28 U.S.C. § 1498(a) (1994); *see also* 35 U.S.C. § 183 (1994), 22 U.S.C. § 2356 (1994).

6. *See supra* note 3.

7. Native American claims against the United States are grounded in statute. *See, e.g.,* 25 U.S.C. §§ 70s, 70v (1976); 28 U.S.C. § 1505 (1994).

8. Jurisdiction over military pay cases, for service members involuntarily retired, separated or discharged, is found in the money-mandating provisions of the Military Pay Act, 37 U.S.C. § 204 (1994 & Supp. III 1997).

Pursuant to the general principles delineated by the U.S. Supreme Court in *United States v. Wickersham*, 201 U.S. 390 (1906), federal civilian employees and former federal civilian employees may file suit in the Court of Federal Claims to seek monies allegedly due to them arising out of their employment relationship with the United

tion cases.⁹ We have a few other areas of assigned jurisdiction, but these are the major ones.

Moreover, I have been fortunate in previous jobs to have had the opportunity to travel, especially in the Pacific region, including the former Trust Territories of the Pacific, and to help set up court systems in vastly different cultures. This has given me an additional perspective on how courts run and how we might wish them to operate.

When I was asked to do this lecture, I started by doing some research on past lectures and on the goals of the lecture series. I tried to select a topic which would be meaningful to the audience and to which I could contribute. I have been interested in the developing law of privileged communications, and whether recent developments are to our benefit or detriment. Thus, I decided this was an opportunity to review what was happening in the law of privileged communications, a subject which is present in virtually every case on my docket, either during discovery or trial.

Shortly thereafter, I left Washington for an out-of-town location, to conduct the remaining two weeks of a seventeen-week government contracts trial having to do with a major construction project at a national landmark. After fifteen weeks of trial, all the lawyers and experts involved in the litigation knew each other well. Our greetings at the start of each trial segment had become friendly and relaxed.

When I walked into court and welcomed everyone back, one of the lawyers for the plaintiff said with a smirk, followed by a laugh: "Big doings in Washington. We can all learn lessons about perjury and useful tips for deposition and courtroom demeanor from our Chief Executive." As he finished, I realized that the very next thing I was about to do was to swear in a key expert witness. What I am describing was a flash in the pan, informal moment — but, I recognized that I needed to respond. I could not let the moment pass and conduct business as usual after the comment that the attorney had made for all to hear. Current events had intruded into our courtroom. It was not a partisan, political issue; it had become

States. The terms and conditions of their employment are governed by statutes and regulations, and it is the statutes and regulations of Executive Departments that mandate the payment of money which may form the basis of a federal employee's action for pay. See *Kania v. United States*, 650 F.2d 264 (Ct. Cl. 1981), *cert. denied*, 454 U.S. 895 (1981).

9. The jurisdiction of the court includes claims for compensation arising from vaccination injuries under the National Vaccine Injury Compensation Act, codified at 42 U.S.C. §§ 300aa-1 to 300aa-34 (1994).

a serious practical problem. It was up to me to take charge and it was necessary to remind everyone present of the seriousness of the oath to tell the truth each witness must take before offering testimony, and which is at the root of our system of fairness and justice. I was compelled to offer a lecture on the consequences in my courtroom if I even suspected the possibility of perjury. I began, "Here in this court we take perjury seriously." With a stern expression, I continued to lecture for a few moments before I said "Mr. [Jones], please take the stand. Raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?" I hoped that I had chosen the right words and communicated how serious I was about the significance of sworn testimony. Imagine in how many other courtrooms around the country similar encounters or thoughts were intruding.

Later, during our next courtroom break, I called my liaison at the law school, who had been wonderful to work with, but who, politely, was breathing down my neck to finalize the topic for the McNamara Lecture. In addition to addressing the law of privileged communications, I decided to include discussion about the role of trial judges to promote truth, fairness and morality in the courtroom, and the dangers to our judicial system if the sanctity of the oath to tell the truth in legal proceedings is allowed to erode.

The topics of privilege and courtroom ethics are related. At some point in virtually every case on my docket, whether during discovery or at trial, both are involved. Moreover, the sanctity of the oath to tell the truth and the recognized right of citizens to preserve the privacy of certain types of communications, even during litigation, are both fundamental to our system of justice. Like so many lawyers and members of the public, I have been troubled by the impact of current events on our system of justice. I was being given an opportunity to think about issues and interact with a sophisticated audience on topics of importance.

Tonight's discussion does not address the politics of recent events. I know some of the principals in the drama and, like everyone in this room, I have definite views on both the issues and the personalities. What is important is that, as attorneys — and those about to become attorneys — we support and enhance a system which has worked well for this country. Our legal and judicial system is not perfect. Although we each have personal gripes and suggestions for reforms to improve the system, such as how to limit litigation expenses and how to speed up the process, few of us want a radical change in how we conduct the resolution of legal conflicts.

As a society, we share the fundamental ethical and moral values which form the basis for our system of laws, and we believe in our legal system. The law students would not be enrolled here, nor would the law professors be teaching, if they did not endorse the system.

We must hold on fiercely to the ethical and moral values which are embedded in our system of conflict resolution and adjudication and upon which our organized and civilized society is based. Quoting a source from 1894, Justice Benjamin Cardozo, in his collection of lectures titled *The Nature of the Judicial Process*, pointed out: "Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live."¹⁰

We live in a chaotic world. Read the newspapers and you cannot miss the worldwide turmoil. We also live in a far more pluralistic and diverse society than our ancestors. In our modern, secular society, the common denominator rules are often increasingly difficult to discern. We do not want the truth to become ephemeral, malleable, or subjective. We do not want truth to become too pragmatic, too subjective, or too situational. If one applies situational ethics, we are left with no basic, fundamental ethics. If pushed to the extreme, we have ended our right to say we have a system of truth and justice. In our legal system, the courts, based on a framework of fundamental values and a dedicated search for the truth, have provided the stability for conflict resolution. Although litigants challenge individual decisions, even negative results are accepted by all but a few.

In the past, an oath was viewed as sacrosanct. Many thought literally that God would strike you dead if you lied under oath. Well, even if you do not believe that today, one still ought to believe that the oath to tell the truth is sacred. For some, perhaps, the greater deterrent is the fear of prosecution for perjury.¹¹ Regardless, the goals which law students and attorneys are pursuing become meaningless if people can come to a trial feeling justified that it is permissible to lie or to shave the truth. At that point, we endorse self-interest as the higher goal to the detriment of the community.

10. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921) (quoting Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 27 HARV. L. REV. 605, 731, 734 (1914) (quoting JOHN FORREST DILLON, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* 18 (1894))).

11. See 18 U.S.C. §§ 1621, 1622 (1994).

The purpose of the legal system on which we all rely is to sort out the rights of men, women, children and institutions, and to promote peaceful co-existence in society. Statutes and regulations are developed, within the context of a fundamental sense of what is right and wrong, to announce the applicable rules and to guide these relationships. Long before judges get involved, citizens, sometimes with the assistance of lawyers, try to establish relationships in their business and private lives. For example, they enter into contracts to develop commercial opportunities, to build houses, and to seal marriages. The goal is to foster honest interactions and to ensure consistency and predictability. All citizens can then understand and rely upon the rules, thereby providing a uniform legal system, including a fair process for conflict resolution.

Judges and courts get involved when those relationships break down. People go to court when they have irreconcilable differences. The vast majority of judges will urge you never to come see them. Unfortunately, we have become a society too prone to litigation. Business is way too good in the court system. Yet, despite the litigious nature of our society, what is laudable about our system of laws is that generally we do not resort immediately to guns or other means of force to resolve disputes. The majority of our citizens rely on peaceful means to resolve their disagreements. The vanguards of protection for our judicial system and society are you, the lawyers or soon-to-be lawyers. For society to succeed, every one of you must bring to your jobs the highest ethical and moral standards each and every day. If you do your jobs well, we judges will see you and your clients, whether it be in the criminal or civil system, far less frequently.

The role of a trial judge is more like that of the practitioner than that of an appellate judge. As judges, we have all taken the same oath, and on the federal level, have all gone through the same confirmation process. We all wear the same black robes and approach our jobs, hopefully, with the same seriousness of purpose to uphold the Constitution and the laws of the jurisdiction in which we sit. Yet, when appellate courts speak, they do not always worry about how their legal wisdom will impact the rest of us down in the trenches. They are encouraged by our system to be legal purists.

Standing in the halls of the law school in which I got my start, I am reminded of the many times that, as law students, we intently debated the meaning of individual legal points for hours. We became caught up in the minor nuances of a single sentence, often without remembering that the cases we were intellectualizing in-

volved real plaintiffs and real defendants. I still enjoy the intellectual debate and have ample opportunity to exercise my intellectual curiosity along with my research and writing skills as an adjunct law professor, teaching third-year law students; during my tours as a visiting fellow on university campuses, teaching on the undergraduate level; and while crafting the complex bench trial and motion practice opinions we generate in our court.

However, I started my legal career as an Assistant District Attorney here in New York City. I like it where the real people are. I like the calculated chaos of the trial court. I like the unpredictability of witnesses, who often bring excitement to cases by offering insights and surprising testimony they may not have previously shared with their attorneys. I welcome the puzzle-like challenge of unscrambling the testimony and exhibits of lengthy and complex cases. Frankly, I enjoy the challenges of the unpredictable and the requirement to make on-the-spot decisions, such as momentary evidentiary rulings.

Perhaps I flatter myself, but I believe that the trial judge has a key role in our society. The role of the trial judge is to be a combination gatekeeper and referee on the adjudicatory ballfield on which claimants face off against each other. It is the mandate of the trial judge to strip the emotions out of the case and to provide guidance on how to resolve the issues in contention, sometimes with the help of a jury and sometimes on his or her own. Ultimately, the trial judge must take the panoply of facts and apply them to a rational framework, either issuing jury instructions or, in the case of a bench trial, by issuing final opinions.

If we, the trial judges, do our jobs well, we can resolve the cases without the need for further adjudication. As trial judges, we can meet our obligations by disposing of as many cases as possible during pretrial proceedings, and by conducting supportable, focused trials which result in decisions that reflect the absence of reversible error. I know in my chambers, one of our goals is to issue well-reasoned and well-written decisions, which fully find and articulate the essential facts and recite and apply the applicable law, so that the need for expending additional time and money on appellate reviews or remands will be kept to a minimum. The losers should be able to easily understand the basis of the decision. The hope is that appeals will be lodged only when there is a clear legal issue on which reasonable men and women can disagree. If the trial judge does a proper job, even if an appeal is filed, the scope of the appellate review will be carefully delineated and minimized. Remands

from an appellate court for arbitrary and capricious fact-finding are a sure sign that the trial court has failed and not done its job well.

To promote a continued belief in and reliance on our legal and judicial system, what is the role of the trial judge? As members of the bar and under the additional governance of the Canons of Judicial Ethics, trial judges need to be sure that we not only facilitate the resolution of litigation, but that we also do so in ways which are consistent with our moral and ethical obligations. In the search for the truth, judges must remain the stalwart defenders of the fundamental values our justice system seeks to preserve.

There are tensions inherent in an adversarial system. Litigants sometimes become consumed with winning, regardless of the method. Judges must provide guidance to ensure that society's values are not eroded, even when, on occasion, to do so might impede litigation. The need in the courtroom to balance the hunt for information, as part of the search for the truth, against intrusion into acknowledged privacy rights, which are also central to our society, is an example of when judicial intervention is required. As a trial judge, I have a hunger for information. I want to decide cases for the right reasons. I do not want the parties to withhold relevant information. I do not want to be fooled because one party has deliberately withheld critical information, because one party has been able to hire better experts, because one party has had more financial resources for investigation, or because one attorney simply was a better advocate. Missing important, relevant information is one of a trial judge's biggest fears.

Almost each day, I find myself having to balance my need and thirst for information, against the possibility of allowing inappropriate intrusions into areas society has traditionally and properly considered private for good reasons, such as the right to avoid self-incrimination, the right to the protection of trade secrets, or the right for citizens to have privileged communications. Tonight I will explore with you one such exemplary area of the law that frequently arises during the pretrial discovery proceedings and at trial, namely, the issue of privileged communications.

Historically, society has placed value on privacies such as the right to consult an attorney without oversight, the privileges of government officials to deliberate and reach difficult decisions in private, the right to seek certain types of medical assistance in private, the ability to seek religious counseling in confidence, and the sanctity of marital relations. The invocation of these rights in a courtroom falls under the term "privileged communications." A

number of the recent challenges involving the law of privilege, however, have suggested to some that we are approaching a merger of necessity and law, and that we should be wary of allowing our legal system of conflict resolution to become captive to the needs of the moment. For example, some have questioned whether a federal secret service agent should have been forced to testify against a President, whom he or she is protecting in the interests of national security.¹² At the same time, a difficult dilemma arises for an attorney representing a client. The attorney is obligated to represent the client to the best of his or her ability. Thus, an attorney may attempt to avoid privilege protection, attempt to assert inapplicable privileges, or even attempt to create new privileges to protect his or her client.

It is the role of the courts to depoliticize the issues and to create rational and positive rules of process for use in litigation, including those in the area of privileged communications. These procedural guidelines must make long-term sense and uphold our traditional values. We need rules to conduct litigation, and we need predictability regarding those rules. Appellate courts can help us to define the rules of privilege. Trial courts, such as the federal trial court in which I preside, must apply those rules and continue to identify issues which need further definition by appellate courts.

Regarding the rules of privilege, which I will review as defined in the federal courts, one must start with the basic principal that no one can exercise the privilege to lie. Even in a criminal proceeding, a defendant has the right not to respond by invoking the Fifth Amendment protection against self-incrimination, but not the right to lie. The obligation to tell the truth during the course of litigation is not negotiable. The oath a witness takes, whether at a deposition, in an affidavit, or during a trial, must have meaning.

At the core of the current, and continuing, controversy surrounding the evolving law of privilege is the idea that certain communications should remain confidential and outside the purview of litigation. "Privilege is 'rooted in the imperative need for confidence and trust.'"¹³ This principal is juxtaposed against the normally predominant rule that all relevant and vital evidence is to be presented to the trier of fact in order to ascertain the truth.¹⁴ The public's expectation that certain communications will remain in

12. See *In re Sealed Case*, 148 F.3d 1073, 1078 (D.C. Cir. 1998).

13. *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

14. See *Trammel*, 445 U.S. at 50.

confidence creates an absolute need for reliability and certainty in the law of privilege and the ability to predict that particular discussions will remain protected. As emphasized by the United States Supreme Court: "An uncertain privilege, or one which purports to be certain but which results in widely varying applications, is little better than no privilege at all."¹⁵

Federal Rule of Evidence 501 focuses on the doctrine of privilege in the federal courts. It is a general rule which does not identify specific codified privileges, but which provides that privileges will be recognized under the federal common law in light of reason and experience.¹⁶ The United States Supreme Court, in *Jaffee v. Redmond*, promoted the notion that the federal courts could define new privileges, and stressed that Rule 501 "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges'"¹⁷ based on "reason and experience."¹⁸

This recognition of the power of the federal courts to adopt new confidential communication privileges, however, should not be interpreted to suggest that the courts intend to embrace liberally various proposed privileges. In 1990, the United States Supreme Court emphasized that "although Rule 501 manifests a congressional desire not to freeze the law of privilege but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively."¹⁹ This judicial resolve, coupled with the established legal

15. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

16. *See* FED. R. EVID. 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Id.

17. *Jaffee*, 518 U.S. at 8-9 (quoting *Trammel*, 445 U.S. at 47).

18. *Trammel*, 445 U.S. at 46 (citing *Hawkins v. United States*, 359 U.S. 74, 79 (1958)).

19. *University of Pennsylvania v. EEOC*, 493 U.S. 182, 189 (1990) (citing *Trammel*, 445 U.S. at 47); *see also* *United States v. Nixon*, 418 U.S. 683, 710 (1974) (stating that "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth").

hurdles that a newly created privilege must surmount, indicate that the addition of new absolute privileges in the federal courts will not be frequent.²⁰ For example, the United States Supreme Court has rejected a university's assertion of privilege for academic peer review process files after finding no constitutional, statutory or historical basis for the creation of a privilege;²¹ has rejected an accountant/auditor-client work product privilege;²² has rejected a state legislator's speech and debate privilege;²³ has rejected a "privilege to the editorial process of a media defendant;"²⁴ and the United States Court of Appeals for the District of Columbia Circuit has rejected a Secret Service protective function privilege.²⁵

A litigant who seeks to invoke a novel privilege in federal court has the burden of establishing the privilege. This burden involves demonstrating that the asserted privilege "promotes sufficiently important interests to outweigh the need for probative evidence."²⁶ The United States Supreme Court has noted that "an asserted privilege must also 'serv[e] public ends.'"²⁷ In addition to these significant private and public interests, it is likewise important for a federal court to consider the "reason and experience" of the states in enacting or recognizing a privilege.²⁸

The well-accepted privileges embraced by our society and endorsed by the courts are rooted in goals in which our society places special values; for example, the sanctity of marriage, the priest/penitent relationship, the right to counsel, and the national security of the country. *Wigmore on Evidence* has articulated four prerequisites to establish a privilege against the disclosure of communications: (1) the communication must originate in a communication that will not be disclosed; (2) the elements of confidentiality must

20. See, e.g., *University of Pennsylvania*, 493 U.S. at 195; *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984); *United States v. Gillock*, 445 U.S. 360, 373 (1980); *Herbert v. Lando*, 441 U.S. 153, 169 (1979); *In re Grand Jury Proceedings*, No. 98-148 (NHJ), 1998 WL 272884, at *5 (D.D.C. May 22, 1998), *aff'd sub nom. In re Sealed Case*, 148 F.3d at 1079.

21. See *University of Pennsylvania*, 493 U.S. at 195.

22. See *Arthur Young & Co.*, 465 U.S. at 817-18.

23. See *Gillock*, 445 U.S. at 373.

24. *Herbert*, 441 U.S. at 169.

25. See *In re Sealed Case*, 148 F.3d at 1078, *aff'd sub nom. In re Grand Jury Proceedings*, 1998 WL 272884, at *5.

26. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

27. *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

28. *Id.* at 12-13 ("We have previously observed that the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one.").

be essential to the full and satisfactory maintenance of the relationship between the parties; (3) the relationship must be one which the community believes ought to be fostered; and (4) the injury from disclosure to the relationship would be greater than the benefit gained for the correct disposition of the litigation.²⁹

One privilege that warrants discussion is the *attorney-client privilege*, which is not only one of the most frequently invoked privileges, but also one of the oldest of the confidential communications privileges.³⁰ The United States Supreme Court has emphasized that the attorney-client privilege's "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."³¹ This privilege is premised on the rationale "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."³² Commentators note that the attorney-client privilege is both intellectually and contextually understood by lawyers and judges, rendering these practitioners sympathetic to applying and enforcing the doctrine.³³

Under the attorney-client privilege, a client seeking legal advice has a permanent protection from disclosure of confidential communications with an attorney acting in her or his legal capacity.³⁴ Likewise, it has been accepted for a long time that, except in limited circumstances generally in the criminal justice context, that the attorney-client privilege survives the death of the client.³⁵ The privilege attaches once a client communicates with an attorney for the purposes of seeking legal services or advice even if the lawyer is not retained.³⁶ The privilege, however, may not be invoked by a client who hires an attorney to seek services or advice that a non-lawyer could readily handle. The privilege "protects only those dis-

29. See 8 WIGMORE ON EVIDENCE § 2285 (McNaughton rev. 1961).

30. See *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 2084 (1998) (citing *Upjohn Co.*, 449 U.S. at 389; *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

31. *Upjohn Co.*, 449 U.S. at 389.

32. *Id.*

33. See Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, 2 FEDERAL RULES OF EVIDENCE MANUAL 697-98 & n.14 (7th ed. 1998) (citing *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450 (1985)).

34. See *id.* (citing 8 WIGMORE, EVIDENCE §§ 2290-92).

35. See *Swidler & Berlin*, 118 S. Ct. at 2088.

36. See, e.g., *In re Auclair*, 961 F.2d 65, 69 (5th Cir. 1992); *In re Bevil, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 124 n.1 (3d Cir. 1986).

closures necessary to obtain informed legal advice.”³⁷ For example, “[a] business that gets marketing advice from a lawyer does not acquire a privilege in the bargain; so too a business that obtains the services of a records custodian from a member of the bar.”³⁸

The attorney-client privilege may not be invoked by the client if the communication is later disclosed to a third-party, not an agent of the attorney from whom advice was sought, and if the client either did not wish to keep the materials confidential or the client did not take adequate measures under the circumstances to prevent disclosure of the privileged communications.³⁹ An exception to the general rule against invoking the privilege for disclosure to third-parties is the “common-interest” doctrine which extends the attorney-client privilege to multiple clients pursuing a common interest, who are represented by separate attorneys and who jointly compile communications that would otherwise qualify as privileged.⁴⁰ Any such “common-interest” client may invoke the privi-

37. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

38. *In re Feldberg*, 862 F.2d 622, 626-27 (7th Cir. 1988).

39. See, e.g., *In re Grand Jury Proceedings*, 33 F.3d 342, 354-55 (4th Cir. 1994); *In re von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987); *United States v. Gann*, 732 F.2d 714, 723 (9th Cir.), cert. denied, 469 U.S. 1034 (1984); *National Helium Corp. v. United States*, 219 Ct. Cl. 612, 614 (1979).

40. See, e.g., *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389-90 (Fed. Cir. 1996), cert. denied sub nom. *Genentech, Inc. v. Regents of the Univ. of Cal.*, 520 U.S. 1193 (1997); *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996), cert. denied, 520 U.S. 1239 (1997); *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989).

The United States Court of Appeals for the Eighth Circuit in a recent decision addressed the definition of common-interest in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), cert. denied sub nom. *Office of President v. Office of Gen. Counsel*, 521 U.S. 1105 (1997). The Office of the Independent Counsel, on behalf of the grand jury, sought notes from meetings, held after the grand jury testimony of Hilary Rodham Clinton, that were attended by the First Lady, members of the White House Counsel's Office and the First Lady's personal attorney. See *id.* at 913-14. The court suggested that the First Lady attempted to invoke the common-interest doctrine by arguing that she and the White House were pursuing a common interest that “involved Mrs. Clinton in her personal capacity, her personal attorney, Mrs. Clinton as a representative of the White House . . . , and the White House's official attorneys.” *Id.* at 922. The court stated that:

there is lacking in this situation the requisite common interest between clients, who are Mrs. Clinton in her personal capacity and the White House. Mrs. Clinton's interest in the OIC's [Office of the Independent Counsel] investigation is, naturally, avoiding prosecution, or else minimizing the consequences if the OIC decides to pursue charges against her. One searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interest.

The OIC's investigation can have no legal, factual, or even strategic effect on the White House as an institution. Certainly action by the OIC may occupy

lege, unless it is waived by the individual who contributed the confidential communication.⁴¹

Recent decisions have placed in the news headlines the question of to what extent the attorney-client privilege applies in the context of advice sought from government attorneys. In a civil action, when the government is the client, and government officials make confidential communications to government attorneys for the purpose of eliciting legal advice as opposed to for policy-making purposes, it appears that the government client may invoke the attorney-client privilege.⁴²

A government attorney-government client privilege, however, does not appear to apply in the context of a criminal grand jury proceeding because, "the strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials."⁴³ Thus, "[a]n official who fears he or she may have violated the criminal law and wishes to speak with an attorney in confidence should speak with a private attorney, not a government attorney."⁴⁴

Society and the courts also have embraced a *psychotherapist-patient privilege*. The United States Supreme Court, in *Jaffee v. Redmond*, recognized that confidential communications to licensed psychologists and psychiatrists, and even to "licensed social workers in the course of psychotherapy," were entitled to protection from testimony as privileged.⁴⁵ The Supreme Court, however,

the time of White House staff members, may vacate positions in the White House if any of its personnel are indicted, and may harm the President and Mrs. Clinton politically. But even if we assume that it is proper for the White House to press political concerns upon us, we do not believe that any of these incidental effects on the White House are sufficient to place that governmental institution in the same canoe as Mrs. Clinton, whose personal liberty is potentially at stake.

Id. at 922-23. The court closed the discussion on common-interest by stating that "the White House and Mrs. Clinton have failed to establish that the interests of the Republic coincide with her personal interests." *Id.* (noting White House's citation of *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 449 (1977)).

41. See *In re Grand Jury Subpoena Duces Tecum*, 406 F. Supp. 381 (S.D.N.Y. 1975).

42. See *Town of Norfolk v. United States Army Corps of Eng'rs*, 968 F.2d 1438 (1st Cir. 1992); *Coastal Corp. v. Duncan*, 86 F.R.D. 514 (D. Del. 1980).

43. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 913-14 (8th Cir.), *cert. denied sub nom.* *Office of President v. Office of Indep. Counsel*, 521 U.S. 1105 (1997).

44. *Id.*

45. *Jaffee v. Redmond*, 518 U.S. 1, 15-16 (1996). The holding of the case appears to apply solely to statements made for the purposes of therapy:

qualified the invocation of the privilege when stating that "we do not doubt that there are situations in which the privilege must give way, for example, if a serious harm to the patient or to others can be averted only by means of a disclosure by the therapist."⁴⁶

A logical extension of this decision might be the validation of a physician-patient privilege. In *Jaffee v. Redmond*, however, the Supreme Court specifically distinguished the role of a physician from that of a psychotherapist by suggesting that confidential communications were not imperative to the physician-patient relationship.⁴⁷ Nonetheless, almost every state has legislatively approved some form of a physician-patient relationship,⁴⁸ despite the fact that the doctor-patient privilege has not been recognized in the federal courts.⁴⁹

Dating back to medieval English roots, the federal courts also recognize a *marital privilege*, but have rejected a parent-child privilege. The marital privilege began as a spousal disqualification from testifying on the theory that "since husband and wife were one, and that since the woman had no recognized separate legal existence, the husband was that one."⁵⁰ This rule evolved into a privilege that

Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Id. at 10. In asserting that the privilege is in the public interest, the Supreme Court stated:

The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.

Id. at 11.

46. *Id.* at 18 n.19.

47. *Id.* at 10 ("Treatment by a physician for physical ailments can often proceed successfully on the basis of the physical examination, objective information supplied by the patient, and the results of diagnostic testing.").

48. See 2 FEDERAL RULES OF EVIDENCE MANUAL 731 & n.137 (citing *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1533 (1985)).

49. See, e.g., *Patterson v. Caterpillar, Inc.*, 70 F.3d 503, 506 (7th Cir.), *reh'g denied* (1995) (rejecting federal physician-patient privilege and application of state privilege); *United States v. Bercier*, 848 F.2d 917, 920-21 (8th Cir. 1988) (rejecting federal physician-patient privilege and collecting cases).

50. *Trammel v. United States*, 445 U.S. 40, 44 (1980).

allowed either spouse, no longer considered one entity, to prevent the other from giving adverse testimony unless both consented.⁵¹

There are two recognized interspousal privileges that arise from a marital relationship: the adverse testimonial privilege and the confidential communications privilege.⁵² The basic premise of the adverse testimonial privilege is to foster the sanctity and harmony of the marriage relationship at the time that testimony is demanded.⁵³ In contrast, the confidential communications privilege, which is intended to protect marital communications at the time that they are made from one spouse to another, may be invoked by either spouse, even if the other spouse is willing to give testimony.⁵⁴ There are, however, several exceptions to the confidential communications privilege, such as the crime-fraud exception.⁵⁵ Moreover, in the event that a spouse is prosecuted or sued for victimizing a family member, in the case of both marital privileges, there exists an exception that allows the testimony.⁵⁶ Despite the similarities to the sanctity of the privileges adherent to the spousal relationship, however, the federal courts uniformly have rejected a parent-child privilege, thereby opening the door for a parent to testify against or about a child, and vice-versa, for a child to testify about a parent.⁵⁷

The federal courts consistently have recognized a *clergy-penitent privilege*. The case law regarding clergy-communicant communications, however, distinguishes between religious or pastoral counseling, as opposed to nonreligious counseling.⁵⁸

51. See *id.* at 43-46.

52. See *id.* at 40.

53. *Id.* at 44.

54. See *United States v. Lofton*, 957 F.2d 476, 477 (7th Cir. 1992).

55. See *United States v. Estes*, 793 F.2d 465, 467 (2d Cir. 1986).

56. *United States v. White*, 974 F.2d 1135, 1138 (9th Cir. 1992).

57. See *In re Grand Jury*, 103 F.3d 1140, 1150 (3d Cir.), *cert. denied sub nom. Roe v. United States*, 520 U.S. 1253 (1997). In the wake of the Office of Independent Counsel's various efforts to investigate the President, public concern arose over the lack of a parent-child privilege after Monica Lewinsky's mother was subpoenaed to testify before the grand jury. The concern resulted in a proposed bill in the 105th Congress, specifically H.R. No. 3577, that would have amended *Federal Rule of Evidence* 501 to include a parent-child privilege. A similar bill was introduced in the 106th Congress into the House of Representatives on February 3, 1999 (H.R. 522). The current proposed bill would not alter the common law approach under *Federal Rule of Evidence* 501, but would add a single codified privilege protecting the parent-child relationship, to be titled *Federal Rule of Evidence* 502.

58. Compare *In re Grand Jury Investigation*, 918 F.2d 374, 384 (3d Cir. 1990) (holding discussions during pastoral family counseling session were privileged), with *United States v. Dube*, 820 F.2d 886, 889 (7th Cir. 1987) (holding conversations with pastor regarding avoidance of tax liability were nonreligious and not privileged).

To promote our fundamental belief in protecting free speech, the federal courts have recognized a qualified *journalism privilege*. In 1972, however, the United States Supreme Court in *Branzburg v. Hayes*,⁵⁹ held that a journalist must provide a grand jury with information relevant to an investigation, including confidential sources. In the federal court system, the holding of *Branzburg v. Hayes* has been limited to the grand jury context.⁶⁰ A journalist's privilege, however, is qualified and "the absence of confidentiality may be considered in the balance of competing interests as a factor that diminishes the journalist's, and the public's, interest in non-disclosure."⁶¹ For example, in *Herbert v. Lando*,⁶² the Supreme Court reaffirmed that this qualified privilege is outweighed in libel cases because otherwise the privilege would be the equivalent of a reporter's or editor's immunity from suit.⁶³

The federal courts also have recognized a number of different *government privileges*, beyond the government attorney-government client privilege discussed above. These include a state and military secrets privilege, a deliberative process privilege, an executive privilege, and a law enforcement privilege. A number of these privileges have been invoked during investigations by the Office of Independent Counsel.

The courts have shown deference to privilege claims that are premised upon *state or military secrets* in which national security is implicated.⁶⁴ Moreover, when the a state secrets privilege is triggered, the privilege is absolute, whether claimed in a civil suit or a criminal prosecution.⁶⁵ The privilege also may be invoked by those for whom the exposure of state secrets is required for the purposes of putting on a defense, thereby precluding the litigation or prosecution altogether.⁶⁶

An Executive Branch agency or governmental entity may invoke the *deliberative process privilege* that is intended to protect a government's decision-making process by precluding disclosure of

59. 408 U.S. 665 (1972).

60. See, e.g., *In re Grand Jury Proceedings*, 5 F.3d 397, 401-02 (9th Cir. 1993), *cert. denied sub nom.* Scarce v. United States, 510 U.S. 1041 (1994); *Zerelli v. Smith*, 656 F.2d 705, 711-12 (D.C. Cir. 1981).

61. *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993).

62. 441 U.S. 153 (1979).

63. See *id.* at 169-71.

64. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir.), *opinion vacated in part* (1992).

65. See *Black v. United States*, 62 F.3d 1115 (8th Cir. 1995), *cert. denied*, 517 U.S. 1154 (1996); *Bareford v. General Dynamics Corp.*, 973 F.2d at 1143.

66. See *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547 (2d Cir. 1991).

predecisional government communications.⁶⁷ The deliberative process privilege is designed so that

it protects creative debate and candid consideration of alternatives within an agency, and, thereby, improves the quality of agency policy decisions. Second, it protects the public from the confusion that would result from premature exposure to discussions occurring before the policies affecting it had actually been settled upon. And third, it protects the integrity of the decision-making process itself by confirming that "officials should be judged by what they decided[,] not for matters they considered before making up their minds."⁶⁸

The courts routinely apply the privilege to shield intra-government documents.⁶⁹ Exercise of the privilege, however, does have limitations so that a document only may qualify for protection under the privilege if it is both predecisional and deliberative.⁷⁰ Therefore, "purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery."⁷¹

Moreover, when the deliberative process privilege is invoked, the need to protect the intra-governmental information is balanced against the citizen's need for the information.⁷² Some of the factors to be considered to assess the requisite balancing are:

(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the "seriousness" of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.⁷³

67. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-55 (1975); *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

68. *Jordan v. Department of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (footnotes omitted) (quoting *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 482 F.2d 710, 718 (1973), *rev'd on other grounds*, 421 U.S. 168 (1975)).

69. See, e.g., *EPA v. Mink*, 410 U.S. 73 (1973); *Providence Journal Co. v. United States Dep't of the Army*, 981 F.2d 552 (1st Cir. 1992); *Quarles v. Department of the Navy*, 893 F.2d 390 (D.C. Cir. 1990).

70. *Quarles*, 893 F.2d at 392.

71. *EPA v. Mink*, 410 U.S. at 87-88.

72. See *id.* at 89.

73. *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 583 (E.D.N.Y. 1979) (citations omitted); see also *In re Subpoena Served upon the Comptroller of the Currency, and Sec'y of Bd. of Governors of Fed. Reserve Sys.*, 967 F.2d 630, 634 (D.C. Cir. 1992).

The privilege must be invoked by the head of an agency or department that controls the desired government information and not by the government attorney that is litigating the case.⁷⁴ The logic of this requirement stems from the fact that the withholding of government documents is at odds with the concept of open governance and access to the government by the citizenry.

A *Presidential privilege* is also available in appropriate circumstances. The United States Supreme Court has held that there is a presumptive, albeit qualified, privilege for Presidential communications made in confidence⁷⁵ and in the course of performance of official duties by the Chief Executive.⁷⁶

The rationale has been explained by the Supreme Court as based on possible foreign policy involvement and implication of state secrets,⁷⁷ as well as on the Chief Executive's role in governmental decision-making, in which there is

necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.⁷⁸

The invocation of the Presidential privilege by an occupant of the White House was examined by the United States Court of Appeals for the District of Columbia Circuit and found to encompass factual and deliberative communications.⁷⁹ Despite the unique role and relationship of the Chief Executive, the court, however, held that "the deliberative process privilege can be overcome by a sufficient showing of need."⁸⁰ The fact that the evidence sought was the sole source for a grand jury criminal investigation was found to outweigh the White House's interest in confidentiality.⁸¹ This balancing is not dissimilar to that undertaken when considering the broader Executive Branch, governmental deliberative process privilege.⁸²

74. See *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634, 641 (S.D.N.Y. 1991).

75. See *United States v. Nixon*, 418 U.S. 683, 708, 711 (1974).

76. See *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997).

77. See *Nixon*, 418 U.S. at 710-11.

78. *Id.* at 708.

79. See *In re Sealed Case*, 121 F.3d at 737.

80. *Id.* at 737.

81. See *id.*

82. See *id.*

The *law enforcement privilege* is intended to "prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation."⁸³ This privilege is qualified in that the state interest must be balanced against an individual's right to mount an effective defense.⁸⁴ "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause, the privilege must give way."⁸⁵ In an informant case, the presumption of confidentiality is removed, instead the onus is placed upon the government to establish that an informant expected the communications to be in confidence and his or her identity anonymous.⁸⁶

Having briefly reviewed the law of privilege, we return to the role of the trial judge who must utilize the privilege rules and others which have been developed for use in court proceedings. Let me offer a few thoughts on how judges can utilize those rules of process, while at the same time promoting fairness and the search for the truth.

First, the trial judge should be the role model in the courtroom through his or her personal demeanor and work habits. The judge must be courteous to all and treat everyone with respect. The judge must ensure that lawyers are deferential to one another and to the witnesses. Civility in the courtroom should not just be an often-pronounced goal, it must become a reality. The judge also must be willing to work as hard as the attorneys and everyone else in the courtroom. For example, abbreviated trial hours or long breaks for lunches protract trials and give a bad name to the profession. The judge must come into the courtroom, whether for pre-trial proceedings or for trial, well-prepared to discuss the issues and to receive the evidence. This includes familiarity with the facts of the case and the applicable law. The parties will be able to tell if the judge is prepared or not.

Second, judges should retain the formalism, the familiar practices and the efficiencies of the courtroom, although not as goals in

83. *In re Dep't of Investigation v. Myerson*, 856 F.2d 481, 484 (2d Cir. 1988) (citations omitted).

84. *See Roviato v. United States*, 353 U.S. 53, 60-61 (1957).

85. *Id.*

86. *See United States Dep't of Justice v. Landano*, 508 U.S. 165, 177, 181 (1993).

and of themselves. Remember, fifty percent of the people who come to court will lose. Those litigants are more likely to believe that they have received a fair trial if the court follows comfortable, predictable and established patterns. If courtroom practice becomes too informal or too uncontrolled, if the case takes too long, or if those in the courtroom are not treated with respect, the loser is more likely to believe that the trial was not fair.

Formalism, however, does not mean arrogance or stuffiness. Lawyers and judges must speak plain English. An attorney who liberally sprinkles his or her speech with Latin phrases or long uncommon words engages in a dangerous practice. As a judge, I might get annoyed, but juries and witnesses may not understand or be receptive to the unfamiliar words or Latin phrases and may dismiss the argument.

Third, in law school, and thereafter as lawyers, we are trained to split hairs and play word games, for example, when we engage in statutory construction or the interpretation of a contract. Lawyers are proud of themselves when they can distinguish their case from otherwise adverse precedent or statutes. If fairness and the betterment of society are our basic goals, the over-legalization and the hairsplitting should be of concern to all. We should question whether to teach our students to parse sentences the way one witness, a member of the bar, did during testimony. Without allowing our personal politics to enter into our understanding, should we not question ourselves when we are quibbling about the definition of the words "is" and "was," as follows: "It depends upon what the meaning of the word is means. If 'is' means 'is, and never has been,' that's one thing. If it means, 'there is none,' that was a completely true statement."⁸⁷ Fortunately, the average jury is not generally comprised of lawyers. Juries are excellent antidotes to our profession because they often see beyond the legalistic word games.

Many members of the public unfortunately see lawyers as the ultimate pragmatists, who will say anything to protect a client. Some attorneys are comfortable with that image as part of their representational duties, some are not. If anyone testifying in my courtroom were to play with the definitions of the words "is" and "was," my ears would immediately perk up and I would be carefully assessing that witness's credibility. So, I think, would the av-

87. Videotaped testimony of William J. Clinton, President of the United States, Washington, D.C., before Office of Independent Counsel Grand Jury, Segment 3 (Aug. 17, 1998), *available in* 1998 WL 644125.

erage juror. There is danger in appearing too cute. Therefore, even if ethics and morality fail to deter an attorney or a witness from cutting fine lines, those same individuals should be forewarned that over-legalization and over-definition of words often backfire on a witness.

Fourth, judges should not promote doing things the way they have always been done merely for that reason. The technological revolution has hit the courtroom. For example, we now have modern capabilities such as smart courtrooms, real-time reporting, the ability to conduct electronic discovery without the exchange of paper documents, teleconferencing of witnesses during depositions and trials, and electronic filing. Technology should be used to facilitate and speed up trials within the formal and familiar context.

Judges have an obligation to promote fairness by keeping cases on their docket moving. Litigation is expensive and generally comes into court only after the issues have been percolating for a considerable length of time. Each of us have those embarrassing cases that for one reason or another have gotten bogged down for too long. And, while judges are, "so to speak," on permanent retainer, time is money for those involved in the litigation. Faith in our legal system is eroded when the expectation is that going to court is almost useless because it will take so long to resolve a dispute through the judicial process. Moreover, if a trial takes too long, it is harder and harder to bring the parties together for a possible settlement. Positions harden, so much money has already been invested that a little more hardly matters, and attorneys' fees sometimes become the problem. For example, even if the parties want to settle at a late stage in the litigation, the attorneys may be the last ones willing to bend.

The new technology can be a boon to those judges who are ready to embrace it. Utilization of technology can make our system far more efficient, and after an initial investment, less costly. For example, I am involved in a large military contract litigation, with millions of pages of documents which are classified for national security purposes. We are conducting paperless discovery by exchanging tapes of scanned documents electronic briefing. This facilitates security protection, avoids exchanging an original and two copies of millions of pages of written material, and, because of research software, makes searching the documents far more efficient.

Fifth, judges must take control of the courtroom. Judges have an obligation to assure fair, expeditious litigation opportunities for all

parties. Sometimes in our adversarial system this becomes a true challenge for the judge. Hard-fighting adversaries can get carried away, either on purpose or for effect, while playing to the judge and/or the jury, or because they lose control. Often, there is a vast disparity between the skill levels of litigators. A judge also has special responsibilities with non-attorney *pro se* litigants, who have a hard time understanding and complying with the rules we lawyers have developed for the orderly processing of litigation.⁸⁸ While being supportive of the *pro se* party, however, the judge also must keep the proceeding moving and avoid tipping the balance of a trial in either the direction of the plaintiff or the defendant. Judges have to remind practitioners that winning is not everything, something many litigators lose sight of in the heat of battle. How one wins also matters. Cases should be decided for the right reasons, not, for example, because one attorney is more able or a better actor than the other.

A controversial aspect of ensuring a fair trial is whether a trial judge should intercede during testimony to create balance, for example by assisting a counsel who is foundering as a result of his or her own ineptitude, and missing the critical points with a witness. Much discussion has been generated on this subject among members of the bar. Most litigators fervently argue that in an adversary system a judge has absolutely no business intervening, and that plaintiffs and defendants have chosen their own lawyers. Unfortunately, not all litigants can choose their own counsel. The economics of litigation are such that not everyone can afford equally competent counsel of their choice. Assigned counsel, of course, can be the most fervent counsel. Public defenders, legal aid society attorneys, and even students in clinics, while often quite young and less experienced, often do a better job than some members of the private bar. Unfortunately, as a trial judge, I see vastly mixed levels of competence.

As I said earlier, I happen to believe that my job as a trial judge is to make sure that we decide cases for the right reasons. My law clerks hear me repeat this phrase over and over. You have to remember that behind the attorneys — good, bad, or indifferent — there are real plaintiffs and defendants who deserve, and should get, the best the court system has to offer. Morally, I have trouble sitting back and watching a trial conclude with what I feel is the

88. See, e.g., *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (requiring that allegations contained in *pro se* complaint be held to "less stringent standards than formal pleadings drafted by lawyers"), *reh'g denied*, 405 U.S. 948 (1972).

wrong result. I am not suggesting that my judgment is perfect, but, I do have an obligation to do the best job I can. Generally, therefore, in egregious situations, I gently try to help the process. One of the harshest forms of intervention is for the judge to ask additional questions of a witness when, as a judge, you think the important issues have not been reached or a witness is lying. Lawyers often object. One solution is to offer the attorneys an opportunity to ask additional questions after the judge has asked his or her questions. On occasion, the insertion into the process is to inquire of an attorney whether he or she objects to the admission of a document. The reactions to bad lawyering can be instinctive and inadvertent. As a judge, you also try to control your body language, but sometimes it is so painful to watch, that complete composure is hard to accomplish. As a trial judge, you have to make hard, on the spot decisions regarding both what to do and what not to do. The general presumption is certainly not to interfere, but, sometimes I feel I have to or an injustice will be done.

Sixth, a good trial judge must be creative. Every day in a trial court should be undertaken with an eagerness to approach new challenges. Although there are helpful instruction books, there are no form books for a good trial. The unexpected happens all the time. Few requests for evidentiary rulings are the same. I have been doing this job for a long time now, and virtually no two cases present the same problems. That is probably why I enjoy my job so much. I am on a train that goes a mile a minute, but it never goes in a straight line. Using available tools such as docket management techniques, pretrial motion practice, stipulations, test cases, and both traditional and non-traditional alternative dispute resolution ("ADR"), judges can speed up the resolution of cases. At the same time, while eagerly searching for new conflict resolution techniques, one also must be careful to use ADR and other techniques wisely and only when appropriate. It is up to the judge to provide the leadership so that naturally cautious litigators are willing to investigate and try new methods.

Seventh, while creativity to solve procedural problems is a vital skill, an able trial judge must apply the law with intelligence and consistency. One of the rules we operate under in the court system is the law of precedential decisions. Blind adherence to precedent is not what I am advocating. It is not the role of a trial judge, however, to disregard existing case precedents. In our system, appellate courts, and most especially the Supreme Court, are dele-

gated the primary responsibility to effect dramatic changes in the law not based on statutory change.

As a lawyer, you study the judge assigned to your case. You try to discern a pattern in his or her legal leanings and temperament. You try to figure out in advance how the judge conducts proceedings. If, after studying your assigned trial judge, you conclude he or she takes each case on a fact-by-fact basis, does a good job of applying the existing law and rules of procedure, and also runs a tight courtroom, with high performance expectations, I personally would consider that profile a compliment. I also would consider it a compliment if the bar which appears before me cannot predict the outcome of cases assigned to me because I am not labeled as a plaintiff's or defendant's judge on any particular type of case or issue. I want a reputation as a fair judge.

Eighth, the trial judge also has a duty to ensure that attorneys who appear in his or her courtroom comply with their own ethical obligations, such as the duties of diligence, confidentiality, conflict of interest, knowing when to decline or to terminate representation, and knowing when a motion or claim is meritorious and, thus, worth pursuing. As members of the bar and officers of the court, it should go without saying that attorneys will act ethically. For example, in a perfect world, judges could trust attorneys not to exercise inappropriate privileges. Unfortunately, although most lawyers do behave at the highest levels, some do not. For example, as a judge, I should be able to expect candor toward the tribunal. During discovery I will say to an attorney, "Mr. [Jones], if you tell me as an officer of the court that the documents which have been subpoenaed do not exist, I will have to take your word for it." Sometimes I say it with a sinking feeling. As a judge, you hope to trust attorneys to abide by the proper ethical boundaries. Judges look to lawyers in their courtrooms to be truthful with the court, to not merely be an advocate for his or her client, but also to do so honestly and forthrightly.

When I attended law school at Fordham, we did not have required ethics and professional responsibility courses, nor was there a related exam as a part of the bar examination in most states. We did have a jurisprudence course, which was more of a history course about some of the great religious and moral leaders. As a former history major, I loved the class, but it did not focus on professional responsibility, except by analogy. The students were expected to make the intellectual leap and apply the teachings to their own lives. Nonetheless, once we graduated, I honestly be-

lieve we would never have dared to do some of the things I now see in the courtroom, and not infrequently.

Each judge has a scrapbook of horror stories. Among my examples, one attorney became more suspect than the clients he represented, some of whom it turned out did not even know the attorney had filed a case on their behalf. Moreover, the attorney was consistently late with required filings and failed to communicate with his clients with respect to the pleadings filed and the status of the cases. Another attorney directly contacted the court reporting service and attempted to have the transcript altered by instructing the reporter to change a negative statement to a positive one after she received a copy of the daily transcript. The reporting service contacted the court. Shortly thereafter, when we held a status conference, everyone in the room but the offending attorney remembered the witness as having made a negative statement on the stand. Her attempted fix required a great deal of audacity and certainly lacked professional responsibility. The court has some options to try to ensure propriety, including putting the attorney and/or the client under oath through affidavit or live testimony. And there is also the possibility of imposing sanctions. Judges, of course, are reluctant to impose sanctions, but they should not be afraid to do so.

Unfortunately, also, too many attorneys come to court unprepared without having reviewed the file or the relevant case precedent. In my days as a litigator, I would have been too scared to do that. Inadequate preparation happens more often for status conferences or pretrial discovery motions than at trial; regardless, it is unacceptable. Similarly, the quality of some of the briefs filed with the court is embarrassing, with little evidence of intelligence or effort. The majority of attorneys do an adequate, and many do an excellent job for their client. But those who do not give a bad name to the practice of law and the system which responsible attorneys try to maintain.

In sum, it is critical for the courts to ensure that litigation continues to be a search for the truth and a promotion of the highest ethical and moral values. One of the most basic tools on which we rely is to put witnesses under oath. Every witness is asked to take an oath that they will "tell the truth, the whole truth, and nothing but the truth." Sitting here tonight, none of us question the definition of perjury. We all readily understand the concept. We also all agree that perjury is wrong, and agree on the critical importance of the oath each witness takes at the start of testimony. No one has

the privilege to lie. The expectation, at a minimum, should be that in a courtroom — in fact, in all our relations with people — we should be entitled to expect honesty. Anything less should cause shock and chagrin. Although the role of the judge is often to decide between two asserted truths offered by two opposing witnesses, the expectation and the standard should be that both witnesses are trying to testify in accordance with the oaths they have taken, but have differences of opinion or different recollections of the events.

I am not so naive as to assume that everyone who comes to court will tell the truth. However, I do not want to become as cynical about our system as many lawyers and many members of the public seem to have become. One attorney friend, who represents many criminal defendants, recently told me “all my witnesses try to lie, even to me, to help themselves.” I never want to believe that every witness potentially is violating the oath to tell the truth in his or her own self-interest. Fortunately, on the whole, judges and juries are surprisingly good at recognizing the lies and understanding the truth. Let me give you one example from my private practice days. I was part of a litigation team on a major construction accident case. We prepared the night before trial. On the stand, one of our principal witnesses, a senior corporate officer in the construction company, did a complete reversal of the testimony he had described the night before. When we asked him why, he responded, “I was watching the jury and I thought it would help my case.” We lost. The jury saw through it. Juries are generally comprised of good, honest and perceptive people.

The oath to tell the truth, and, if necessary, the threat of perjury, have been and should be promoted as the watchdogs of truthfulness in the courtroom. We cannot allow the expectation of truthfulness during discovery and trial to diminish. New York Senator Daniel Patrick Moynihan coined a useful phrase, “defining deviancy down,”⁸⁹ which describes a process by which society tolerates and comes to accept formerly unacceptable conduct. Conduct that was previously considered negative, immoral or even criminal is now considered normal, thus reducing the level of expectation for appropriate, ethical and moral behavior. Gradually we make fewer and fewer demands on members of the community. In other words, we begin on a path of normalizing deviancy.

89. Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17 (1993).

As attorneys, we must refuse to allow erosion of our system by ignoring the ramifications of perjury. Every bad image of the legal profession and system becomes true if we allow perjury to go unpunished and to become an acceptable norm dependant upon the circumstances. The prohibition against perjury is not negotiable. The expectation must remain that once a witness takes an oath of truthfulness during any part of a judicial proceeding, that witness must meet the obligations of that oath. The procedures we use in the courtroom must have meaning, and violation of those procedures must have consequences. To excuse perjury under any circumstances is to promote the image of attorneys as slick, greasy operatives who have been taught to manipulate the truth and who can talk others into, or out of, anything. It is also to destroy the very core of our judicial system.

Practicing law should be fun. It should be an honor to be admitted to the bar and to continue as part of a noble profession which defines and promotes ethics and morality. You should be in this profession not just to support yourselves and your families, but to reward yourselves in other ways. You also should be in it for the intellectual satisfaction the law can provide. I certainly have that privilege. You also should be in it to make your community a better place, whether on the job or through extra-curricular activities in which you share your unique skills with others.

Every day, each of us must commit to further enhance a system of laws that promotes an ultimate forum in which conflict resolution and a search for truth is the goal we uniformly applaud and actively support. The accomplished lawyer must combine legal proficiency and technical skill with humanity and morality. Our commitment as lawyers and judges alike should be to accept responsibility for the proper and effective functioning of our legal system and to defend its basic principles. We should never allow the pressures of our profession to compromise our commitment to a fair and ethical search for the truth.

I thank you all for allowing me to be with you tonight.

HIV NAME REPORTING AND PARTNER NOTIFICATION IN NEW YORK STATE

Sonia Bhatnager*

Introduction

The World Health Organization estimates that new cases of full-blown Acquired Immunodeficiency Syndrome ("AIDS")¹ increase by almost twenty percent worldwide each year, and that at the end of 1996, 1.64 million people worldwide were suffering from AIDS.² It also estimates that only one-fifth of the actual number of cases is reported.³ The nature of the disease is changing as well: advancements in drug therapy and treatment are enabling infected individuals to remain asymptomatic for years.⁴

Calls for epidemiological data that enable scientists to study the disease and treat people with HIV infection have led to HIV name reporting in some states.⁵ Other states have instituted partner notification programs in hopes of apprising contacts of their exposure

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1. A case of AIDS was first defined as "illness in a person who 1) has either biopsy-proven KS [Kaposi's Sarcoma] or biopsy- or culture-proven, life-threatening opportunistic infection, 2) is under age 60, and 3) has no history of either immunosuppressive underlying illness or immunosuppressive therapy." U.S. Department of Health and Human Services, *Updates on Kaposi's Sarcoma and Opportunistic Infections in Previously Healthy Persons - United States*, 31 MORBIDITY & MORTALITY WKLY. REP. 294 (1982). The definition was expanded in 1985 to include diseases such as disseminated histoplasmosis, chronic isosporiasis and certain non-Hodgkin's lymphomas. In 1987, another expansion occurred to the definition, which resulted in diseases such as extrapulmonary tuberculosis, HIV encephalopathy and HIV wasting syndrome being added. The latest revision takes effect as of January 1, 1993, which "includes all HIV-infected adults and adolescents who have less than [sic] 200 CD4+ T-lymphocytes/ μ L or a CD4+ T-lymphocyte percent of total lymphocytes less than 14, or who have been diagnosed with pulmonary tuberculosis, invasive cervical cancer, or recurrent pneumonia." Centers for Disease Control and Prevention, *AIDS Surveillance in the United States* (visited Mar. 12, 1999) <<http://www.cdc.gov>> [hereinafter CDC, *AIDS Surveillance*].

2. See *AIDS Cases Rising Steadily Worldwide*, TEXAS HIV/STD UPDATE (Fall 1997) <<http://www.tdh.state.tx.us/hivstd/up97fal.htm>>.

3. See *id.*

4. See *infra* note 99 and accompanying text.

5. See The Association of the Bar of the City of New York (Committees on AIDS, Civil Rights, Health Law, Legal Issues Affecting People with Disabilities and

to the virus and breaking the chain of transmission.⁶ Thirty-three states and U.S. Territories provide for some form of partner notification by statute.⁷ Although, as of June 30, 1998, thirty-one states collect the names of HIV-infected people,⁸ these names only account for a small percent of those suffering from AIDS nationally.⁹ New York, on the other hand, has the nation's highest rate of reported AIDS cases.¹⁰ Thus, New York's decision to enact a name reporting and partner notification law may significantly influence other states with high seroprevalence levels to follow its lead,¹¹ or alternatively, to determine that the process does not work in those areas.

On July 7, 1998, the New York State Senate enacted a name reporting and partner notification law that amended Article 21 of the

Sex and Law), *Name Reporting of HIV Cases* 1, 1 (1998) [hereinafter NYC Bar, *Name Reporting*].

6. See *infra* note 15 and accompanying text; see also Lawrence O. Gostin & James G. Hodge, *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 5 DUKE J. GENDER L. & POL'Y 9, 14 (1998) (claiming that the goal of contact tracing is to "reduce disease transmission by locating and containing the spread of a given STD within a certain population") [hereinafter Gostin & Hodge, *Piercing the Veil*].

7. See The Association of the Bar of the City of New York (Committees on AIDS, Civil Rights, Health Law, Mental Health, Legal Issues Affecting People with Disabilities and Sex and Law), *Partner Notification and HIV* 1, 3 (1998) [hereinafter NYC Bar, *Partner Notification*].

8. See Centers for Disease Control and Prevention, 10 HIV/AIDS SURVEILLANCE REP. 1 (1998). Connecticut and Texas required name reporting of children less than thirteen years old, and Oregon required reporting for children less than six years of age. The remaining twenty-eight states that have laws requiring confidential reporting by name of all persons infected with HIV are Alabama, Arizona, Arkansas, Colorado, Florida, Idaho, Indiana, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, Wisconsin and Wyoming. See *id.* at 7. Texas disposed of its unique identifier system and adopted name reporting for all HIV positive individuals as of January 1, 1999. See *infra* note 126 and accompanying text. New York also has adopted name reporting for HIV as of July 1998. See *infra* notes 12-13 and accompanying text.

9. See NYC Bar, *Name Reporting*, *supra* note 5, at 1-2.

10. See Centers for Disease Control and Prevention, *supra* note 8, at 1. In a survey conducted from July 1997 to June 1998 of Metropolitan areas in the U.S., New York City had the highest AIDS annual rate per 100,000 population with a rate of 101.2. No other city had a rate over 100.0 per 100,000. Jersey City, New Jersey came the closest with a rate of 72.2 per 100,000. See *id.* at 8. More importantly, however, is the fact that out of the 665,357 AIDS cases reported to the CDC through June 1998, New York State contributed to about 124,793 of them. See *id.* at 6. The CDC does not have HIV infection rates for New York. See *id.* at 5.

11. See Lynda Richardson, *AIDS Groups Stunned by Vote for Partner Notification*, N.Y. TIMES, June 20, 1998, at B3.

Public Health Law by adding a new Title III.¹² The new law requires physicians and other health officials to report individuals who test positive for HIV, AIDS or other HIV-related illnesses to the municipal health commissioner.¹³ The law also mandates notification of contacts by the infected individual or physician.¹⁴ This Note explores the consequences and benefits of partner notification for HIV, focusing on its likely impact on New York State. Part I details the meaning and history of partner notification in the United States. Part II presents arguments for and against partner notification. Part III analyzes the New York law and argues that a unique identifier system in lieu of name reporting would assuage fears of privacy, encouraging a more effective implementation of a partner notification system. This Note concludes that HIV is a public health problem that cannot be ignored and must be combated aggressively, in a manner that simultaneously promotes testing and stunts transmission.

I. Name Reporting and Partner Notification in the United States and New York

Every state¹⁵ has implemented a policy of name reporting for AIDS.¹⁶ The information collected by state health departments includes "demographics, diagnostic facility, patient risk history, laboratory analysis, clinical status, and treatment/service referrals."¹⁷ At the national level, patient and provider identifiers are deleted from the data so that reporting is done without the disclosure of infected individuals' names.¹⁸ The national system of AIDS reporting had developed almost from the inception of the epidemic,¹⁹

12. See N.Y. PUB. HEALTH LAW § 2130 (McKinney 1999).

13. See *id.* § 2130(1).

14. See *id.* § 2133(1).

15. See CDC, *AIDS Surveillance*, *supra* note 1 (describing that data is collected from all fifty states, the District of Columbia, U.S. dependencies and possessions and independent nations in free association with the United States (Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Republic of Palau, the Republic of the Marshall Islands, the Commonwealth of the Northern Mariana Islands and the Federated States of Micronesia)).

16. See *id.* ("[B]y 1985 all states had regulations requiring physicians and other health care providers to report AIDS cases directly to the local or health department," which in turn, share their data with the CDC.); see also Lawrence O. Gostin & James G. Hodge, *The "Names Debate": The Case for National HIV Reporting in the United States*, 61 ALB. L. REV. 679, 705 (1998) [hereinafter Gostin & Hodge, *The "Names Debate"*].

17. Gostin & Hodge, *The "Names Debate"*, *supra* note 16, at 705-06.

18. See *id.* at 706.

19. See *id.* at 696.

and caused little uproar.²⁰ Early on in the epidemic, those identified as AIDS' carriers often were on the brink of death already, thus privacy issues were of little concern.²¹ However, this claim is not true today for HIV-positive individuals, especially those who are asymptomatic and may remain so for years.²² Accordingly, it is no surprise that the trend towards expanding the name reporting system to HIV infected individuals has resulted in conflicted emotions, despite the benefits of gathering epidemiological data about the epidemic.²³

The current push for partner notification, especially in New York, can most likely be attributed to advances in effective drug therapy and recent reports of individuals putting others at risk of contracting the virus.²⁴ In New York, a name reporting and partner notification bill, introduced by Senator Velella and Assembly Member Nettie Mayersohn, was enacted on July 7, 1998.²⁵

A. Meaning and History of Partner Notification in the United States

Partner notification can be viewed as a combination of three concepts that sometimes overlap: "(1) contact tracing; (2) the duty of the infected persons to disclose their infection to a sexual partner; and (3) the duty of health care providers to warn of sexual and other risks to the partners of their infected patients."²⁶

1. Contact Tracing

The practice of contact tracing generally enlists the help of public health authorities who interview infected individuals (referred to as "index" patients) to assemble a list of their contacts that may have been exposed to HIV.²⁷ With this information, the authorities

20. See American Civil Liberties Union, *HIV Surveillance and Name Reporting: A Public Health Case for Protecting Civil Liberties* (Oct. 1997) <<http://www.aclu.org/issues/aids/namereport.html>> [hereinafter ACLU, *HIV Surveillance*].

21. See *id.*

22. See CDC, *AIDS Surveillance*, *supra* note 1 (stating that HIV is the causative agent for AIDS).

23. See *infra* note 100 and accompanying text.

24. See Bill Laden, *Albany Begins Drive to Lift HIV Confidentiality*, N.Y. L.J., Dec. 1, 1997, at 1 ("[T]he recent case of Nushawn Williams, whom authorities suspect may have infected numerous young women with HIV, has raised questions about the privacy law and the legal rights of AIDS victims, and has propelled legislators to suggest amendments to the law.").

25. See N.Y. PUB. HEALTH LAW §§ 2130, 2133 (McKinney 1999).

26. Gostin & Hodge, *Piercing the Veil*, *supra* note 6, at 14.

27. See *id.*

attempt to trace the contacts and notify them of their potential infection.²⁸ The name of the index patient is not disclosed but may be deduced under certain circumstances,²⁹ such as where the notified individual has only had one contact. This process then continues with any identified contact who likewise tests positive for HIV.³⁰

The first contact tracing program dates back to the syphilis epidemic of the early sixteenth century.³¹ Once syphilis was recognized as a sexually transmitted disease, individuals infected with the disease were banished from communities, quarantined in special hospitals and/or banned from public places.³² Prostitutes, who were viewed as the carriers of sexual contagion, such as syphilis, were subjected to government-sponsored medical inspection known as reglementation throughout Europe and the United States.³³ The Illinois Board of Health even had the authority to hospitalize women on mere suspicion of infection and to place signs on their doors warning "suspected VD."³⁴

Thomas Parran, the newly-appointed Surgeon General during Franklin Delano Roosevelt's presidency, decreed his goal to be the eradication of the syphilis epidemic.³⁵ With the assistance of federal funding, Parran began a national contact tracing program, which included contact notification.³⁶ This effort "marked the first time in the United States that formal case finding and contact tracing were applied to a sexually transmitted disease on a national scale."³⁷ However, the advent of penicillin in 1943 and its promise to cure syphilis stymied the role that contact tracing would play in reducing infection rates.³⁸ Penicillin diminished the urgency for notification, leaving the success of contact tracing undetermined.³⁹

Although contact tracing is mainly the responsibility of state health departments, the Centers for Disease Control and Preven-

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.* at 16.

32. *See id.* 16-17.

33. *See id.* at 17-19.

34. *See id.* at 19 (quoting Marvin S. Amstey, *The Political History of Syphilis and Its Application to the AIDS Epidemic*, 4 *WOMEN'S HEALTH ISSUES* 16, 17 (1994)).

35. *See id.* at 21.

36. *See id.* at 21-22.

37. *Id.* at 22.

38. *See id.* at 22-23.

39. *See* David P.T. Price, *Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context*, 94 *DICK. L. REV.* 435, 466 (1990).

tion ("CDC"), as part of the federal Department of Health and Human Services, provide funding to these state offices.⁴⁰ The CDC, in turn, requires state health departments to implement partner notification programs according to certain guidelines.⁴¹ The guidelines include models denominated "patient referral," "provider referral" or the hybrid "conditional referral."⁴²

The patient referral model enlists the aid of the index patient, who is asked to disclose her seropositive status to her sexual contacts and/or to injection drug users ("IDUs") with whom she has shared syringes.⁴³ The index patient is assisted by the public health authorities to the extent that she is provided with medical information, which she may pass on to her contacts.⁴⁴ These programs do not guarantee notification of contacts and do not provide for confidentiality of the index patient, as she personally notifies her contacts of the exposure to HIV.⁴⁵

Provider referral programs, on the other hand, place the responsibility of contact tracing in the hands of public health officials once an index patient has disclosed a list of her contacts.⁴⁶ Counseling is provided to the contact, preferably face to face, by the official.⁴⁷ The anonymity of the patient is maintained because her name is not revealed to contacts.⁴⁸ Obviously, however, the contact may deduce the name in certain circumstances.⁴⁹ Although provider referral programs generally are more costly because of the heightened involvement of health authorities, they tend to ensure the transmission of high quality information.⁵⁰ They also typically result in a higher rate of notification. In a study conducted in North Carolina, which assigned participants to either a patient referral group or a provider referral group, seventy-eight of 157 partners were successfully notified in the latter group whereas only ten out of 153 were notified by the patient referral model group.⁵¹

40. See Gostin & Hodge, *Piercing the Veil*, *supra* note 6, at 25-26.

41. See *id.* at 26.

42. *Id.*

43. See James T. Dimas & Jordan H. Richland, *Partner Notification and HIV Infection: Misconceptions and Recommendations*, 4 AIDS & PUB. POL'Y J. 206, 206.

44. See *id.*

45. See *id.*

46. See *id.*

47. See Gostin & Hodge, *Piercing the Veil*, *supra* note 6, at 27.

48. See Dimas & Richland, *supra* note 43, at 206.

49. See Gostin & Hodge, *Piercing the Veil*, *supra* note 6, at 27.

50. See Dimas & Richland, *supra* note 43, at 206.

51. See Suzanne E. Landis, M.D. et al., *Results of a Randomized Trial of Partner Notification in Cases of HIV Infection in North Carolina*, 326 NEW ENG. J. MED. 101, 101 (1992).

The third model, conditional referral, is a hybrid of the patient and provider referral models.⁵² In this model, the index patient is granted a limited period of time in which she may notify her contacts before the health authority intervenes.⁵³ As with the provider referral model, the official does not disclose the identity of the index patient.⁵⁴

2. *Duty to Disclose*

Partner notification sometimes denotes the "duty to disclose," whereby a duty exists to disclose one's sexually transmitted disease to his/her sexual partner.⁵⁵ Since the turn of the century, persons aware of their infections have been responsible for disclosing contagious conditions, such as whooping cough and tuberculosis, to others with whom they were in contact.⁵⁶ Today, in the context of HIV/AIDS, the duty to disclose has been significantly extended. In fact, the failure to disclose one's positive serostatus can result in criminal prosecution for putting others at risk for infection.⁵⁷ Nushawn Williams, the man accused of having unprotected sex with a teenage girl months after learning he was HIV-positive, was charged with reckless endangerment in New York City.⁵⁸ By the end of 1991, more than three hundred people had been prosecuted for exposing others to HIV, and approximately fifty of those cases resulted in conviction.⁵⁹

3. *Duty to Warn*

The third component of partner notification, a physician's duty to warn foreseeable third parties who may be endangered by the patient, is based on the principle articulated in *Tarasoff v. Regents*

52. See Gostin & Hodge, *Piercing the Veil*, *supra* note 6, at 27.

53. See *id.*

54. See *id.*

55. See *id.* at 14-15.

56. See *id.* at 36-37.

57. See, e.g., IND. CODE ANN. § 16-41-7-1(d) (West 1998):

Carriers who know of their status as a carrier of a dangerous communicable disease described in subsection (a) [includes AIDS and HIV] have a duty to warn or cause to be warned by a third party a person at risk of the following:

(1) The carrier's disease status.

(2) The need to seek health care such as counseling and testing.

58. See Lynda Richardson, *Man Faces Felony Charge of Exposing Girl to H.I.V.*, N.Y. TIMES, Aug. 20, 1998, at B4 (noting that Williams also was suspected of infecting more than a dozen women and girls in upstate New York).

59. See LAWRENCE BURRIS & HARLAN L. DALTON, *Criminal Law*, in AIDS LAW TODAY 242 (Harlan L. Dalton et al. eds., 1993).

of the Univ. of California.⁶⁰ The California Supreme Court determined that physician-patient confidentiality must yield to the interests of third parties in similar situations where a special relationship exists between the patient and the individual responsible for warning.⁶¹ As of 1996, twenty-three states had adopted a *Tarasoff*-type duty by way of either judicial decision, legislative enactment or both.⁶²

This duty to warn was extended to HIV/AIDS cases in *Reisner v. Regents of the Univ. of California*.⁶³ In this case, the California Court of Appeals determined that a physician, who failed to inform his patient that she had received a tainted blood transfusion and thus was infected with HIV, was liable to the patient's sexual partner who later contracted the virus from the patient.⁶⁴ Like *Tarasoff*, a special relationship existed between physician and patient in *Reisner*, and the physician's responsibility did not stop at just treating his patient, but extended to informing her of her contagion.

Physician liability also has been found where a third party, with whom the physician has established no physician-patient relationship, was injured by the physician's patient. In *DiMarco v. Lynch Homes - Chester County, Inc.*,⁶⁵ the Supreme Court of Pennsylvania found two physicians liable to a third party who had been harmed as a direct result of the doctors' erroneous medical advice to their patient.⁶⁶ The court determined that a physician's duty required informing her patients of their disease or condition, not in-

60. 551 P.2d 334 (Ca. 1976). In *Tarasoff*, a California court imposed such a duty on psychotherapists whose patient expressed an intent to kill his victim. Because the patient was mentally unstable and had expressed a desire to kill a readily identifiable individual, the physicians should have alerted the victim that she was in danger. See *id.*

61. See *id.* at 343 (finding that a "special relationship" exists between a patient and his/her doctor or psychotherapist such that affirmative duties for the benefit of third persons may arise).

62. See Christine E. Stenger, *Taking Tarsoff Where No One Has Gone Before: Looking at "Duty to Warn" Under the AIDS Crisis*, 15 ST. LOUIS U. PUB. L. REV. 471, 476 (1996).

63. 31 Cal. App. 4th 1195 (1995).

64. See *id.*

65. 583 A.2d 422 (Pa. 1990). The physicians had given erroneous medical advice to their patient concerning the contagious nature of her illness, which resulted in injury to the third-party plaintiff. The physicians only were required to give correct medical advice to their patient concerning the transmission of the hepatitis virus that she may have contracted; they were not required to inform third persons, foreseeable or not. See *id.*

66. See *id.*

forming every possible third-party plaintiff.⁶⁷ This scenario would suggest that the physicians' duty is to inform, rather than to warn. As long as the physician correctly informs her HIV-diagnosed patient concerning the modes of transmission, she should be free from professional liability. *Reisner* emphasizes this duty to inform by finding the physician liable to an injured third party for failure to warn his patient, not for failure to warn the third party directly.⁶⁸ The reasoning in *Reisner* would not seem to require partner notification; rather, it serves as a reminder to physicians about their pre-existing duty to fully inform patients about their disease.⁶⁹

Although courts have laid down a tradition that requires physicians to warn family members and others in close proximity to the patient of the contagious nature of the patient's disease,⁷⁰ these cases are "generally characterized by the inability of the patient either to adapt his conduct so as to avoid or minimize the risk of infection or to communicate adequately to third parties the nature of the risk."⁷¹ Moreover, these duty-to-warn cases generally involved minor children or seriously debilitated people.⁷² It thus follows that opponents of partner notification likely would respond that this tradition does not apply to HIV because the index patient is informed of her condition and the ways to control transmission to others when she is diagnosed.⁷³

Furthermore, the foundation upon which the duty to warn has been erected is factually distinguishable from that in the HIV situation. In *Tarasoff*, the physician was a psychotherapist and the patient a mentally deranged individual who had made explicit comments about his intent to murder a readily identifiable woman.⁷⁴ However, in reality, the physician who diagnoses an index

67. *See id.*

68. *See Reisner*, 31 Cal. App. 4th at 1195 (finding physician liability in an action by a man who had contracted HIV through his girlfriend due to physician's failure to inform his patient that she had received tainted blood in a transfusion and was HIV positive).

69. *See Stenger, supra* note 62, at 502.

70. *See Price, supra* note 39, at 449 (citing *Davis v. Rodman*, 227 S.W. 612 (Ark. 1921); *Jones v. Stanko*, 160 N.E. 456 (Ohio 1928); *Wojcik v. Aluminum*, 183 N.Y.S.2d 351 (1959); *Simonsen v. Swenson*, 177 N.W. 831 (Neb. 1920)).

71. *Id.* at 450.

72. *See id.* at 449 (citing *Davis*, 227 S.W. at 612; *Jones*, 160 N.E. at 456; *Wojcik*, 183 N.Y.S.2d at 351 (1959); *Simonsen*, 177 N.W. at 831).

73. *See, e.g., N.Y. PUB. HEALTH LAW* § 2781(3) (McKinney 1999) (requiring health officials testing patients to inform them of the nature of the disease, the possibility of discrimination, and ways to curb transmission).

74. *See Tarasoff v. Regents of the Univ. of California*, 551 P.2d 334, 339 (Ca. 1976).

patient with HIV is generally not a psychotherapist, nor is the index patient generally insane. More likely, the physician is a medical doctor who can explain the known routes of HIV transmission and the ways to prevent it. The patient, through behavior modification, can stop the chain of transmission, as can his/her contact via protective measures. An individual who desires to kill another, whether it be with a physical weapon or with a virus, differs greatly from one who is infected with a virus and will take the necessary precautions to prevent its transmission. Additionally, the duty to warn applies to future harm that may occur to an individual from the intended acts of another.⁷⁵ Partner notification, however, attempts to retrospectively warn those potentially infected by the virus, which in its own way may make a stronger case for partner notification – the harm, e.g., exposure, has already occurred and is no longer speculative.

Although many of the duty-to-warn cases do involve contagious diseases such as hepatitis, HIV/AIDS can be distinguished from those infectious diseases. Not surprisingly, the stigma associated with HIV/AIDS is far greater than that associated with any other infectious disease.⁷⁶ “The privacy interest in one’s exposure to the AIDS virus is even greater than one’s privacy interest in ordinary medical records The potential for harm in the event of a non-consensual disclosure is substantial.”⁷⁷ Additionally, HIV/AIDS is different in kind from diseases such as tuberculosis because of the determinate role that behavior modification plays in transmission of the former. Adhering to certain precautions can prevent the spread of HIV, whereas tuberculosis is air-borne.⁷⁸ While incurable,⁷⁹ Hepatitis B also is different from HIV because vaccines ex-

75. See *id.* at 340.

76. See NYC Bar, *Partner Notification*, *supra* note 7, at 8; see also Herek & Capitanio, *infra* note 77 and accompanying text.

77. *Doe v. Borough of Barrington*, 729 F. Supp. 376, 384 (D.N.J. 1990) (recognizing a constitutional privacy right in one’s HIV status). See generally Gregory M. Herek, Ph.D. & John P. Capitanio, Ph.D., *A Second Decade of Stigma: Public Reactions to AIDS in the United States, 1990-91* (1997) <http://psychology.ucdavis.edu/rainbow/html/aids_stigma_paper.html> (outlining the discrimination still faced by individuals infected with HIV/AIDS today including employment discrimination and equal treatment by health professionals arising from fear and stigma surrounding the disease).

78. See Gostin & Hodge, *Piercing the Veil*, *supra* note 6, at 686.

79. See Marc Kaufman, *Hepatitis B Vaccine Effort Draws Fire; Critics Cite Reports of Adverse Effects in Opposing Mandatory Inoculations of Children*, WASH. POST, Feb. 2, 1999, at Z11. The hepatitis B virus infects about 200,000 Americans annually. At least 36 states, however, require the vaccine, which consists of a series of three shots, before a child can register for school. See *id.*

ist for Hepatitis B, capable of preventing its spread for at least fifteen years.⁸⁰ However, both diseases are spread through blood and other bodily fluids, and are found most frequently among IDUs and people engaging in high-risk sexual activities in the United States.⁸¹ Still, Hepatitis B, while more readily transmissible, is less likely to be fatal.⁸²

B. Name Reporting and Partner Notification in New York

The new law enacted by New York in the summer of 1998 mandates that physicians and others authorized to order diagnostic tests, as well as laboratories performing these tests, must report any person testing positive for HIV, AIDS or HIV-related illness to the municipal health commissioner.⁸³ This commissioner must then forward the information, which contains the identifying information of the index patient and any contacts, to the municipal health commissioner of the municipality where the disease occurred.⁸⁴ Although name reporting of HIV would serve certain epidemiological benefits such as "facilitat[ing] the study of the course of the disease and allow[ing] better targeting of resources and prevention efforts,"⁸⁵ many assert that it is a great deterrent to testing.⁸⁶

New York legislation continues to state that, in the case of contacts residing outside of the municipality, the commissioner will send the report to the particular contact's municipality, whose commissioner will make a good faith effort to notify the contact.⁸⁷ The commissioner will accompany notification with information relating to HIV treatment and prevention,⁸⁸ ensuring, at the very least, that accurate information is disclosed.⁸⁹ During the notification process, the commissioner or authorized official is not permitted to divulge the identity of the index patient or the identity of any other contact.⁹⁰

80. See Ron Geraci, *Do You Have Hepatitis C?*, MEN'S HEALTH, Mar. 5, 1999.

81. See Kaufman, *supra* note 79, at Z11.

82. See Stenger, *supra* note 62, at 488; see also Ron Geraci, *supra* note 80 (stating that most cases of Hepatitis B resolve themselves but almost 15% become chronic and can cause cirrhosis or liver cancer).

83. See N.Y. PUB. HEALTH LAW § 2130(1) (McKinney 1999).

84. See *id.* §§ 2130(2)-(3).

85. NYC Bar, *Name Reporting*, *supra* note 5, at 1.

86. See *supra* notes 168-169 and accompanying text.

87. See N.Y. PUB. HEALTH LAW § 2131 (McKinney 1999).

88. See *id.* § 2133(2).

89. See Dimas & Richland, *supra* note 43, at 206.

90. See N.Y. PUB. HEALTH LAW § 2133(3) (McKinney 1999).

The law also stipulates that no criminal or civil liability will result for any index patient's failure to cooperate in contact tracing, and adds a safety provision for index patients threatened by domestic violence.⁹¹ Other safety precautions are the ones given to health officials who must report or notify partners: "Good faith reporting or disclosure pursuant to this title shall not constitute libel or slander or a violation of the right of privacy or privileged communication."⁹² Furthermore, immunity from civil and criminal liability is granted for good faith attempts at reporting.⁹³ The physician also is given the alternative of notifying contacts if she has notified the patient of her intent and given the patient an opportunity to express a preference as to notification.⁹⁴

Finally, the option of anonymous testing still is retained by the new law. Section 2138 emphasizes that: "Nothing in this article shall be interpreted to eliminate the anonymous testing option provided for in section twenty seven hundred eighty-one of this chapter."⁹⁵ Unlike other infectious diseases, anonymous testing has been available for HIV at publicly-funded sites in the United States since 1985.⁹⁶ In confidential testing, a person's name is linked to the specimen, and the result of the test is recorded in the medical chart with a name.⁹⁷ Anonymous testing, on the other hand, uses a unique identifier, rather than the patient's name, to link the specimen with the test result, and the results are not recorded in the medical chart.⁹⁸

II. The Debate Over Name Reporting and Partner Notification: The Ramifications of Disclosure

It is no secret that name reporting and partner notification are controversial and emotionally-charged issues. At the heart of the debate, the welfare of unknowingly HIV-infected individuals is directly pitted against the privacy interest one has in her own serostatus. It is difficult, if not impossible, to draw clear lines between

91. See *id.* §§ 2136(3), 2137.

92. *Id.* § 2136(1).

93. See *id.* § 2136(2).

94. See *id.* § 2782(4)(a)(4).

95. *Id.* § 2138.

96. See A. B. Bindman et al., *Multistate Evaluation of Anonymous HIV Testing and Access to Medical Care*, 280 JAMA 1416 (1998) (stating that as of October 1998, forty states have publicly funded anonymous testing sites for HIV, and all fifty states have publicly funded confidential testing sites).

97. See *id.*

98. See *id.*

right and wrong. The following are arguments posited by proponents and opponents of name reporting and partner notification.

A. The Benefits of Name Reporting and Partner Notification

Proponents of name reporting and partner notification ground their argument in the changing face of the disease: once found primarily in male homosexuals and IDUs, HIV has evolved. "[T]he epidemic American society now faces is no longer a plague of unstoppable, deadly disease among predominantly gay persons, but a potentially controllable chronic condition with increasing effects on heterosexuals, women, and children."⁹⁹ As HIV has affected more of the American population, the push to decrease the spread of HIV infection has increased considerably. The need for epidemiological data to understand and control HIV is crucial, especially considering the benefits that recent advances have already shown: "From a public health and epidemiological perspective, the advantages of tracking and profiling HIV are significant, as HIV marks the beginning of the disease process rather than the end. In contrast, AIDS surveillance is triggered by events marking the late-stage progression of disease."¹⁰⁰

1. *Advances in Drug Therapy*

The practices of name reporting and partner notification are further justified by the recent success of drug therapies. Encouraging trends in AIDS cases in the United States have been attributed primarily to the effect of antiretroviral therapies on HIV-positive individuals.¹⁰¹ AIDS deaths declined twenty-three percent in 1996 compared to 1995, indicating that the therapies are having a significant impact on the rate of HIV progression.¹⁰² In addition, recent studies varying antiretroviral regimens have shown significant improvements in mortality and AIDS-free survival for men and wo-

99. Gostin & Hodge, *The "Names Debate," supra* note 16, at 710.

100. Texas Department of Health Bureau of HIV and STD Prevention, *Unique Identifier Reporting for HIV Infection Surveillance* (Nov. 1997) <<http://www.tdh.state.tx.us/hivstd/stats.htm>>.

101. See U.S. Department of Health and Human Services, *Update: Trends in AIDS Incidence - United States, 1996*, 46 MORBIDITY & MORTALITY WKLY. REP. 861 (1997) [hereinafter USHHS, *Update*]. Antiretroviral therapy achieving maximum HIV suppression generally includes a mixture of two nucleosides and protease inhibitor. See HIV/AIDS Information Center, *Compliance with HIV Treatment Guidelines Linked to Physician Experience* (July 2, 1998) <<http://www.ama-assn.org>>.

102. See USHHS, *Update, supra* note 101 ("From 1995 to 1996, deaths declined in all four geographic regions . . . ; among men and women; among all racial/ethnic groups; and in all risk/exposure categories. . . .").

men.¹⁰³ Individuals free of AIDS who took the less effective regimen were nearly three times more likely to progress to AIDS or die than those in the other group.¹⁰⁴ Antiretroviral agents also have been known to reduce viral loads in individuals for periods of months to years,¹⁰⁵ reflecting the strides medicine has made since the beginnings of the epidemic.

Furthermore, recent reports indicate that a triple therapy regimen without protease inhibitors can effectively suppress HIV.¹⁰⁶ A study was conducted in 173 drug-naïve HIV-positive individuals in which eighty-seven received triple-drug therapy while eighty-six received two-drug therapy.¹⁰⁷ The results showed that triple-drug therapy resulted in undetectable levels of the virus in eighty-six percent of patients after sixteen weeks, while two-drug therapy only resulted in undetectable levels of the virus in forty-three percent of patients after the same week period.¹⁰⁸ Thus, it has been asserted that "HIV has become a potentially manageable disease on a multiple decade timetable."¹⁰⁹ Advancements in medical research have even created optimism about the development of a vaccine.¹¹⁰

Treatment with zidovudine also has reduced the rate of perinatal transmission of HIV.¹¹¹ Perinatal transmission accounts for virtu-

103. See Robert S. Hogg et al., *Improved Survival among HIV-infected Individuals Following Initiation of Antiretroviral Therapy*, 279 JAMA 450 (1998) (attributing improvement of HIV-infected individuals to new antiretroviral therapy strategies that included separating patients into two therapy regimens: ERA-I included zidovudine-, didanosine-, or zalcitabine-based therapy and ERA-II included lamivudine or stavudine).

104. See *id.* (noting that the ERA-II group showed marked improvements).

105. See Roy M. Gulick, *HIV Treatment Strategies: Planning for the Long Term*, 279 JAMA 957 (1998).

106. See HIV/AIDS Information Center, *Triple Therapy Without Protease Inhibitor Effectively Suppresses HIV* (June 29, 1998) <<http://www.ama-assn.org>>. The triple drug therapy consisted of a combination of the drugs abacavir, lamivudine and zidovudine. See *id.*

107. See *id.* (stating the two-drug therapy group received lamivudine and zidovudine only).

108. See *id.*

109. HIV/AIDS Information Center, *Long-term Antiretroviral Compliance: Patients Can't Do It Alone* (July 2, 1998) <<http://www.ama-assn.org>> (quoting Dr. Stefano Vella of Italy).

110. See HIV/AIDS Information Center, *Geneva Data Offer "Sobering" View of HIV Treatment* (June 30, 1998) <<http://www.ama-assn.org>>.

111. See Public Health Service Task Force Recommendations for the Use of Antiretroviral Drugs in Pregnant Women Infected with HIV-1 for Maternal Health and for Reducing Perinatal HIV-1 Transmission in the United States (Jan. 30, 1998) <http://hivinsite.ucsf.edu/medical/tx_guidelines/2098.37e2.htm>.

ally all new HIV infections in children.¹¹² “As of September 30, 1997, perinatal transmission of HIV accounted for 7310 (one percent) of the 626,334 total AIDS cases in adults and children reported to the CDC by state and territorial health departments.”¹¹³ New York State alone comprised twenty-seven percent of the perinatally transmitted infections.¹¹⁴ A 1996 study showed that the HIV transmission rate for infants receiving a placebo was 22.6%, as compared with a 7.6% rate for infants receiving zidovudine.¹¹⁵ These differences amounted to a sixty-six percent reduction in the risk of transmission.¹¹⁶ The Institute of Medicine has recommended that HIV testing be universal and added to the standard battery of prenatal tests.¹¹⁷ Partner notification may apprise pregnant women of their exposure to HIV and potentially prevent their children from contracting the disease.

Partner notification may help HIV-positive individuals make better use of available drugs by informing them that they have been exposed to the disease in hopes of getting them into treatment before any symptoms of infection occur. “Early detection of the virus is considered increasingly important since a new class of AIDS drugs called protease inhibitors has proven effective in treating the disease in many people.”¹¹⁸ Research has indicated that these new drug therapies are more effective if begun soon after infection.¹¹⁹ Name reporting may help to develop even more effective treatments or improve those already available.

2. Cost Efficiency of Partner Notification

Proponents of partner notification also argue that money spent on implementing such programs is money well spent. Colorado

112. See Centers for Disease Control and Prevention, *Update: Perinatally Acquired HIV/AIDS – United States, 1997*, 46 MORBIDITY & MORTALITY WKLY. REP. 1086 (1997).

113. *Id.*

114. See *id.*

115. See *id.*

116. See *id.*

117. See Centers for Disease Control and Prevention, *Status of Perinatal HIV Prevention in the United States: CDC Statement Following the Release of the Institute of Medicine Report* (Oct. 14, 1998) <<http://www.cdc.gov>> (stating that the CDC has recommended since 1994 that all pregnant women be offered HIV testing as part of prenatal care, and if infected, be offered an AZT regimen).

118. Richard Pérez-Peña, *Bill in Albany to Track H.I.V. Gains Backing*, N.Y. TIMES, June 19, 1998, at A1.

119. See American Civil Liberties Union, *HIV Partner Notification: Why Coercion Won't Work*, ACLU REPORT 1, 2 (March 1998) [hereinafter ACLU, *Why Coercion Won't Work*].

health officials calculated that every dollar spent on HIV partner notification saves \$7.20 in clinical care costs for AIDS patients.¹²⁰ This figure assumes that each partner who elects to be tested as a result of notification will transmit HIV to one less partner and fifty percent of those tested would develop AIDS.¹²¹

Another way to understand the cost-efficiency of partner notification is to analyze the increasing costs associated with HIV/AIDS drug therapy and the subsequent economic benefits derived from halting transmission to others. Several years ago, basic HIV therapy amounted to an annual cost of \$3000, whereas basic therapy in 1998, which currently involves four or five drugs, has risen to more than \$12,000 annually.¹²²

3. *No Effective Alternatives*

Many proponents of name reporting rally against non-name reporting systems, such as the unique identifier system used in several states, which they view as ineffective in collecting data to study the disease. Maryland's unique identifier system, in effect since June 1, 1994, is a twelve digit number consisting of the last four digits of an individual's Social Security number, date of birth, race/ethnicity and gender.¹²³ An evaluation of Maryland's system from July 1994 through December 1996 found that twenty-nine percent of 9971 laboratory reports entered into the system were missing a portion of the unique identifier, usually the social security number.¹²⁴ The Maryland system was also plagued by a fifty percent rate of completeness, a large number of duplicate reports and lack of HIV risk information.¹²⁵

Texas also instituted a unique identifier system in March 1994, but recently abandoned it in favor of HIV reporting by name,

120. See Dimas & Richland, *supra* note 43, at 207.

121. See *id.*

122. See David N. Rose, *AIDS Drug Regimens that are Worth Their Costs*, 279 JAMA 160 (1998).

123. See American Civil Liberties Union, *The Maryland Lesson: Conducting Effective HIV Surveillance with Unique Identifiers*, ACLU REPORT (Dec. 1997) <<http://www.aclu.org/issues/aids/mdnamereport.html>> [hereinafter ACLU, *The Maryland Lesson*]. Texas's unique identifier system also used these same components. See Texas Department of Health, *HIV Reporting by Name: Why Texas is Changing* (visited Mar. 11, 1999) <<http://www.tdh.state.tx.us/hivstd>>.

124. See Centers for Disease Control and Prevention, *Evaluation of HIV Case Surveillance Through the Use of Non-Name Unique Identifiers - Maryland and Texas, 1994-1996*, 46 MORBIDITY & MORTALITY WKLY. REP. 1254 (1998) [hereinafter CDC, *Evaluation of HIV Case Surveillance*].

125. See *id.*

which will be effective January 1, 1999.¹²⁶ However, this change will not affect the availability of anonymous HIV testing.¹²⁷ Texas' decision to stop using the unique identifier system stems from incomplete codes collected throughout the years: from a pool of 20,000 reports in the last three years, only forty-nine percent have been complete.¹²⁸

4. *Name Reporting is not a Deterrent to Testing*

Studies have shown that name reporting and partner notification are not significant deterrents to testing.¹²⁹ One study conducted last year revealed that there were no significant declines in the total number of HIV tests provided at counseling and testing sites in the months immediately after implementation of HIV reporting occurred in any of the six states studied, other than those expected from previous trends.¹³⁰ In fact, the study found increases in Nebraska (15.8%), Nevada (48.8%), New Jersey (21.3%) and Tennessee (62.8%).¹³¹ Predicted decreases occurred in Louisiana and Michigan (10.5% and 2.0%, respectively).¹³² All six states showed increases in testing of at-risk heterosexuals.¹³³ Only two states showed minimal declines for men who have sex with men.¹³⁴ Three states had declines for IDUs.¹³⁵

126. See Texas Department of Health, *HIV Reporting by Name Adopted in Texas* (visited Dec. 13, 1998) <<http://www.tdh.state.tx.us/hivstd/input.htm>> [hereinafter TDH, *HIV Reporting by Name*].

127. See *id.*

128. See *Texas to Switch from Codes to Names to Track HIV Cases*, AIDS POL'Y & LAW, Feb. 20, 1998, at 1, 11.

129. See A. K. Nakashima et al., *Effect of HIV Reporting by Name on Use of HIV Testing in Publicly Funded Counseling and Testing Programs*, 280 JAMA 234 (1998) (explaining studies that found name reporting and partner notification to be deterrents were flawed either because they targeted people seeking anonymous testing, who were naturally more likely to be concerned about confidentiality than the average person, or conducted their studies before highly effective antiretroviral therapies were available, or both).

130. See *id.*

131. See *id.*

132. See *id.*

133. See *id.* (chronicling increases for heterosexuals were as follows: Louisiana, 10.5%; Michigan, 225.1%; Nebraska, 5.7%; Nevada, 303.3%; New Jersey, 462.9%; Tennessee, 603.8%).

134. See *id.* ("Declines in testing occurred among men who have sex with men in Louisiana (4.3%) and Tennessee (4.1%) after HIV reporting; testing increased for this group in Michigan (5.3%), Nebraska (19.6%), Nevada (12.5%), and New Jersey (22.4%).").

135. See *id.* ("Among injection drug users, testing declined in Louisiana (15%), Michigan (34.3%), and New Jersey (0.6%) and increased in Nebraska (1.7%), Nevada (18.9%), and Tennessee (16.6%).").

The Texas Department of Health ("TDH") conducted a study in 1996 and 1997 in which HIV prevention workers interviewed 615 Texans in three risk categories for HIV (men who have sex with men, IDUs and high risk heterosexuals).¹³⁶ Eighty-five percent of those interviewed said that they were likely to test for HIV in the next year.¹³⁷ Seventeen percent expressed some concern about named reporting of HIV test results, but only two percent cited concerns over confidentiality or reporting as the most important reason for delaying or avoiding testing.¹³⁸

Moreover, from a survey of 399 patients who had not been tested for HIV, only eighteen cited discrimination and confidentiality concerns as factors in their decision, showing that despite widespread misconceptions about partner notification, the deterrence to testing is small.¹³⁹ This survey also showed that ninety-one percent of respondents believed that HIV-positive index patients should apprise their sexual partners of their possible exposure to HIV.¹⁴⁰

5. *Allocating and Improving Scarce Resources*

After abandoning its unique identifier system, TDH argued that HIV reporting by name was necessary to "make sure that resources get to the communities that need them most."¹⁴¹ TDH uses AIDS case numbers to allocate HIV treatment resources, but these numbers do not accurately reflect the people infected with HIV.¹⁴² Thus, communities with large numbers of asymptomatic HIV individuals do not get the resources they need.¹⁴³ Additionally, TDH has argued that it cannot get a reliable estimate on the number of HIV infected individuals in Texas without HIV reporting.¹⁴⁴ Without this number, improving HIV prevention and services programs is difficult, especially considering the increasing time lag between HIV infections and AIDS.¹⁴⁵ The subtle trends in in-

136. See Texas Department of Health, *HIV Reporting by Name: The Impact on HIV Testing* (visited Mar. 11, 1999) <<http://www.tdh.state.tx.us/hivstd>>.

137. See *id.*

138. See *id.*

139. See Dimas & Richland, *supra* note 43, at 206.

140. See *id.* at 208.

141. Texas Department of Health, *HIV Reporting by Name: Questions & Answers* (visited Mar. 11, 1999) <<http://www.tdh.state.tx.us/hivstd>>.

142. See *id.*

143. See *id.*

144. See *id.*

145. See *id.*

fection rates among different groups cannot be gauged without data on HIV.¹⁴⁶

B. Arguments Against Name Reporting and Partner Notification

1. Threats to Confidentiality

Perhaps the most basic argument against name reporting and partner notification is the potential breach of patient confidentiality and the degeneration of the doctor-patient relationship: "Named reporting also by its nature requires a breach of the therapeutic relationship, because the physician, by law, must report confidential information to the health department."¹⁴⁷ Partner notification results in a similar breach, because although the physician does not disclose the name of the index patient, she still must inform contacts of the index patient, not unreasonably resulting in the index patient's fear of discovery.

In states requiring partner notification, the contours of what would be the inner-sanctum of the doctor-patient relationship are mandated by statute. Some states impose penalties on HIV positive individuals who fail to notify contacts,¹⁴⁸ and others authorize physicians and public health officials to notify contacts, even without the patient's consent.¹⁴⁹

The creation of databases containing the names of infected individuals and their contacts increases the possibility of further breaches in confidentiality. There already have been such breaches, including the theft of a computer containing the names of people with AIDS from a public health office in Sacramento, California.¹⁵⁰ State experts reviewing a backup computer tape found a list of names and characteristics of about sixty AIDS patients that

146. *See id.*

147. *See* Gostin & Hodge, *The "Names Debate," supra* note 16, at 684.

148. *See, e.g.,* IND. CODE ANN. § 35-50-3-3 (West 1994).

149. *See, e.g.,* CONN. GEN. STAT. ANN. § 19a-584 (West 1997):

A public health officer may inform or warn partners of an individual that they may have been exposed to the HIV virus under the following conditions: (1) The public health officer reasonably believes there is a significant risk of transmission to the partner; (2) the public health officer has counseled the protected individual regarding the need to notify the partner and the public health officer reasonably believes the protected individual will not inform the partner; (3) the public health officer has informed the protected individual of his intent to make such disclosure.

150. *See* Richard C. Paddock, *Thieves Steal Computer Containing Confidential List of 60 AIDS Victims*, L.A. TIMES, July 9, 1987, at 3.

dated back more than a year and should have been erased earlier.¹⁵¹

There have also been leaks of information on computer discs from the Pinellas County Health Unit in Florida, which may have contained the names of approximately 4000 individuals infected with HIV.¹⁵² The database contained telephone numbers, addresses, dates of birth and the manner by which individuals contracted AIDS.¹⁵³ Investigation into this incident revealed the practice of Florida's employees visiting hospitals and doctors carrying laptops and discs containing the entire list of HIV-positive individuals for the county in which they worked.¹⁵⁴ Opponents of HIV partner notification fear that health officials privy to the HIV serostatus of so many individuals will continue to compromise confidentiality by leaking the information.

Disclosure of one's serostatus to others may also lead to domestic violence. One study showed that forty-five percent of health care providers serving HIV-positive women reported that they have patients who feared domestic violence as a result of partner notification.¹⁵⁵ One-quarter of these providers had patients who actually had been assaulted by their partners upon notification.¹⁵⁶

Additional breaches in confidentiality may come from the contact who is notified by the physician or public health authority. Although statutory requirements prohibit disclosure to non-privileged sources,¹⁵⁷ the name of an index patient whose identity is deducible by the contact may be leaked by that contact.¹⁵⁸ In certain situations, it could be virtually impossible to determine where a breach occurred, especially if it was perpetrated by an angered

151. *See id.*

152. *See* Sue Landry, *AIDS List is Out*, ST. PETERSBURG TIMES, Sept. 20, 1996, at 1A.

153. *See id.*

154. *See* Sue Landry & Tim Roche, *Lawsuit Filed Over AIDS List*, ST. PETERSBURG TIMES, Sept. 24, 1996, at 1A.

155. *See* ACLU, *Why Coercion Won't Work*, *supra* note 119, at 9 (citing Karen H. Rothberg et al., *Domestic Violence and Partner Notification: Implications for Treatment and Counseling of Women with HIV*, 50 JAMWA 3:87 (1995)).

156. *See id.* (citing Karen H. Rothberg et al., *Domestic Violence and Partner Notification: Implications for Treatment and Counseling of Women with HIV*, 50 JAMWA 3:87 (1995)).

157. *See, e.g.*, N.Y. PUB. HEALTH LAW § 2135 (McKinney 1999) ("All reports or information secured by the department, municipal health commissioner or district health officer . . . shall be confidential except in so far as is necessary to carry out the provisions of this title.").

158. *See* Price, *supra* note 39, at 469.

contact. Not surprisingly, it would be difficult to enforce laws prohibiting disclosure by contacts.

Opponents of name reporting and partner notification have rallied behind programs such as anonymous testing and unique identifier systems. Another system that would not breach confidentiality but may pose other problems is the use of a unique identifier that is not comprised of the last four digits of a patient's social security number.¹⁵⁹ An example of this identifier is a word or phrase that the patient chooses herself, similar to e-mail addresses used on the internet.¹⁶⁰ This identifier need not in any way be linked to the patient, assuring perfect confidentiality. However, this system relies completely on the patient's cooperation, making the collection of a comprehensive pool of data in comparison with a name reporting system more difficult.

2. *Stigma and the Inadequacy of Legal Protections*

Mandatory name reporting and partner notification may be more palatable to the general populace if the stigma surrounding HIV/AIDS was not so strong. In a study conducted by Gregory M. Herek, Ph.D. and John P. Capitanio, Ph.D. at the University of California at Davis, it was demonstrated that the stigma of AIDS is still alive and strong.¹⁶¹ The study examined attitudes towards people with AIDS ("PWA") in the second decade of the disease.¹⁶² It found that between one-third and one-fifth of the general public holds negative feelings towards PWA, believes that they deserve their illness, or even supports punitive measures to be taken against them.¹⁶³ The study further revealed that many misconceptions around transmissibility of the disease still exist.¹⁶⁴

Legal protections are necessary to stop discrimination against PWA. Unfortunately, current protections are inadequate in accomplishing this goal. As illustrated by the Americans with Disabilities Act ("ADA"), although a law may be able to prohibit discrimination in theory, it cannot always control it in practice. For

159. See Symposium, *Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual, Transgendered Law*, 27 *FORDHAM URB. L.J.* (forthcoming Oct. 1999) (citing Catherine Hanssens, Esq., Lambda Legal Defense and Education Fund).

160. See *id.*

161. See Herek & Capitanio, *supra* note 77.

162. See *id.*

163. See *id.*

164. See *id.* Of the 538 surveyed, roughly half thought transmission of HIV was likely when two uninfected homosexual men had intercourse without condoms, when a person shared a drinking glass with an HIV-positive person, was coughed or sneezed on by a infected individual, or was bitten by an insect. See *id.* at tbl. 2.

example, in *Bragdon v. Abbott*¹⁶⁵ the Supreme Court recently determined that asymptomatic HIV infection is a disability for ADA purposes, thereby prohibiting employment discrimination against HIV-positive individuals.¹⁶⁶ Still, the Court cannot eliminate the obvious social stigma attached to the disease. Even the ADA working at full capacity cannot prevent a seropositive individual from suffering discrimination in social situations and by loved ones.¹⁶⁷

3. *Name Reporting and Partner Notification Deter Testing*

A common argument against name reporting and partner notification programs is that they will deter people from voluntary HIV testing. According to some, "while the goal of increased tracking of HIV infection is to bring those with HIV into the public health system and to obtain more accurate epidemiological data, name reporting will likely have the opposite effect."¹⁶⁸ Studies suggest that a significant number of individuals tested anonymously for HIV would not have undergone testing if their names would have been reported to public health authorities.¹⁶⁹

Moreover, if the ultimate goal is to get people tested, treated and engaged in less risky behavior as quickly as possible, then name reporting and partner notification may have a deleterious effect.¹⁷⁰ Research indicates that when anonymous testing is available, the average amount of time spent deciding to be tested can be reduced by more than one half, from a mean of twelve months to a mean of five months.¹⁷¹ Moreover, more individuals return for their results at anonymous testing centers than at centers that prac-

165. 524 U.S. 624 (1998).

166. *See id.*

167. *See* ACLU, *HIV Surveillance*, *supra* note 20.

168. *See id.*

169. *See id.* (citing Susan M. Kegeles et al., *Many People Who Seek Anonymous HIV-Antibody Testing Would Avoid it Under Other Circumstances*, 4 AIDS 585, 586 (1990) (observing that over sixty percent of individuals tested anonymously would not have tested if their names were reported to public health officials); *see also* Gostin & Hodge, *Piercing the Veil*, *supra* note 6, at 33 (citing Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., *Partner Notification and Confidentiality of the Index Patient: Its Role in Preventing HIV*, 17 SEXUALLY TRANSMITTED DISEASES 113, 113-14 (1990)).

170. *See* ACLU, *HIV Surveillance*, *supra* note 20 (citing Laura Fehrs et al., *Trial of Anonymous Versus Confidential Human Immunodeficiency Virus Testing*, 2 LANCET 391 (1998)).

171. *See id.*

tice name reporting.¹⁷² The number of individuals failing to return likely would increase where testing entailed not only name disclosure to authorities, but also was followed by partner notification. Additionally, fears of discrimination and stigmatization are so strong that many travel across state lines to obtain anonymous testing.¹⁷³ Performed in conjunction with name reporting, partner notification appears to add barriers to an already emotionally-charged situation. Partner notification is self-defeating if it acts as a deterrent to testing. Fewer contacts will be notified if fewer people are willing to be tested.

4. *The Failure of Partner Notification to Eradicate the Spread of Syphilis*

Although sexually-transmitted, HIV/AIDS is different in degree from other STDs. HIV/AIDS cannot be rendered non-infectious like syphilis and gonorrhea, meaning that any partner notification program for HIV/AIDS-infected individuals would have to continue throughout the person's existence, making it considerably more expensive than those employed for other STDs.¹⁷⁴ Despite the central role partner notification played in syphilis treatment programs in the 1940s, it is unclear whether it had an effect on reducing transmission.¹⁷⁵ In fact, both syphilis and gonorrhea infections have increased in the past twenty years, leading many to question the effectiveness of partner notification measures.¹⁷⁶ Even the CDC recognized this dilemma, attributing partner notification's failure to control syphilis to the fact that syphilis affects a large number of illegal drug users, rendering notification of contacts difficult and sometimes impossible.¹⁷⁷ HIV infection also is largely related to IDUs: The demographics of HIV are changing from largely gay and bisexual men in the first decade of the epidemic to people of color and IDUs in the second decade.¹⁷⁸

172. *See id.* A study conducted in North Carolina showed that 30.3% of people undergoing confidential testing did not return, as compared to only 8.2% of anonymously tested individuals. *See id.* (citing Irva Hertz Picciotto et al., *HIV Test-Seeking Before and After the Restriction of Anonymous Testing in North Carolina*, 86 AM. J. PUB. HEALTH 1446, 1448 (1996)).

173. *See id.*

174. *See* NYC Bar, *Partner Notification*, *supra* note 7, at 3, 8.

175. *See id.* at 3.

176. *See id.*

177. *See* ACLU, *Why Coercion Won't Work*, *supra* note 119, at 6. (citing Centers for Disease Control, *Alternative Case-Finding Methods in a Crack-Related Syphilis Epidemic - Philadelphia*, 40 MORBIDITY & MORTALITY WKLY. REP. 5:77 (1991)).

178. *See id.* at 2.

In addition, the various risk factors that have been attributed to the failure of partner notification efforts in controlling recent outbreaks of syphilis - drug dependency, anonymous sex, needle-sharing partners, and the exchange of sex for drugs or money - are all present among the fastest growing population at risk for contracting HIV.¹⁷⁹

The circumstances surrounding HIV and syphilis are similar, suggesting that partner notification may not effectively combat the spread of HIV either.

III. Improving the New York Name Reporting and Partner Notification Law

Many obstacles must be overcome before the New York Name Reporting and Partner Notification Statute can be applied effectively. Between the statute itself and the proposed regulations, a definitive plan for instituting the law remains muddled and impractical. The following section analyzes the new law, suggesting various changes to it while also supporting the implementation of a unique identifier system in conjunction with partner notification.

A. Cost Efficiency of Partner Notification

Even if one assumes that the costs and resources associated with partner notification are reasonable considering the results,¹⁸⁰ one cannot help but wonder whether available resources may be better spent on medical research and providing access to health care.¹⁸¹ "The CDC estimated in April 1987 that the cost of identifying, locating, counseling, and testing partners was \$98 per HIV-infected partner and \$91 per HIV-seronegative partner."¹⁸² New York, however, is not just any state. One must recognize the many obsta-

179. *Id.* at 8.

180. See generally Andrew T. Pavia, M.D. et al., *Partner Notification for Control of HIV: Results after 2 Years of a Statewide Program in Utah*, 83 AM. J. PUB. HEALTH 1418, 1422-23 (1993) ("The benefits of partner notification for HIV exposure thus appear to outweigh the potential risks and costs, but its precise role remains to be determined.").

181. See ACLU, *Why Coercion Won't Work*, *supra* note 119, at 12 (Data from test sites in Florida and New Jersey show that it cost \$281,964 to locate 1035 partners (of 8633 that had been named), and 122 of those notified tested positive for HIV) (citing Thomas A. Peterman, et al., *HIV Partner Notification: Cost and Effectiveness Data from a Multicenter Randomized Controlled Trial*, XI INT. CONF. AIDS, Abstract #Th.C.4626 (1996)).

182. Dimas & Richland, *supra* note 43, at 206-07 (stating that the difference in cost stemmed from the need for additional post-test counseling for HIV-positive individuals).

cles in reporting infected individuals and notifying their partners in urban areas with such high seroprevalence levels such as New York City.¹⁸³

Still, New York has posited that after several thousands of dollars spent on updating laboratory materials and facilities to accommodate the increase in HIV reporting, the additional costs associated with reporting and notification will be nominal: \$5.00 per report for a health care provider to fill out the form, \$8.00 per interview with HIV positive individual, post-test counseling that may be eligible for Medicaid reimbursement at an average rate of \$72.00 per session, and an estimated \$100.00 for one hour of time per partner notified by a physician.¹⁸⁴ These numbers then have to be multiplied by the additional 11,000 newly diagnosed cases of HIV that the state expects to report annually (9000 in New York City and 2000 in the rest of the state).¹⁸⁵ Also added to these costs must be the number of contacts notified. Another factor that must be taken into account for New York City in particular is the difficulty in locating partners of IDUs and other marginalized groups,¹⁸⁶ such as people without places of permanent residence. "[T]he fastest expansion [of HIV cases in New York] is among the state's most disenfranchised: the poor, intravenous-drug users, people of color, gay teenagers and runaway children."¹⁸⁷ These people, if attempted to be notified, will surely increase the costs per notification.

The state must recognize that partner notification in New York will necessarily be more expensive and less successful than in other states, so that a basic weighing and evaluation of each tested individual should be done. If it appears that the contacts named by the index patient are not able to be located without undue costs, or the information concerning their whereabouts is not forthcoming, a health official may not want to incur the unexpected, additional costs. This evaluation should be done on a case-by-case analysis so that much needed funds that could be used for treatment are not wasted on hopeless cases.

183. See Price, *supra* note 39, at 478; see also Centers for Disease Control and Prevention, *supra* note 8 and accompanying text.

184. See *Regulatory Impact Statement*, Notice of Proposed Rule Making, Amendment of N.Y. COMP. CODES R. & REGS., tit. 10, ch. 163, at 7-10, (1999) (proposed regulations, on file with the *Fordham Urban Law Journal*).

185. See *id.* at 6.

186. See *supra* notes 177-179 and accompanying text.

187. Laurie Garrett, *Hidden HIV / The Search is on for People Who Don't Know They Carry the Virus that Causes AIDS*, *NEWSDAY*, Aug. 18, 1998, at C6.

B. A Unique Identifier System

New York could achieve its twin goals of data collection and partner notification without discouraging testing by instituting a unique identifier system and eliminating name reporting.¹⁸⁸ As noted earlier, this system has been instituted in Maryland, and until recently, Texas.¹⁸⁹ Although Maryland recognizes its problems with incomplete reports, it notes that the percentage of complete reports has been steadily increasing.¹⁹⁰ A pilot program, whereby staff members are trained in the unique identifier system, has resulted in a markedly improved 96.6% completeness rate.¹⁹¹ Therefore, New York should ensure that health department employees creating unique identifier numbers undergo training programs when the system is initiated.

A unique identifier system's success is measured by more than the completeness of the numbers reported. Its "ability to match the [unique identifiers] of persons listed in the UI Registry with the UI's of persons listed in the state's AIDS Registry and consequently to be able to distinguish new cases of HIV infection from previously reported AIDS cases" also mark a system's value.¹⁹² Maryland's match rate was 76.5%, while that of Alabama and Arizona, two states using HIV name reporting, had match rates of seventy-nine to ninety percent.¹⁹³ The seroprevalence rate of Maryland, however, is approximately three times higher than that of Alabama and Arizona, suggesting a higher case load; may have been responsible for lower match levels.¹⁹⁴ Because New York has one of the highest seroprevalence rates in the U.S.,¹⁹⁵ a unique identifier system is feasible within the state only with better training, adequate staffing, and more resources proportionate to its seroprevalence rate. If New York can lead the way in instituting an efficient and effective unique identifier system, it should not be difficult for other states to follow.

After a series of public meetings revealed great opposition to a name-based reporting system, Washington authorized a pilot pro-

188. See N.Y. PUB. HEALTH LAW § 2130 (McKinney 1999).

189. See TDH, *HIV Reporting by Name*, *supra* note 126.

190. See ACLU, *The Maryland Lesson*, *supra* note 123 ("While only 61% of UI's reported in the first six months of the program were complete, approximately 77% of the UI's reported in the last six months of 1996 were complete.").

191. See *id.*

192. *Id.*

193. See *id.*

194. See *id.*

195. See *supra* note 10 and accompanying text.

gram using a non-name unique identifier system.¹⁹⁶ The Washington system differs slightly from those used in Texas and Maryland and promises to eliminate incomplete reports and assure confidentiality by destroying records linking the individual to her identifier.¹⁹⁷ In this new system, the individual's name and related information would be sent to the health department, who would then create the coded number and delete the individual's name from the database,¹⁹⁸ rather than requiring the entity who does the testing to complete these tasks. If the Washington system does lead to more complete reports, New York also should tailor its program similarly. By shifting the onus of creating coded numbers onto the health department, the state does not need to rely on the cooperation of private facilities, especially if cooperation is not forthcoming.

Rather than employing the twelve digit number used in Maryland,¹⁹⁹ New York should expand its system to include important information such as risk behavior.²⁰⁰ This goal can be accomplished by encoding different behaviors and adding more digits to the system. The addition of risk behavior and other information may assist in locating trends among certain at-risk populations or identifying other populations that are increasingly affected by the epidemic, so as to maximize the infusion of resources where they are needed most.

C. Non-cooperation by the Index Patient

As required by the New York Bill, the report sent to the commissioner at the state health department will contain information identifying both the index patient and any contacts.²⁰¹ The first obvious problem with this law and other partner notification statutes is the hurdle posed by an index patient's refusal to cooperate with the authorities. Although the index patient may be forced to reveal her own name to obtain insurance reimbursement,²⁰² she

196. See *Washington State Moves Toward Study of Unique Identifiers*, AIDS POL'Y & L., Mar. 6, 1998, at 12.

197. See *id.*

198. See *id.*

199. See *supra* note 123 and accompanying text.

200. See generally CDC, *Evaluation of HIV Case Surveillance*, *supra* note 124, at 1254 (noting the importance of including HIV risk information for an effective surveillance system).

201. See N.Y. PUB. HEALTH LAW § 2130(3) (McKinney 1999).

202. See Notice of Proposed Rule Making, Amendment of N.Y. COMP. CODES R. & REGS., tit. 10, §§ 63.2-63.3(a)(1) (1999) (proposed regulations, on file with the *Fordham Urban Law Journal*) ("[F]or purpose of insurance coverage, confidential, as

cannot be forced to reveal the name of her sexual and/or needle-sharing contacts. The law stipulates that no criminal or civil liability will result for any index patient's failure to cooperate in contact tracing.²⁰³

This non-cooperation obstacle suggests that the process of partner notification, at its essence, is voluntary or contingent on index patient cooperation. That is not to say that coercive notification may not occur. An individual ignorant of her rights under the law may be unwillingly duped into cooperation. Even worse, she may lie about her sexual history and characteristics, resulting in inaccurate data. Thus, written informed consent²⁰⁴ is the key to managing non-cooperation. Informed consent for HIV testing here means that the patient who is to be tested must first be given pre-test counseling, which includes explanations regarding the nature of the disease and current treatment options, the possibility of discrimination, and ways to prevent transmission.²⁰⁵ Most importantly, however, pre-test counseling includes notice of name reporting and partner notification, and the availability of anonymous testing sites.²⁰⁶

In addition to these elements of informed consent, health officials and physicians should be required to inform patients of their right not to disclose contacts, while always emphasizing the importance of contacting partners. This *Miranda*-like²⁰⁷ warning should be built into the informed consent definition such that a failure to give it to the individual about to undergo testing may result in professional liability for the physician or center offering the test.

opposed to anonymous testing is required.""). The reporting regulations apply to people receiving confidential HIV-related information.

203. See N.Y. PUB. HEALTH LAW § 2136(3) (McKinney 1999).

204. See *id.* § 2780(5). "Capacity to consent" is defined as:

an individual's ability, determined without regard to the individual's age, to understand and appreciate the nature and consequences of a proposed health care service, treatment, or procedure, or of a proposed disclosure of confidential HIV-related information, as the case may be, and to make an informed decision concerning the service, treatment, procedure or disclosure.

Id.

205. See *id.* § 2781(3).

206. See *id.* § 2781(4).

207. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that statements that were obtained from defendants during incommunicado interrogation in a police-dominated atmosphere, without full warning of constitutional rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination.

D. Defining "Contacts"

This problem of non-cooperation, in turn, creates another one: the problem of defining the term "contact." The amendments to section 2780(10) attempt to elaborate on the definition of "contact":

identified spouse or sex partner of the protected individual, a person identified as having shared hypodermic needles or syringes with the protected individual or a person who the protected individual may have exposed to HIV under circumstances that present a risk of transmission of HIV, as determined by the commissioner.²⁰⁸

This definition is neither exhaustive nor realistic. It does not take into account the existence of sexually-inactive spouses or estranged spouses, nor does it clearly delineate how far back the contact tracing process must venture. It also does not set limits on the extent of probing a health official or physician must undertake, such as whether she must investigate claims of sexual inactivity by the index patient. The law's over-broad reach may extend into the realm of marital privacy, an area upon which the Supreme Court has declined to tread.²⁰⁹ Infringement on the privacy rights of one's sexual partners also is prohibited.²¹⁰

E. Notification of Contacts

"[T]he municipal health commissioner or the department's contact notification assistance program staff . . . [must make a] determination that the reported case or any other case merits contact notification in order to protect the public health" ²¹¹ Factors to be considered in this determination are the awareness of known contacts and situations involving newly-diagnosed persons with HIV.²¹² The first factor is obviously spawned out of convenience; limited or no investigation is required prior to notification. The second factor, on the other hand, does not seem grounded in any logic. What the health official may think is a "new diagnosis" may actually be a "newly discovered" one because of the difficulty in

208. N.Y. PUB. HEALTH LAW § 2780(10) (McKinney 1999).

209. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a zone of privacy in the marital realm).

210. *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending the privacy rights of married couples to unmarried couples under the Equal Protection Clause).

211. Notice of Proposed Rule Making, Amendment of N.Y. COMP. CODES R. & REGS., tit. 10, § 63.8(a)(3) (1999) (proposed regulations, on file with the *Fordham Urban Law Journal*).

212. *See id.* § 63.8(b).

predicting with certainty when a person first contracted the disease. Also, it would seem more efficacious to notify partners of someone who has been HIV positive for a longer period because there has been a longer period in which the person has been infectious.

The New York law also requires health officials to notify the contact in person unless circumstances prevent this method.²¹³ While the great expense of carrying out this requirement exhausts money and resources that could be used in finding a cure or better treatments,²¹⁴ the in-person notification may be well worth the expense in such an emotionally-charged situation. Moreover, providing the contact with an opportunity to receive detailed advice on the importance of getting tested and reducing risk behavior from an individual trained to share accurate information is critical. After all, partner notification serves little purpose in breaking the chain of transmission if the notified individual does not then herself get tested.

Many opponents of the law understandably fear health officials knocking on a contact's door while neighbors look on or leaving a message that the contact should get in touch with the local health department. Thus, the state should consider a policy of notifying contacts in neutral places, such as the physician's office or the local health department. If telephone contact must be made, the health official should never leave a message with a party other than the named contact.

F. Special Cases Where Immunity Should be Granted

During the notification process, the commissioner or authorized official is not permitted to divulge the identity of the index patient or the identity of any other contact.²¹⁵ In reality, the identity protection offered by the plan is a façade in some circumstances where the index patient's identity easily can be deduced. For example, if the contact of an index patient only has engaged in sexual relations with the index patient and has never injected drugs, the identity of the index patient may be obvious to the contact. Under these cir-

213. See N.Y. PUB. HEALTH LAW § 2133(4) (McKinney 1999).

214. See *supra* notes 182-155 and accompanying text.

215. See N.Y. PUB. HEALTH LAW § 2133(3) (McKinney 1999); see also Notice of Proposed Rule Making, Amendment of N.Y. COMP. CODES R. & REGS., tit. 10, § 63.1 (1999) (proposed regulations, on file with the *Fordham Urban Law Journal*) ("In all cases of contact tracing authorized in this Part, the name or other identifying information regarding the protected person shall not be disclosed to contacts and the name of contacts shall not be disclosed to other contacts.").

cumstances, the statute should have an immunity provision, which weighs the degree of exposure to the contact against the need for confidentiality to the index patient on a case-by-case basis. Unless the degree of risk is substantially likely to transmit the virus, immunity should be granted to the index for nondisclosure. Of course, the index patient should always be strongly encouraged to notify on her own, despite the risk of discovery.

Another difficult scenario for partner notification proceedings is where domestic violence plays a role. Physicians and other persons required to report must indicate whether they have conducted a domestic violence screen on each case.²¹⁶ Statistics show that domestic violence in relationships is prevalent,²¹⁷ and partner notification to an abusive spouse may aggravate the situation. As part of the aforementioned HIV "*Miranda*" warning, the health authority should initiate the inquiry into whether there exists a threat of domestic violence for the individual being tested, rather than waiting for the patient to offer the evidence him/herself. The health official also should clearly explain that the threat of domestic violence may excuse the patient from partner notification.²¹⁸

Additionally, considering the difficulty in detecting domestic violence and the secrecy usually maintained around it by victims, the state may want to defer domestic violence judgments to those professionally-trained in such matters, rather than give just any physician or authorized testing facility such important discretionary power. In the alternative, the state should train health officials in domestic violence screening, and then defer to their discretionary power.

G. The Physician's Role

Another problem associated with New York's law is the unwarranted emphasis it places on the doctor-patient relationship, presuming that there exists something inherently special between

216. See Notice of Proposed Rule Making, Amendment of N.Y. COMP. CODES R. & REGS., tit. 10, § 63.8 (a)(1) (1999) (proposed regulations, on file with the *Fordham Urban Law Journal*).

217. See *supra* notes 155-156 and accompanying text.

218. See Notice of Proposed Rule Making, Amendment of N.Y. COMP. CODES R. & REGS., tit. 10, § 63.8(c) (1999) (proposed regulations, on file with the *Fordham Urban Law Journal*) ("Where partner notification is otherwise merited, "if an indication of risk of domestic violence has been identified, the health official must be satisfied in his/her professional judgment that reasonable arrangements and referrals to address safety of affected persons have been made if and when the notification is to proceed.").

provider and patient to warrant disclosure by that particular provider, as opposed to any other. By assigning such highly personal responsibilities to physicians, the state may be relying upon a misperception of the status of the professional relationship as it exists currently. In today's managed care system, it is not uncommon for an individual to lack a close relationship with her physician.²¹⁹ In fact, with the relatively recent advent of health care maintenance organizations and preferred provider organizations, a patient may see a different healthcare provider with every visit. The days of the family doctor that cared for the patient from birth on is no longer a reality for most individuals.

Also, the law does not explore the ramifications of disclosure from the contact's perspective. Although the index patient may have established a relationship with the physician, it is unlikely that the contact also would know the physician. Mandating that the index patient disclose her risk practices with others, the law also reveals risk practices of the contact, including sexual and/or drug-related activity that the contact may want to keep confidential. Despite confidentiality requirements, partner notification may infringe on the contact's right to privacy and confidentiality.²²⁰

The law addresses the issue of possible liability incurred by the reporting individual or agency: "Good faith reporting or disclosure pursuant to this title shall not constitute libel or slander or a violation of the right of privacy or privileged communication."²²¹ Furthermore, immunity from civil and criminal liability is granted for good faith attempts at reporting.²²² This provision is essential to eliminating any kind of fear a physician might feel concerning legal action.

The amendment also changes section 2782(4) of the Public Health Law, concerning the physician's authorization to notify contacts: "A physician may disclose confidential HIV related information . . . [if] the physician has counseled the protected individual [about notification] . . . and . . . the physician has informed the protected individual of his or her intent to make such disclosure to a contact"²²³ In this instance, the physician must give the

219. See BARRY R. FURROW ET AL., *HEALTH LAW* ch. 3.III, at 800 (3d ed. 1997) (arguing that "[b]ecause subscribing to an HMO usually means being treated by an HMO-affiliated doctor, HMOs are less likely to attract persons with chronic illnesses already attached to a doctor").

220. See *supra* notes 147-149 and accompanying text.

221. N.Y. PUB. HEALTH LAW § 2136(1) (McKinney 1999).

222. See *id.* § 2136(2).

223. *Id.* §§ 2782(4)(a)(3)-(4)(a)(4).

index patient an opportunity to express a preference as to the process of disclosure.²²⁴

In the patient referral model, it may be difficult for health authorities to ensure that contacts have been notified. Also, fewer partners may be notified in this model in comparison to the physician referral model.²²⁵ Unfortunately, if the goal of partner notification is to actually notify contacts, New York's provision giving index patients an option over whether to personally inform contacts or assign that responsibility to a health authority may be self-defeating. Thus, it is important that the law requires public health officers to take reasonable steps to inform contacts if notification by the physician cannot be verified.²²⁶ In a unique identifier system, however, the contact may even use a code name for herself that has been prearranged, and/or refer to the index patient through her unique identifier number.

H. Anonymous Testing Sites

Despite the enactment of the new law, anonymous testing sites still are alternatives to confidential testing, which will be accompanied by name reporting.²²⁷ Currently, the availability of anonymous testing is important because even with a system of non-named reporting in place, some individuals will fear confidentiality breaches. Although anonymous testing may create some initial data errors,²²⁸ it may be the only way to encourage certain groups to be tested and possibly conduct partner notification.

A multistate survey found benefits to anonymous testing, such as a shorter time span between being tested anonymously and seeking treatment than that of testing confidentially and entering the healthcare system: "The mean time from learning they were HIV positive to the diagnosis of AIDS was almost a year and a half longer (529 days) for those tested anonymously than for those

224. See *id.* § 2782(a)(4).

225. See *supra* note 51 and accompanying text.

226. See Notice of Proposed Rule Making, Amendment of N.Y. COMP. CODES R. & REGS., tit. 10, § 63.8(j)(4) (1999) (proposed regulations, on file with the *Fordham Urban Law Journal*).

227. See N.Y. PUB. HEALTH LAW § 2138 (McKinney 1999). The option of anonymous testing may be more mirage than real under the revised law since a patient must be tested confidentially in order to receive insurance reimbursement for HIV medical treatment. See *supra* note 202 and accompanying text.

228. See Bindman et al., *supra* note 96, at 1416 ("Because people who test HIV positive anonymously cannot be individually identified, reporting systems that rely on the results of anonymous testing are prone to measurement error. It can be difficult to detect repeat tests, and the potential exists for duplicate reporting.").

tested confidentially”²²⁹ Earlier testing allowed patients to receive the benefits of a longer period of medical treatment for HIV.²³⁰ The same survey also showed that almost a quarter of HIV-positive persons who had been tested voluntarily before being diagnosed with AIDS had sought anonymous testing.²³¹ Thus, at least for the present, the option of anonymous testing is crucial in New York because it may alleviate many of the fears associated with HIV testing.

Eventually, however, anonymous testing should be phased-out to prevent data errors, which threaten to be substantial: “Anonymous testing appears to be on the upswing in New York. In 1992, nearly 190,000 New Yorkers had an HIV test in a publicly funded facility. In 1996, that number was less than 40,000.”²³² These statistics can only mean either New Yorkers have switched to private, anonymous testing or there has been a seventy-nine percent decrease in HIV testing.²³³ Once people are made to understand the privacy protections of a unique identifier system, the elimination of anonymous testing should not be so frightening. The unique identifier system would alleviate most confidentiality fears while still maintaining accurate and comprehensive data.

Conclusion

The world soon will be entering the third decade of the HIV/AIDS epidemic. Despite great advances in treatment, there is no cure and AIDS remains an ultimately fatal disease. The New York legislature’s passage of a HIV name reporting and partner notification law marks a monumental step in the history of the disease because of the state’s high seroprevalence level.²³⁴ Despite the lofty goals set by advocates of partner notification, such as informing those who have been exposed to HIV with the hope that they will then be tested and motivated into less risky behavior,²³⁵ drawbacks still exist. The fear of stigmatization is still strong, as is the possibility of discrimination.²³⁶ There is no doubt that some people, whether few or many, will be deterred from being tested.²³⁷

229. *Id.* at 1418.

230. *See id.*

231. *See id.*

232. Garrett, *supra* note 187, at C6.

233. *See id.*

234. *See supra* note 10 and accompanying text.

235. *See supra* note 168 and accompanying text.

236. *See supra* notes 161-167 and accompanying text.

237. *See supra* notes 168-169 and accompanying text.

In order to achieve the twin goals of the collection of epidemiological data for research purposes and the notification of partners exposed to risk, the New York law needs to be modified. By replacing name reporting with a more refined system of unique identifiers, which include valuable factors like risk behavior, the first goal may be achieved and patient security ensured. Modifying the New York statute to include immunity provisions for certain patients and opt-out provisions for providers may also further these goals. In the end, it appears that a unique identifier system in conjunction with a compassionate system of partner notification may be the best route for New York to take in its fight against AIDS.

FEDERALISM FOR THE NEW MILLENNIUM: ACCOUNTING FOR THE VALUES OF FEDERALISM

Dennis M. Cariello*

The central issue of federalism, of course, is whether any realm is left open to the States by the Constitution — whether any area remains in which a State may act free of federal interference.¹

Introduction

The American Republic consists of two governing bodies: the national and state governments.² Each government exists individually to serve the people³ and together, the state and national gov-

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1. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580-81 (1985) (O'Connor, J., dissenting).

2. See, e.g., THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) [hereinafter all citations are to this edition] ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among district and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."); Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), in VIII THE PAPERS OF ALEXANDER HAMILTON 63, 98 (Harold C. Syrett ed., 1965) ("The . . . powers of sovereignty are in this country divided between the National and State Governments . . ."); James Wilson, Speech to the Pennsylvania Convention on the Adoption of the Federal Constitution, in 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 444 (Jonathan Elliot, ed., 2d ed., 1836) [hereinafter ELLIOT'S DEBATES] ("[The people] can distribute one portion of power to the more contracted circle, called *state governments*; they can also furnish another proportion to the government of the United States.").

3. See, e.g., THE FEDERALIST NO. 46, *supra* note 2, at 294 (James Madison) ("The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes.").

ernments serve as a check on each other, ensuring that the people are served.⁴ This arrangement, known as federalism, was the Framers' unique contribution to political science and theory.⁵

At its core, federalism is a cooperative form of government where state and national governments are asked to provide citizens with services. Federalism seeks to allocate responsibility to whichever government that can best perform that service.⁶ This policy began with the Framers and serves as sound political theory relevant to twenty-first century America. Since America's inception, however, questions about federalism and the allocation of power between the national and state governments have plagued the nation.⁷

4. See, e.g., THE FEDERALIST NO. 28, *supra* note 2, at 181 (Alexander Hamilton) ("[T]he general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."); THE FEDERALIST NO. 26, *supra* note 2, at 172 (Alexander Hamilton).

[T]he State legislature, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but if necessary, the ARM of their discontent.

Id. Alexis de Tocqueville later noted:

It is an axiom of American public law that every power must be given full authority in its own sphere which must be defined in a way that prevents it [the power] stepping beyond it [its sphere]: that is a great principle, and worth thinking about.

THE RECOLLECTIONS OF ALEXIS DE TOCQUEVILLE 247 (J.P. Mayer ed., 1959). Now, more than ever, Americans look to both governments to provide essential services. From 1985-90 twenty-one million Americans moved between states. In fact, as of 1990, only 61.8% of Americans lived in the state in which they were born. See Kristin A. Hansen, *Immigrants, Outmigrants, and Net Migration Between 1985 and 1990 and Movers from Abroad, for States: 1990* (Oct. 1995) <<http://www.census.gov/population/socdemo/migration/net-mig.txt>>.

5. See Henry J. Friendly, *Federalism: A Forward*, 86 YALE L.J. 1019 (1977) ("The genius of the Framers lay in devising a unique form of federalism—one in which a national government was authorized to act directly on the people within the powers confided to it rather than solely on the states, and was endowed with an amplitude of powers which might or might not be used as the future would dictate."). See generally, GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 524-32, 564 (1969) (discussing federalism).

6. See, e.g. THE FEDERALIST NO. 46, *supra* note 2, at 295 (James Madison) ("[I]t is only within a certain sphere that the federal power can in the nature of things, be advantageously administered.").

7. For a recent example, consider the recent debate over local "sanctuary" or "non-cooperation" ordinances and the effect they have on a state's ability to provide services for its citizens and the national government's ability to enforce immigration policy. See Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50 (1994) (referring to ordinances that restrict cooperation between local police and federal

Immigration and Naturalization Service authorities as both "sanctuary ordinances" and "non-cooperation ordinances"). Briefly, non-cooperation ordinances prevent local officers and employees from giving the federal government information regarding the status of aliens. *See id.* Many cities passed these ordinances to alleviate fears of deportation for illegal and undocumented aliens who seek police protection, medical services or education for their children. *See* Rudolph W. Giuliani, Public Address, *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 4 GEO. J. ON FIGHTING POVERTY 165 (1996) ("[New York City's non-cooperation ordinance, Executive Order 124] create[s] a zone of protection for illegal and undocumented immigrants who are seeking the protection of the police, or seeking medical services because they are sick, or attempting to or actually putting their children in public schools so they can be educated."). This policy, in turn, aids the general population. As New York Mayor Giuliani noted:

If you do not create an area of protection for those 400,000 [illegal and undocumented aliens in New York] people to report when they are victimized, then not only do you increase the risk that they will be victimized again, but that the next time the mugger seeks to victimize someone, that person might not be an illegal or undocumented immigrant.

Id. at 167. Mayor Giuliani also added:

If you tell people "you are going to pay a very heavy penalty by reporting crimes that are committed against you to the police," you deprive the police of significant information they could use to catch criminals. And when you are talking about as many people as we are talking about, it is a significant part of the population in which the police enforce the law and protect all citizens.

Id. For these reasons, many states and cities enacted these ordinances. *See* Bau, *supra* note 6, at 52 & n.10 (listing jurisdictions with non-cooperation ordinances); Alison Fee, Note, *Forbidding States from Providing Essential Social Services to Illegal Immigrants: The Constitutionality of Recent Federal Action*, 7 B.U. PUB. INT. L.J. 93, 100-02 & nn.47-48 (1998) (same). Despite the compelling policy reasons underlying these ordinances, Congress twice attempted to revoke the ordinances. *See* H.R. 5255 102nd Cong., 2d Sess. (1992); S. 1607, 103rd Cong., 1st Sess. (1993); *see also* Giuliani, *supra* note 6, at 168 ("As I have said, this idea [revoking non-cooperation ordinances] has long been debated in Congress and there have been at least two other attempts to revoke the order [New York City's Executive Order 124], both of which have been defeated."). Both attempts failed. Eventually, however, Congress accomplished its goal by passing § 434 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1644 (1996) ("Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States."), and Section 642 of the Illegal Immigration Reform and Immigration Responsibility Act of 1996. 8 U.S.C. § 1373 (1996). Section 642 provides:

- a. Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
- b. Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful of any individual:

Part I of this Note explores the beginnings of federalism through an examination of the history of "layered" government in America. From Jamestown to the Articles of Confederation to the Constitutional Convention and beyond, America has always operated under two governments: one "national," the other "local." Therefore, paying attention to America's history of layered government should clarify the Framers' intent in making federalism a vital part of the Constitution.

Part II reviews the conflict in the Supreme Court over federalism. Specifically, this Part examines how the Court has dealt with federalism vis-à-vis congressional powers.⁸ The discussion will clarify the failure of the Supreme Court to articulate a cohesive test for federalism concerns covering a variety of congressional powers.

Part III then proposes a method for resolving federalism disputes. This method calls for an allocation of authority into the spheres intended by the Framers. The proposal specifically looks to the values of federalism to help distinguish between national and local interests and, thus, allocate authority. Such a test is easily applicable to all federalism concerns and is sound public policy for America in the twenty-first century. This Note concludes that revisions consistent with those prescribed in this Note are necessary to increase the effectiveness of the state and national governments alike.

(1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

Maintaining such information.

(2) Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. § 1373.

The Virginia and Kentucky Resolutions (1798-99), the Hartford Convention (1814-15), the Nullification Crisis (1831-33), the northern response to the Fugitive Slave Act (1850-52), the Civil War (1861-65) and Reconstruction (1868-70) are just a few of the conflicts between the national and state governments over the allocation of power and responsibility. See Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1242-55, 1295-97 (1990) (discussing the Virginia and Kentucky Resolutions, the Hartford Convention, the Nullification Crisis, the northern response to the Fugitive Slave Act, the Civil War and Reconstruction).

8. This Note does not concern any of the problems of federalism as it coexists with the federal courts, the executive branch or the Fourteenth Amendment. Nor does this Note consider the effect later historical developments should or have had on Constitutional interpretation. See, e.g., Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 837 (1986) ("Because they believed that national citizenship was primary and state citizenship derivative, the congressional framers of the fourteenth amendment and the Civil Rights Act of 1866 also believed that Congress possessed primary authority to secure the civil rights of United States citizens.").

I. Background

The history of inter-governmental relations between England and the colonies greatly influenced the Framers. As a result, they conferred upon the national government many of the same powers held by England in the colonial system. Likewise, the powers retained by the states are strikingly similar to those held by the colonies. Moreover, because the Framers were so influenced, the Constitution may be viewed as a return to the principles of layered government under the colonial system — principles disregarded while America was governed under the Articles of Confederation. Accordingly, understanding the relations between England and her colonies can better illustrate the Framers' intentions when they balanced power between national and state government.

A. America's Infancy, 1606-1700

1. *Early Colonial Autonomy*

The American colonies were a completely "new species of colonizing, of modern date, and differing essentially from every other species of colonizing that is known."⁹ While dependent on England,¹⁰ the early colonies enjoyed a great deal of autonomy.¹¹ Two factors influenced this relationship. First, the nature of the colonies greatly shaped their relationship with England. The great distance from England to the American Colonies made control impracticable.¹² More importantly, the colonies operated for specific purposes — to cultivate the land and promote trade for the good of themselves and England.¹³ Consequently, as England received the economic benefits from her colonies, strict control of colonial life was unnecessary.¹⁴

Second, the character of the American colonialists also influenced the relationship with England. The monarchy encouraged private adventurers (either through chartered companies or indi-

9. JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788* 9-10 (1986) [hereinafter GREENE, *PERIPHERIES*].

10. *See id.* at 10.

11. *See id.*

12. *See id.* at 8.

13. *See id.*

14. "English officials thought of [the colonies] . . . as a series of economic units intended to contribute to the prosperity of England and to provide it with a solid claim to a portion of the vast riches of the New World." JACK P. GREENE, *NEGOTIATED AUTHORITIES: ESSAYS IN COLONIAL POLITICAL AND CONSTITUTIONAL HISTORY* 43 (1994) [hereinafter GREENE, *AUTHORITIES*].

vidual lord proprietors) to settle colonies by granting them exclusive title to large areas of land, extensive self-governing powers and, often, special economic considerations.¹⁵ The resulting American colonists were an adventurous, individualistic people, motivated by profit or the pursuit of freedom. The colonists brought with them English traditions of law and governance, which put a high value on both individual liberty and local autonomy.¹⁶ As a result, the American colonists were predictably "jealous of [their] autonomy and resistant to local interference."¹⁷

During the early years of the colonies, England, preoccupied with affairs at home and unsure of proper colonial policy, paid little attention to her colonies.¹⁸ The colonists, therefore, were left to

15. See generally GREENE, *PERIPHERIES*, *supra* note 9, at 10-11 (noting this English colonizing strategy). Moreover, as early as 1579, the younger Richard Hakluyt conceived of colonial self-government, for when recommending the occupation of the Magellan Strait he concluded:

But admit that we could not enjoye the same long, but that the English there would aspire to governement of themselves, yet were it better that it sholde be soe then that the Spanyard shold with the tresure of that countrey torment all the contries of Europe. . . . But we myght kepe the cuntry as well as the Spanyards doe, and use traffique with them.

THE ORIGINAL WRITINGS AND CORRESPONDENCE OF THE TWO RICHARD HAKLUYTS 143 (E.G.R. Taylor ed., 1935).

16. See GREENE, *PERIPHERIES*, *supra* note 9, at 11; Mark A. Kishlansky, *Communism and Continuity: A Review of Selected Works on English Local History*, 3 WILLIAM AND MARY QUARTERLY, 31, 140, 146 (1980); KENNETH R. ANDREWS, *TRADE, PLUNDER AND SETTLEMENT: MARITIME ENTERPRISE AND THE GENESIS OF THE BRITISH EMPIRE, 1480-1630* 17 (1984). Tudor England, for example, was "a largely self-governing society-under the crown." *Id.* at 16-17. The Tudor monarchs freely extended franchise to English boroughs up until the reign of Charles II. See LEONARD WOODS LABAREE, *ROYAL GOVERNMENT IN AMERICA* 180 (2d ed., 1934). During and after the reign of Charles II, however, only twice was such local representation granted, to the borough of Newark (by the King) and the town and city of Durham (by Parliament). See *id.*

17. ANDREWS, *supra* note 16, at 16-17. From 1628, the time the House of Burgess reconvened in Virginia, until 1776 elective government was a permanent feature in the colonies. See LABAREE, *supra* note 16, at 172. Edmund Burke summarized the situation: "The settlement of our colonies was never pursued upon any regular plan; but they were formed, grew, and flourished, as accidents, the nature of the climate, or the dispositions of private men happened to operate." *Id.* (quoting 2 EDMUND BURKE, *AN ACCOUNT OF THE EUROPEAN SETTLEMENTS IN AMERICA* 288 (1757)).

18. See LABAREE, *supra* note 16, at 173. Indeed, Jack Greene remarked:

[T]he failure of develop any central agency in England for colonial administration, the distractions of the Civil War, the refusal of the colonists to abide by regulations they opposed, and the lack of adequate enforcement machinery prevented either crown or Parliament from establishing effective controls over the colonies, despite sporadic attempts by one or the other to do so.

GREENE, *AUTHORITIES*, *supra* note 14, at 45.

define their own civil liberties and laws.¹⁹ In Massachusetts Bay, for example, the Body of Liberties of 1641²⁰ guaranteed all citizens due process²¹ and equal justice.²² It also ensured freedom of speech,²³ assembly²⁴ and movement.²⁵ The Body of Liberties also extended fairly liberal criminal procedure protections²⁶ and established criminal laws, such as prohibiting violence against married women by their husbands²⁷ and protecting animals from cruelty,²⁸ as well as listing capital offenses.²⁹

19. In 1625, after assuming control over Virginia after the courts vacated the charter of the Virginia Company, the crown asserted its jurisdiction over all colonial plantations and declared its intent to provide "one uniforme Course of Government" for all of them. *A Proclamation for Settling the Plantations of Virginia*, May 13, 1625, reprinted in 18 *FOEDERA, CONVENTIONES, LITERAL, ACTA PUBLICA, REGIS ANGLICAE* 72-73 (Thomas Rymer ed., 1726), quoted in GREENE, *AUTHORITIES*, *supra* note 14, at 45. This intention, however, was not fully carried to term, undermining its effectiveness.

20. See *A Coppie of the Liberties of the Massachusetts Collinie in New England* reprinted in *SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606-1775* 73 (William Macdonald ed., 1906).

21. See *id.* ¶ 1 at 74.

No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restrayned, banished, dismembred, nor any ways punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken from him, nor any way indammaged under Coulor of law, or Countenance of Authoritie, unlesse it be by virtue or equitie of some expresse law of the Country warranting the same, established by the generall Court and sufficiently published

Id.

22. See *id.* ¶ 2 at 74 ("Every person . . . shall enjoy the same justice and law, that is generall for the plantation, which we constitute and execute one towards another, without partialitie of delay.").

23. See *id.* ¶ 12 at 75.

24. See *id.*

25. See *id.*

26. Among them, Massachusetts Bay provided for grants of bail, granted the right to challenge jurors, prevented double jeopardy and cruel and unusual punishments and required a heightened burden of proof in capital cases. See *id.* ¶¶ 18 at 76 (bail), 30 at 78 (challenge jurors), 42 at 80 (double jeopardy), 46 at 80 (cruel and unusual punishments), 47 at 80 (requiring two witnesses in a capital case).

27. See *id.* ¶ 80 at 85.

28. See *id.* ¶ 92 at 87.

29. See *id.* ¶ 94 at 87 (including among them: "worship of any other god, but the lord god"; "[I]f any man or woeman be a witch"; blasphemy; murder, whether premeditated, in the heat of passion or by "poysoning or other such divelish practice[s]"; stealing; kidnapping; lying for the purpose of "tak[ing] away a man's life"; and treason). Also in New England, Rhode Island established extensive regulations on internal matters. See *Code of Laws adopted by the First General Assembly of "The Incorporation of Providence Plantations" in 1647*, reprinted in *THE EARLIEST ACTS AND LAWS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 1647-1719* 12-55 (John D. Cushing ed., 1977) (providing for "relief for the poor," requiring licenses for "Ale Houses," outlawing "fraudulent dealing," "trespass by man or

In Virginia, the House of Burgess produced the Virginia Code of 1662.³⁰ This code covered most issues of colonial life. For example, it provided for marriage licenses, for replacement ministers and regulated the height of fences Virginian planters. It also regulated the cost doctors could charge for surgery, prohibited cruelty to servants, levied taxes on tobacco and other products and prevented any person from "having any commerce or trade with any Indian for beaver, otter, or any other furs except those commissioned by the governor."³¹

William Penn, as proprietor of Pennsylvania, established a colonial government in 1682 — balancing power between the elected assembly and the proprietor's council.³² This government operated for seventeen years until 1699, when, faced with unhappiness in his colony, Penn, the Assembly and the Council completed the Charter of Privileges of 1701, the most famous of the colonial constitutions. The Charter provided for an enhanced freedom of religion, yearly elections to an annual assembly, the right to counsel in criminal trials, required licenses for tavern owners and other "houses of public entertainment," and intestacy laws.³³

Interestingly, New York's colonists did not have a large role in defining their laws and civil liberties. In 1665, Governor Nicolls drafted an extensive body of laws, covering topics ranging from capital offenses and juries to property laws and marriage regulations.³⁴ These laws, based on the codes used in New Haven and Massachusetts, were presented to delegates from the Long Island towns at Hempstead in March of 1665. After incorporating minor

beast," "rape," "buggery," "adultery and fornication," "touching whoremongers" (sodomy), "witchcraft," "robbery," "burglary," "murder," and "manslaughter").

30. See 2 THE STATUTES-AT-LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, 41-148 (W.W. Henning ed., 1619-1792), *reprinted in* HAWKE, U.S. COLONIAL DOCUMENTS 137-43 (1996) (various selections).

31. HAWKE, *supra* note 30, at 143. The Maryland Assembly likewise, provided similar laws. See CHARTER OF MARYLAND (1632), *reprinted in* SELECT CHARTERS, *supra* note 20, at 53-58. Maryland also provided for extensive religious liberties. See MARYLAND TOLERATION ACT (1649), *reprinted in* SELECT CHARTERS, *supra* note 20, at 105 ("Be it Therefore . . . enacted . . . that noe person or persons whatsoever within this Province . . . professing to believe in Jesus Christ, shall from henceforth bee any waies troubled, Molested or discountenanced for or in his respect of his or her religion nor in the free exercise thereof . . .").

32. See FRAME OF GOVERNMENT OF PENNSYLVANIA (1682), *reprinted in* SELECT CHARTERS, *supra* note 20, at 192.

33. See THE CHARTER OF PRIVILEGES (1701), *reprinted in* SELECT CHARTERS, *supra* note 20, at 224.

34. See THE DUKE'S LAWS 1665, 1 THE COLONIAL LAWS OF NEW YORK 5-100 (1894), *reprinted in* HAWKE, *supra* note 30, at 168-71.

revisions, the delegates reluctantly accepted the code,³⁵ becoming the only colony to have its internal code provided for it.³⁶

2. *Limitations on Colonial Autonomy*

England's *lassie-faire* attitude towards the American Colonies soon ceased. After the restoration of Charles II in 1660, Parliament issued various instructions to the royal governors to limit the authority of colonial assemblies.³⁷ Parliament also established a series of acts designed to more precisely define the economic relationship between England and her colonies. The acts specifically sought to eliminate colonial trade with rival foreign powers and to subordinate the economies of the colonies to that of England.³⁸

The Navigation Acts of 1660³⁹ and 1663,⁴⁰ for example, afforded England increased control over commerce in the colonies. The 1660 Act provided that all imports and exports to and from British holdings must be transported in British or colonial vessels⁴¹ and that these exports were to be exported only to England or its holdings.⁴² The 1663 Act tightened this control by requiring all foreign exports destined for the colonies to be shipped by way of Eng-

35. See HAWKE, *supra* note 30, at 168.

36. Of interest is the case of Carolina, which, when presented with the Fundamental Constitutions of Carolina of 1669, rejected the program. Drafted by the Earl of Shaftesbury and John Locke, this government, as John Adams would attempt to do for both Massachusetts and all the United States, tied power to property. See 1 THE COLONIAL RECORDS OF NORTH CAROLINA 187-205 (William L. Saunders et. al., eds. 1886-1914), cited in HAWKE, *supra* note 30, at 156.

37. See GREENE, PERIPHERIES, *supra* note 9, at 13-17.

38. See, e.g., LAWRENCE HARPER, THE ENGLISH NAVIGATION LAWS: A SEVENTEENTH-CENTURY EXPERIMENT IN SOCIAL ENGINEERING *passim* (1939) (discussing this point). Indeed, a report of royal commissioners sent to investigate the New England colonies suggested to reduce the colonies to "an absolute obedience to the King's authority." 5 CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND THE WEST INDIES, 1661-68 ¶ 75 at 25 (W. Noel Sainsbury ed., 1964) (1880).

39. 12 Car. 2, ch. 18.

40. 15 Car. 2, ch. 7.

41. See 12 Car. 2, ch. 18.

42. See *id.* British control extended over "sugars, tobacco, cotton-wool, indigoes, ginger, fustick, or other dying wood, of the growth, production or manufacture of any English plantations in America, Asia, or Africa. . . ." Later Acts would extend such control over naval stores, hemp, rice, molasses, beaver skins, furs and copper ore. See OLIVER M. DICKERSON, THE NAVIGATION ACTS AND THE AMERICA REVOLUTION 11 (1951). Later the Sugar Act of 1764 would include coffee, pimento, whale fins, coconuts, raw silk, hides and skins, pot and pearl ashes. See *id.*

land,⁴³ thereby ending the burgeoning colonial foreign import-export trade and making England the colonies' sole marketplace.⁴⁴

During this period, England possessed great authority over inter-empire commercial matters. England not only controlled the flow of commerce, but also what products entered its stream by imposing tariffs and import bounties. For example, through various import bounties, England encouraged the colonists to grow their own hemp⁴⁵ and make their own tar,⁴⁶ thus building up the naval-stores industry. Due to its control over inter-empire trade, England enjoyed great power over foreign relations and maritime laws as well. Only the King, however, as the embodiment of the central government, held authority over inter-empire trade, foreign relations and maritime law,⁴⁷ a view recognized by both colonist and King alike.⁴⁸

43. See 15 Car. 2., ch. 7.

44. As late as 1676, however, Edward Randolph would report that, when he instructed colonial leaders in Massachusetts Bay to enforce the Navigation Acts, he was told that the "laws made by your Majesty and your Parliament obligeth" Massachusetts residents "in nothing but what consists with the interests of that colony." GREENE, *AUTHORITIES*, *supra* note 14, at 46 (quoting A. BERRIEDALE KEITH, *CONSTITUTIONAL HISTORY OF THE FIRST BRITISH EMPIRE* 104-05 (1930)).

45. Bounties of £6 per ton were placed on hemp. See 3 Anne ch. 10.

46. A 33% import bounty was placed on all foreign tar and pitch. See 5 W. & M. ch. 5.

47. Indeed, the colonists apprehended Parliament's trade laws, considering them a violation of their rights and liberties. This was because the colonists were not represented in Parliament and, thus, Parliament did not represent the whole empire in the way the King did. See 1 THOMAS HUTCHINSON, *THE HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY* 272 (Lawrence Shaw Mayo ed., 1936). As Thomas Hutchinson, the former governor of colonial Massachusetts, and an authority on colonial history commented:

[The colonists] apprehended them [Parliamentary trade laws] to be an invasion of the rights, liberties and properties of the subjects of his Majesty in the colony, they not being represented in parliament, and according to the usual sayings of the learned law, the laws of England were bounded within the four seas and did not reach America. However, as his Majesty had signified his pleasure, that these acts should be observed in the Massachusetts, they had made provision by law of the colony, that they should be strictly attended to from time to time, although it greatly discouraged trade, and was a great damage to his Majesty's plantation.

Id.

48. King Charles II, after the passage of the Navigation Acts, sent a letter to Massachusetts saying, "[w]e are informed that you have lately made some good provision for observing the acts of trade and navigation, which is well pleasing to us." THOMAS HUTCHINSON, *HUTCHINSON PAPERS* 521 (Burt Franklin ed., 1967). Hutchinson explains, "[t]his is very extraordinary, for this provision [the "good provision" referred to] was an act of the colony declaring that the acts of trade should be in force there." *Id.* Here, King Charles II, the King responsible for one of the largest expansions of English power at the expense of colonial autonomy, recognized that colonial acquies-

In 1675, Charles II created the Lords of Trade ("Lords"), a permanent committee of the Royal Privy Council. For a decade, the Lords worked to secure colonial obedience to royal authority and the Navigation Acts and limit colonial autonomy.⁴⁹ At the urging of Lords, the Privy Council voided numerous colonial acts.⁵⁰ The Lords tightened control over the King's governors⁵¹ and also worked to reduce the influence of the colonial assemblies.⁵² In ad-

cence to Parliament's authority was not obligatory. Indeed, John Adams cited this letter as evidence of royal recognition of the lack of authority Parliament had over the colonies. See John Adams, *Novanglus, To the Inhabitants of the Colony of Massachusetts-Bay*, Mar. 6, 1775, in 2 PAPERS OF JOHN ADAMS 319 (Robert J. Taylor et. al., 1977) ("Had he [the king], or his ministers an idea that parliament was the sovereign legislative over the Colony? If he had, would he not have censured this law [the Massachusetts law] as an insult to that legislature?").

49. See GREENE, *PERIPHERIES*, *supra* note 9, at 13-14; LABAREE, *supra* note 16, at 222.

50. See, e.g., 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS (Leonard W. Labaree ed., 1935). For example, in Virginia, the Lords voided fifteen acts of the Virginia Assembly from 1676 to 1682. See *id.* at 159-60 (voiding eleven acts of the Virginia Assembly: An Act of Free Pardon, An Act of Attainder, An Act of Inflicting Pains, Penalties, and Fines upon Great Offenders, An Act for the Relief of Such Loyal Persons as Have Suffered Loss by the Late Rebels, An Act Limiting Times of Receipt and Payment of Public Tobaccos, An Act Regulating Ordinaries and the Prices of Liquors, An Act Disposing of Amercements upon Cast Actions, An Act Concerning Servants Who Were out in Rebellion, An Act for Laying of Parish Levies, An Act for Delivery of Stray Horses, etc., and An Act for Signing Executions on Judgments in the Assembly); *id.* at 161 (voiding two acts passed by the Virginia Assembly: An Act Prohibiting the Exportation of Any Iron, Wool, Woolfells, Skins, hides, or Leather and An Act for Encouragement of the Manufactures of Linen and Wollen Cloth in 1683); *id.* at 165 (voiding the proceedings of Virginia Assembly repealing the pardon of "Nathaniel Bacon the younger and his accomplices"). In addition, New Hampshire, see *id.* at 165 (requiring that the New Hampshire Assembly repeal all laws in that colony from 1682-86), and New York, see *id.* at 201 ("Repeal of New York 'Charter of Liberties and Privileges'" in 1686-88) also suffered significantly at the hands of the Lords.

51. The Lords did so by insisting upon more frequent and detailed reports on colonial activities and expanding the scope of the royal instructions given to the governors. See GREENE, *PERIPHERIES*, *supra* note 9, at 13-14; LABAREE, *supra* note 16, at 222.

52. From 1678 to 1689, the Lords drafted directions to the Royal Governors for limiting the colonial assemblies. From 1678 to 1689, the Lords drafted directions to the Royal Governors for limiting the colonial assemblies. See 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, *supra* note 50, at 88-167. Some limitations on the colonial assemblies included: "Biennial Summons of Virginia Assembly" (obliging Virginia to call the assembly but "once in two years unless some emergent occasion shall make it necessary, the judging whereof we leave to your discretion") (Va., 1676); "Assemblies in Emergencies: Jamaica and Virginia" (excepting colonial laws passed during invasion, rebellion or urgent necessity, from transmitting them to England) (Va., 1679-82); "Disqualification of Beverley and Hill in Virginia" (disqualifying Col. Robert Beverley and Col. Edward Hill from public service, because they are "persons of evil fame and behavior" (Va., 1679-82); "Assemblymen to be Elected

dition, to increase the crown's influence throughout the colonies, the Lords prevented the creation of any more private colonies and attempted to convert those existing private colonies into royal colonies.⁵³ Perhaps the most ambitious attempt on colonial political

by Freeholders Only" (requiring all member of the assembly be freeholders) (Va. 1676-1761; Md. 1691-1715; NH, 1692-1776; NC, 1730-54; SC, 1720-76); "Council and Assembly Not to Meet in Taverns", (NH, 1682-86); "Not to Reenact Laws" (prohibiting reenacting any law, presumably that was voided by the Privy Council) (Va., 1682-1728); "Laws Disallowed to be Void" (declaring all laws passed by colonial legislatures but not approved by the Privy Council to be void) (NY, 1686-88, New England, 1686-89). *See id.* The Lords also persuaded the Virginian and Jamaican assemblies to make the governors partially dependent on the crown for revenue, thus increasing both gubernatorial dependency on the crown, and, consequently, willingness to enforce royal prerogative over the colonists' desires. *See* GREENE, *PERIPHERIES*, *supra* note 9, at 14. Virginia was the only mainland colony to do so. The other colonies refused as such a vote would deprive them of "the greatest Security of their Rights and Privileges: *Viz.* Their Power of Deprivation, which is the greatest Check against . . . absolute Government." *Id.* (quoting *Votes and the Proceedings of the General Assembly of the Colony of New-York*, June 24, 1749-August 4, 1749 14-17 (New York, 1749)). In addition, theoretically, Royal Governors initiated all colonial legislation. *See* LABAREE, *supra* note 16, at 218 ("The [governor's] commission empowered the governor, by and with the advice and consent of council and assembly, 'to make, constitute, and ordain laws, statutes, and ordinances for the public peace, welfare, and good government.'"). Practice, however, did not bear this out. Royal Governors commonly consented to legislation as it originated in the colonial assemblies. *See* LABAREE, *supra* note 16, at 219. To remedy this, the Lords attempted to apply Poyning's Law to Jamaica (in 1678) and Virginia (in 1679). *See* 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, *supra* note 50, § 199 (Royal Instruction for incorporating "Poyning's Method" to Virginia and Jamaica). The American version of Poyning's Law (Poyning's Law was originally applied to Irish Assembly, *see* LABAREE, *supra* note 16, at 219, provided that all legislation, save for cases of invasion or other dire emergency, be framed by the governor, then sent to England for revision and approval by the Privy Council. Only then, now under the great seal, would the assembly be called to consent to the bill. *See* 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, *supra* note 50, § 199; LABAREE, *supra* note 16, at 219.

Virginia failed to see the significance of this innovation. *See* LABAREE, *supra* note 16, at 221 (noting that the House of Burgess in Virginia passed the provisions with few amendments). The Jamaica Assembly, however, opposed the measure vehemently. *See* 10 CALENDAR OF STATE PAPERS, COLONIAL, 1677-1680, *supra* note 38, ¶¶ 596, 600, 601, 786, 794, 814, 815, 827, 961, 1001, 1117, 1188, 1265, 1361; 1 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES 1613-1680 ¶¶ 1201, 1202, 1257, 1274 (W. L. Grant & James Munro 1908). During the three years this measure remained in force, the Jamaica Assembly passed no bills that did not originate with them. In late 1680, the Lords of Trade acquiesced, restoring initiative to the assembly in Jamaica. *See* LABAREE, *supra* note 16, at 222 & n.6 (citing Powers to the Earl of Carlisle for making laws, Nov. 3, 1680, and Instructions to Governor Carlisle, Jamaica, Nov. 3, 1680). These changes were made for Virginia in the next governor's instruction as well. *See* LABAREE, *supra* note 16, at 222.

53. Thus, upon its recommendation, the New Hampshire towns were separated from Massachusetts Bay in 1679 and made a royal colony. Although Charles II granted Pennsylvania to William Penn in 1681, the Lords secured a series of limitations and regulations into the Pennsylvania charter. The Lords also assaulted the

life occurred when the Lords briefly unified the colonies, creating the Dominion of New England, which stretched from Maine to Pennsylvania, in an effort to ease enforcement of royal instructions.⁵⁴

3. *The Colonies Fight Back*

In light of these attempts to reign in the colonies, the colonial assemblies attempted to claim individual and collective rights from the crown. Virginia, for example, attempted to obtain a new charter in 1675-76.⁵⁵ The Charter of Liberties, enacted by the first New York Assembly in 1683 and manifestos adopted in Massachusetts, New York and Maryland in 1688-89 articulated rights the colonists felt they possessed that England could not disturb. Predictably, England and the Privy Council routinely denounced these acts, going so far as voiding the New York Charter of Liberties. Inspired by the Glorious Revolution of 1688-89, the legislatures of Virginia, New York, Massachusetts, South Carolina and Maryland passed imitations of Parliament's 1689 Declaration of Rights.⁵⁶ Indeed, despite England's attempts to the contrary, the colonists made it clear that they intended to define their civil liberties.⁵⁷

4. *Summary of the Early Colonial Period*

Early on, colonists sought to preserve their personal liberties and to govern themselves. The colonists routinely established internal laws and civil liberties, levied internal taxes and regulated internal, or "intra-colony," commerce. The colonists repeatedly fought

charters of private colonies in the English courts, resulting in the forfeiture of the Massachusetts Bay and Bermuda charters. See GREENE, *PERIPHERIES*, *supra* note 9, at 15.

54. The Dominion lasted from 1684 to 1691 and proved disastrous. First, the Dominion destroyed the colonists' own attempt at unification, the New England Confederation of 1643. The Confederation, borne of a limited desire for cooperation and the need to address the problems made obvious by the Pequot War of 1637, was between the colonies of Connecticut, New Haven, Massachusetts and Plymouth. See Articles of Confederation of May 19, 1643, in *DOCUMENTS OF AMERICAN HISTORY* 26-28 (Henry Steele Commager ed., 3d ed. 1947). The Massachusetts Charter enacted after the dissolution of the Dominion required all legislation passed by the assembly and approved of by the governor, be approved of by the king in council—who within three years of the passage of the act, could disallow the legislation. Laws not disallowed within three years remained in force. See HERBERT EUGENE BOLTON AND THOMAS MAITLAND MARSHALL, *THE COLONIZATION OF NORTH AMERICA* 344 (1942).

55. See GREENE, *PERIPHERIES*, *supra* note 9, at 16.

56. See *id.*

57. See *id.*

English encroachment on these local areas, especially intra-colonial political culture or territorial changes. England, on the other hand, controlled the external areas of inter-empire trade, foreign relations and Maritime laws. This rule was accomplished by royal, rather than parliamentary, fiat. These early examples of colonial authority established the American understanding of layered governments, an understanding the Framers would later rely on when creating the new government under the U.S. Constitution.

In the coming half-century, however, the colonial paradigm shifted. The King no longer conducted the day-to-day regulation of the colonists; instead, after the Glorious Revolution, Parliament emerged as England's governing body. Consequently, colonial friction increased because Parliament, which the colonists did not recognize as a sovereign entity, began to legislate on subjects formally under the province of the King. The colonists were further angered by this new system because Parliament often legislated on matters traditionally of colonial concern. With the existing colonial model thus threatened, and Colonial America clinging to its past, the colonists had cause to charge toward revolution. As fate would have it, however, circumstance and a prolonged period of "salutary neglect" temporarily minimized confrontation between England and her colonies.

B. Eighteenth Century America, 1700-1763

1. Early Expansions of British Authority

Under King William, British influence over trade in the American colonies grew. Motivated by complaints from British merchants of piracy and smuggling, the crown created the Board of Trade ("Board") to succeed the defunct Lords in 1696.⁵⁸ The Board continued the policies taken up by the Lords a decade earlier. The Board drafted the instructions to the royal governors, examined colonial legislation, examined the accounts of the colonial treasuries and nominated new governors.⁵⁹ The Board also conducted all aspects of colonial administration, except for the execution of its policies. Together with the Privy Council⁶⁰ and Parliament, England thereby tightened its grip on the colonies.

58. See, e.g., GREENE, *PERIPHERIES*, *supra* note 9, at 16; BOLTON & MARSHALL, *supra* note 54, at 347. Interestingly, among the Board's first non-ministerial officials was John Locke. See *id.*

59. See BOLTON & MARSHALL, *supra* note 55, at 347.

60. The Privy Council remained responsible executing of English law in the colonies. See *id.*

During the reigns of William and Anne, Parliament passed various trade laws designed to subrogate colonial commercial enterprises to that of the motherland. The Navigation Act of 1696 required that all ships carrying colonial imports and exports be English ships manned by English ship-masters and a crew at least three-fourths English. It also granted greater powers to Customs officials and called for trials under the authority of the Act to be done either by a jury of English or Irish natives, hence effectively precluding jury trials in America, or in the Admiralty Courts which did not provide for jury trials.⁶¹ The Woolen Act of 1698 restored the English monopoly over manufactured goods by forbidding the export of woolen products to the colonies.⁶² Seven years later, rice, molasses and various naval stores (tar and pitch) were included in the list of articles shipped solely to England.⁶³ In 1710, Parliament reorganized the post-offices for the empire, a regulation that was previously left to the colonies. Finally, under the rule of Queen Anne, chartered colonies were disallowed and a few formerly chartered colonies shifted to royal control.

2. *Fortune Smiles on the Colonists*

Beginning in 1721, coinciding with the ascendancy of England's first minister, Sir Robert Walpole,⁶⁴ colonial administration was relaxed. Three factors contributed to this situation. First, Sir Walpole, in practice, returned to the *lassie-faire* colonial administration that characterized the first half of English colonization in America.⁶⁵ Second, day-to-day administration of colonial affairs

61. This last provision is of particular importance because juries were generally sympathetic to those who violated English trade laws and often acquitted them. See BOLTON & MARSHALL, *supra* note 54, at 348.

62. See *id.* at 349.

63. See *id.*

64. Sir Walpole served as minister from 1721-1742. See GREENE, *AUTHORITIES*, *supra* note 14, at 62.

65. See *id.* As one writer put it, Sir Walpole sought to ensure the colonists had "a Government . . . as Easy & Mild as possible to invite people to Settle under it." JOSHUA GEE, *THE TRADE AND NAVIGATION OF GREAT BRITAIN* 98 (1729), *quoted in* GREENE, *AUTHORITIES*, *supra* note 14, at 62. Moreover, Sir Walpole's style of governance led him to avoid conflict wherever possible. See *SETTLEMENTS TO SOCIETY, 1584-1763* 231-32 (Jack P. Greene ed., 1966) (quoting Charles Delafaye, a subordinate to Sir Walpole, addressing South Carolina Governor Francis Nicholson, Jan. 26, 1722 ("One would not Strain any Point where it can be of no Service to our King and Country, and will Create Enemys to one[']s Self.")); GREENE, *AUTHORITIES*, *supra* note 14, at 67 ("Walpole's tende[d] to let the colonies proceed on their own without interference by the administration except in such matters as were of serious concern to powerful interest groups in Britain . . .").

shifted from the Board of Trade to the secretary of state for the southern department.⁶⁶ By 1724, the Duke of Newcastle was appointed to that position and, in his twenty-four year reign,⁶⁷ proved to be a lax colonial administrator,⁶⁸ as well as inefficient and corrupt.⁶⁹ Lastly, a lack of support in England for strict enforcement of colonial policy,⁷⁰ combined with a willingness to compromise with the colonies on economic measures where possible,⁷¹ contrib-

66. See GREENE, *AUTHORITIES*, *supra* note 14, at 62.

67. *See id.*

68. For example, after repeated instructions and entreaties from the Board of Trade failed to force the Massachusetts House of Representative to establish a permanent revenue to provide salaries for crown officers, the Board threatened, in 1729, to turn to Parliament. The administration, led by the duke of Newcastle, was not eager to bring "things to that extremity" and thus, the Massachusetts house stood firm and the Board was forced to back down. *See* 36 *CALENDAR OF STATE PAPERS*, 1728-29, *supra* note 38, ¶¶ 582, at 311-14; 643, at 338-40; 792, 793 at 412-414.

69. *See* BOLTON & MARSHALL, *supra* note 54, at 349-53. Specifically, the Duke regarded the colonial policy as a means to reward supporters. As a result, while many of his gubernatorial appointments were excellent officials, others were corrupt or incapable. In addition, the Duke also attempted to regulate the entire of the colonies himself.

70. From 1734 to 1749, Parliament considered strengthening royal political authority in the colonies on three separate occasions and failed to do so. *See* GREENE, *AUTHORITIES*, *supra* note 14, at 67 (noting that the House of Lords failed to transform a proposal to "prevent any colonial law from taking effect until they had been approved by the crown" into a bill to be voted on and that the House of Commons, in 1744 and then again in 1749, failed to enact clauses that would have given royal instructions the effect of law in the colonies, despite that both bills that included these measures originally were passed).

71. Noted historian Jack Greene explains:

Whenever colonial interests coincided with those of some influential group in Britain, the colonies could count on a favorable response to their requests. Thus, the rice growers of Carolina combined with rice traders in Britain in 1730 to persuade Parliament to permit the direct exportation of rice from Carolina to southern Europe, and South Carolina indigo planters joined with woolen manufacturers in 1748 to secure a bounty to encourage the production of Carolina indigo.

GREENE, *AUTHORITIES*, *supra* note 14, at 65. James Oglethorpe summarized the prevailing ideal in the House of Common in 1732:

[I]n all cases that come before this House, where there seems to be a clashing of interests between one part of the country and another[,] . . . we ought to have no regard to the particular interest of any country or set of people; the good of the whole is what we ought only to have under our consideration: our colonies are all a part of our own dominions; the people in every one of them are our own people, and we ought to shew an equal respect to all.

Jan. 28, 1732, *reprinted in* 4 *PROCEEDINGS AND DEBATES OF THE BRITISH PARLIAMENTS RESPECTING NORTH AMERICA* 125 (Leo Francis Stock ed., 1924-41).

uted to this period of "salutary neglect."⁷² Fittingly, colonial resistance to British policies increased as well.⁷³

72. By 1701, royal governors complained of the situation in the colonies. Jamaica Governor William Beeston wrote that the members of the lower house of the Jamaica legislature believed "that what a House of Commons could do in England, they could do here, and that during the sitting all power and authority was only in their hands." Beeston to Board of Trade, Aug. 19, 1701, 19 *CALENDAR OF STATE PAPERS* 1701, *supra* note 38, at 424-25. Barbados Governor Robert Lowther wrote in 1712 that the colonists "have extorted so many powers from my predecessors, that there is now hardly enough left to keep the peace, much less maintain the decent respect and regard that is due to the Queen's servant." Lowther to Board of Trade, Aug. 16, 1712, 27 *CALENDAR OF STATE PAPERS* 1712-14, *supra* note 38, at 29. The situation deteriorated so much that, by 1752, South Carolina Governor James Glen would comment:

Governors are to do their utmost to enforce the observance of the laws, but I am afraid all they can do is very little. In England, indeed, if the laws of trade are not punctually observed, it must generally be owing to the negligence or connivance of officers But here we have few or no officers, and those I believe never attend either the loading or unloading and ship, and it is not possible they should attend all. . . . Some years ago I was assured that there was very little illegal trade carried on here, but I presume they have meant it comparatively with regard to some other provinces, for I am now convinced and know for certain that there is very considerable illegal trade in this province, injurious to the fair trader, highly hurtful to the king's revenue, and destructive to the manufactures of Britain; and I see it a growing evil.

Comment by South Carolina Governor James Glen to the Board of Trade (1752), *reprinted in* HAWKE, *supra* note 30, at 265-66. In 1752, the Board of Trade asked the colonial governors to comment on the Board's instructions to them. *See id.* at 265. The instructions in question were:

Article 1: You shall inform yourself on the principle laws relating to the plantation trade, [here follows a list of the ninety-four acts of navigation and trade relative to the colonies].

All which laws you will herewith receive: and you must take a solemn oath to do your utmost that all the clauses, matters, and things contained in the before-receited acts and all other acts of Parliament now in force or hereinafter shall be made relating to our colonies or plantations be punctually and bona fide observed, according to the true intent and meaning thereof.

Id. at 265.

73. For example, while individual colonists acquiesced to the navigation acts, they did so selectively. Merchants in the middle colonies and New England, for example, explicitly violated the Molasses Act of 1733 because they felt it discriminated against them in favor of West Indian sugar interests. As Caleb Heathcote, Surveyor-General of Customs, lamented:

[F]or while they [the colonists] have a power (as they imagine) of making laws separate from the crown, they'll never be wanting to lessen the authority of the King's officers, who, by hindering them from a full freedom of illegal trade, are accounted enemies to the growth and prosperity of their little commonwealths.

Caleb Heathcote to Board of Trade, Sept. 7, 1719, *reprinted in* DIXON RYAN FOX, *CALEB HEATHCOTE, GENTLEMAN COLONIST* 188 (1926). The colonial assemblies in particular resisted British attempts to limit their authority. Governors complained the assemblies "extorted so many powers from [their] predecessors that there" was "hardly enough left to keep the peace, much less to maintain the decent respect and

3. *Focusing the Debate*

Although governmental relations between England and her American colonies were generally amicable during this period, problems did arise. Particularly, disputes surfaced between the colonial assemblies and the colonial governors, problems that unearthed the fundamental question for this period, namely "On what foundation did the assemblies rest?"⁷⁴ Did the assemblies rest on, as New York Justice William Smith said in 1734, the right "to choose the Laws by which we will be governed" and "to be governed only by such Laws,"⁷⁵ or by the King's prerogative alone?

The debate centered on the validity of royal limitations on the assemblies. Over the next seventy years, the colonial assemblies and governors wrangled over the authority to extend representation to new districts,⁷⁶ to make qualifications necessary to vote and

regard that is due to the Queen's servant." Sir William Beeston to Board of Trade, Aug. 19, 1701, 19 *CALENDAR OF STATE PAPERS*, 1701, *supra* note 38, at 424-25; Robert Lowther to Board of Trade, Aug. 16, 1712, 27 *id.* at 29; Board of Trade to king, Aug. 10, 1721, 32 *id.* at 386-87; Samuel Shute to king, Aug. 16, 1723, 33 *id.* at 324-30. Caleb Heathcote, Surveyor-General of Customs reported the situation to the Board of Trade:

I need not acquaint your Lordships, that notwithstanding they have oft received commands for sending home their laws, it has hitherto, in this government, been wholly neglected; and they nevertheless presume to put them in execution, though many thereof are repugnant not only to the laws of Great Britain, but even to the express words of their charter.

Caleb Heathcote to Board of Trade, Sept. 7, 1719, *reprinted in* DIXON RYAN FOX, *CALEB HEATHCOTE, GENTLEMAN COLONIST* 188 (1926). All royal officials, however, did not look at this with disdain. As the governor of Rhode Island noted, "the various circumstances of the time and place and people doe often make it necessary to enact and establish Laws different [from], though not repugnant, to the Laws of England." Governor and Company of Rhode Island, Reply to Charges, Feb. 1, 1706, 23 *CALENDAR OF STATE PAPERS*, 1706-08, *supra* note 38, at 33-35. Robert Raymond told the Board of Trade that the colonists' "religion, liberties and properties should be inviolably preserved to them" through the assemblies. Robert Raymond to the Board of Trade, Aug. 17, 1713, 27 *CALENDAR OF STATE PAPERS*, 1712-14, *supra* note 38, at 222.

74. See generally LABAREE, *supra* note 16, at 179-217 (discussing this point).

75. Joseph Murray, *Mr. Murray's Opinion Relating to the Courts of Justice in the Colony of New-York* 7, 15 (1734), *quoted in* GREENE, *PERIPHERIES*, *supra* note 9, at 39.

76. See LABAREE, *supra* note 16, 179-88. Who had authority to extend representation to new districts was an issue of paramount importance during the colonial period. Indeed, Jefferson gave voice to this grievance in the Declaration of Independence: "He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature, a right inestimable to them and formidable to tyrants only." *THE DECLARATION OF INDEPENDENCE* ¶ 5 (U.S. 1776). English precedent was inconclusive; early on, the Tudor Monarchs extended representation to towns and boroughs. Under the Stuarts, Parliament exercised this power. After the Restoration of Charles II, however, the

be elected,⁷⁷ to fix the meeting places of the assemblies,⁷⁸ to select

monarchy granted the borough of Newark representation. Three years earlier, Parliament granted representation to the county and city of Durham. These were the only precedents the Americans had to follow. See LABAREE, *supra* note 16, at 180. If the extension of franchise was a power of the assembly, then, so the colonists contended, the assemblies existed as a natural right. If, however, the crown, as represented by the governors in America, was the only body who could properly extend representation to new towns, the colonial assemblies would exist by royal prerogative. See *id.* at 179. Two colonial examples, one from New Hampshire, and the other from Massachusetts, are noteworthy, yet inconclusive. In New Hampshire, pursuant to royal instruction, Governor Benning Wentworth ordered five new delegates from new towns and districts. See 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, *supra* note 50, § 162. The New Hampshire Assembly refused to grant them seats. Throughout the next seven years, Governor Wentworth refused to nominate a speaker for the assembly, thus preventing the assembly from passing any new laws or collecting any taxes. By September 1752, a beaten New Hampshire Assembly admitted the new delegates and ended the struggle. See LABAREE, *supra* note 16, at 179-83. Earlier, in 1742, Governor Shirley of Massachusetts suggested that the new frontier towns be organized into "precincts, parishes, or villages with all the officers and privileges of a township except that of sending representatives." *Id.* at 185 (quoting Shirley to the Board of Trade, Oct. 18, 1742). Later, further instructions would commend Shirley for this policy. The policy, however, clearly infringed on the rights of assembly granted in Massachusetts' charter of 1691. This, Professor Labaree has commented, may explain for the failure in enforcement of this instruction in Massachusetts. Indeed, Governor Shirley himself approved bills for the full incorporation of three towns in 1754, with representatives. See LABAREE, *supra* note 16, at 184-85. Later, in 1767, due to the new settlements in the west, numerous acts from the assemblies of New Hampshire, Massachusetts, New York and South Carolina were sent to the Privy Council, increasing the number of communities eligible to send representatives, rapidly increasing the size of the colonial assemblies. See *id.* at 186. The Privy Council denied every such act. See 5 ACTS OF THE PRIVY COUNCIL, 1766-1783, *supra* note 52, ¶¶ 29-30, 32-35, 40. Further, in 1767, the Privy Council sent every governor a circular letter forbidding them from assenting to any act increasing the size of the assemblies. See *Constitution of Assembly Not to be Altered by Act*, reprinted in LABAREE, *supra* note 16, at 107 (forbidding the governors from assenting to any increase in the size of the assembly).

77. See *id.* at 188-90. While the British and colonists agreed that franchise and the right to be elected ought to be limited to freeholders—those with tangible land stakes in the community—the property qualifications varied. By 1767, the Board of Trade attempted to regulate the property qualifications in all thirteen colonies. See, e.g., Circular instruction, approved Aug. 26, 1767, cited by LABAREE, *supra* note 16, at 189 & n.38; 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, *supra* note 50, §§ 154 ("Assemblymen to be Elected by Freeholders Only") (requiring that freeholders only may vote), 159 ("Qualifications of Electors and Elected in Georgia") ((requiring Georgia assemblymen to be: non-Catholic ("no person shall be capable of being elected a representative . . . who is a Popish recusant"), twenty-one years old and have a freehold estate of five hundred acres) (also requiring the same of voters, except the freehold requirement was only fifty acres)), 163 ("Constitution of the New Jersey Assembly I" (requiring that freeholders that are elected representatives have one thousand acre freeholds and that all voters have one hundred acre freeholds), 164 ("Constitution of the New Jersey Assembly II" (in addition to the first instruction, this provision extended franchise to men with a personal estate of £50 sterling and the right to be elected to those with a personal estate of £500 sterling)).

speakers for the assemblies,⁷⁹ to extend privileges to assembly-

78. See LABAREE, *supra* note 16, at 190-99. Two examples are illustrative. The first involves instructions to the governors of New Jersey that required the meeting of the assembly alternatively at Perth Amboy in East Jersey and Burlington in West Jersey. See *id.* at 190-91 & n.39 (discussing Instructions to Cornbury, and Instructions to Lovelace); 1 ROYAL INSTRUCTIONS TO THE BRITISH COLONIAL GOVERNORS, *supra* note 50, § 148. In 1709, an act of the West Jersey representatives and Lieutenant Governor Ingoldsby required all future sessions of the assembly to meet in Burlington. Governor Hunter, who arrived the next year, could not decide which to follow: the instruction or the act. The act, although signed by Queen Anne, had not arrived in signed form, so Governor Hunter followed the instructions. By 1715, the act was signed and received by Governor Hunter, which gave rise to a new question: should Hunter follow the act, now signed by Queen Anne, or the new instructions issued by King George I (King George I actually reissued the prior instructions)? In an important decision, the Board of Trade decided that Hunter should follow the act rather than the new instruction. As a result, royal authorities recognized that colonial legislation approved by the king was granted the same force as an act of Parliament. See LABAREE, *supra* note 16, at 190-93. The other notable controversy occurred in Massachusetts. A provincial elections act of 1698 repeatedly referred to the assembly as summoned to meet in the townhouse of Boston. See LABAREE, *supra* note 16, at 193. In 1721, the question of where the assembly was to meet arose. The representatives insisted that the act required the governor to convene all assemblies there. The governor asserted "Boston" was merely illustrative and that the meeting place might be freely altered. The question arose again in 1728, and on each occasion no final settlement was reached. In 1769, with the presence of regular troops in Boston, Governor Bernard chose to convene the assembly to Harvard College in Cambridge. The colonists objected strenuously. With the Boston Massacre in 1770, the formerly conservative majority in the assembly became distinctly hostile to the British desires. Lieutenant Governor Hutchinson later told the representatives that the assembly would convene in Cambridge because it was the king's desire and his commission as Lieutenant Governor required him to act in accordance with royal instructions. The colonists responded by pointing to their charter which granted the governor "full power and authority" to adjourn, prorogue, and dissolve the assembly. Thus, the governor's authority was not subject to royal instructions. After an address by Hutchinson in the Massachusetts House of Representatives, that body replied with an address, likely the work of Samuel Adams. In it, the paper asserted that the colonists have a right to dispute what was in the public good and "withstand the abusive exercise of a legal and constitutional acts of the crown." House of Representatives to Hutchinson, July 31, 1770, 3 HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY, *supra* note 47, at 388. The paper held "that whenever instructions cannot be complied with, without injuring the people, they cease to be binding." *Id.* at 390. In 1772, Hutchinson compromised: he returned the assembly to Boston, but did so without implicating the king's right to instruct governors. In 1774, however, Parliament passed the Boston Act and the Massachusetts Government Act and Secretary of State Dartmouth ordered the removal of the assembly to Salem. The colonists objected, but without result. As Professor Labaree notes, "[n]o more sweeping challenge than this was made to the system of royal government in the provinces before the actual expulsion of the governors upon the outbreak of the Revolution." See LABAREE, *supra* note 16, at 198.

79. See *id.* at 199-203. As the colonists quickly pointed out, only in 1679 did royal approval of a speaker of the House of Commons become more than a formality. See *id.* at 199. This method of controlling the legislature was, however, widely employed

men⁸⁰ and to adjourn the assembly.⁸¹ These examples show that the colonists, as they did earlier when facing Poyning's Law,⁸² failed to recognize authority in Parliament to limit local political bodies with respect to their operation within the state.

English officials and Loyalists considered the colonist's right to an assembly to be a policy choice.⁸³ Thus, the colonists legislated at England's whim. Most colonists, however, rejected this position. Some viewed the colonial charters as contracts with the King.⁸⁴

in America. *See id.* at 200. Such sentiments illustrate the growing self-consciousness of colonial assemblies and their feelings of equality with Parliament. *See id.* 207.

80. *See id.* at 203-10. Privileges often included access to the governor's person, freedom of debate and vote in the assembly, and freedom from arrest during the term. *See id.* at 203. Most assemblymen enjoyed these privileges, giving rise to colonial sentiment that "this house [the colonial assembly] has the same inherent rights in this province, as the House of Commons has in Great Britain." Massachusetts House of Representatives to Hutchinson, July 31, 1770, 3 *HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY*, *supra* note 47, at 392. Such comments are illustrative of the increasing self-awareness of the colonial assemblies and their feeling of equality with Parliament. *See* LABAREE, *supra* note 16, at 207.

81. *See id.* at 207-17. The importance over this issue is evident; the Declaration of Independence complains:

He has dissolved representative houses repeatedly for opposing with manly firmness his invasions of the rights of his people. He has refused for a long time after such dissolutions to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the state remaining in the meantime exposed to all the dangers of invasion from without and convulsions within.

DECLARATION OF INDEPENDENCE ¶ 8.

82. *See supra* note 52.

83. *See* GREENE, *PERIPHERIES*, *supra* note 9, at 34. One New York Loyalist even taunted by "prerogative . . . alone . . . you are ruled, . . . the Royal Pleasure . . . is your Magna Charta." *Id.* "Without any Regard to the Magna Charta," another writer contended, the colonists might "be Ruled and Governed by such wayes and methods, as the Person who wears [the] . . . Crowne . . . shall think most proper and convenient." *Id.* at 35.

84. Edward Rawson, when justifying the overthrow of the Dominion of New England, called the charters the "Original Contract[s] between the King and the first Planters" by which the King promised them that "if they at their own cost and charge would subdue a Wilderness, and enlarge his Dominions, they and their posterity after them should enjoy such Privileges as are in their Charters expressed." EDWARD RAWSON, *THE REVOLUTION IN NEW ENGLAND JUSTIFIED* 42-43 (1691), *quoted in* GREENE, *PERIPHERIES*, *supra* note 9, at 36. Patrick Henry also used this argument in 1763. At the time, tobacco was the medium of exchange in Old Dominion, Virginia. The Virginia clergy were paid 17,000 pounds of tobacco annually. The Burgesses passed acts in 1755 and 1758 allowing debts to be redeemed at two pence per pound of tobacco—effectively reducing the ministers' yearly income. The King disallowed these laws in 1759 and the ministers brought suit to recover their losses. In one such suit, brought by Reverend James Maury in 1763, Patrick Henry argued that the acts of 1758 were acts of general utility consistent with the original compact upon which government was based. Thus, the King, by disallowing this act, became a tyrant and forfeited his

Other colonists viewed their rights in terms of natural law.⁸⁵ The New York Assembly, for example, viewed the rights they desired as "Rights and Privileges inherent in Us, in common with . . . his Majesty's Free-born Natural Subjects."⁸⁶ Other Colonists argued that both British and American traditions supported the colonial assemblies and their claims to full legislative power.⁸⁷

Whether by contract, natural right or custom, the colonists believed in the authority of their assemblies. Consequently, the colo-

right to obedience from his subjects. See BOLTON & MARSHALL, *supra* note 54, at 429.

85. The Pennsylvania Assembly took this view when it initially refused to contribute to England's wars with Spain and France because doing so violated the religious beliefs of the Quakers, a right protected in its charter:

That as very many of the Inhabitants of the Province are of the People called Quakers who, tho' they do not condemn the use of Arms in others, yet are principled against it themselves; a law to compel them to arm would not only be a *Breach of that fundamental One for Liberty of Conscience, comprised in the Charter of Privileges* granted by the first Proprietor, and since [illegible] Times confirmed by Acts of Assembly, but would in Effect be to commence Persecution against them.

That as the greater Part of the Assembly are principled against Fighting, They cannot make any law exempting those of the same Principles, and compelling others of different Persuasions to bear Arms, without being chargeable with Partiality and [illegible] consistency.

1 THE AMERICAN MAGAZINE 13 (Jan. 1740-41) (reporting the proceedings of the Assembly of Pennsylvania, Jan. 5, 1740) (emphasis added). Eventually, the Pennsylvania Assembly, only after much pressure from its Governor, did contribute to the war effort. See *id.* at 64 (reporting the proceedings of the Assembly of Pennsylvania, July 7, 1740) (noting that upon reading a threatening message from the Pennsylvania Governor, the Assembly voted "That a Sum of Money, such as the House should thereafter agree upon, be given to the Crown").

86. GREENE, PERIPHERIES, *supra* note 9, at 34. Another colonist argued the inhabitants of "America have a just Claim to the *hereditary Rights* of British Subjects." *Id.* at 36. These inherent, or hereditary rights, as one colonial writer defined them, included "to have a Property of his own, in his Estate, Person and Reputation; subject to Laws enacted by his own Concurrence, either in Person or by his Representatives." *Id.*

87. Joseph Murray of New York relied on British tradition, declaring that the colonial assemblies derived "their Power or authority . . . from the common Custom and Laws of England, claimed as an English-man['s] Birth Right, and as having been such, by Immemorial Custom in England." Joseph Murray, *Mr. Murray's Opinion Relating to the Courts of Justice in the Colony of New-York* 7, 15 (1734), quoted in GREENE, PERIPHERIES, *supra* note 9, at 39. He continued "and tho' the People" of the colonies could not "claim this by Immemorial Custom here, yet as being part of the Dominions of England, they are intitled to the like Powers and Authorities here, that their fellow Subjects have, or are intitled to, in their Mother Country, by Immemorial Custom." *Id.* On the other hand, James Knight, a former attorney general of Jamaica, relied on American custom to give colonial assemblies their legitimacy. He announced that the assemblies had authority to exercise "Legislative power in its full[est] extent," in part because over a long period of time the assemblies had "in Fact Exercised a Legislative Power in almost every Instance, wherein it is possible to be Exercised." *Id.* at 39-40.

nial understanding was that England, the central authority, could not place limits on the colonial governments, insofar as they acted within their colony. To be sure, when an assembly acted outside its authority, the offending colonial act was voided. Yet, the colonists understood that layered government, under the colonial model, required each layer to have complete autonomy within their defined scopes of authority. Indeed, each layer was nearly *sovereign* within their respective scopes of authority.

C. A Seven Year Itch: Prelude to the Revolution, 1763-70

Throughout the middle of the eighteenth century, England waged wars against the Spanish and French in an effort to protect her colonies. In America, the colonists helped this effort from 1754-1763 during the French and Indian War. During this time, England exercised its war-making authority to request both troops and money contributions from the colonies, each a proper exercise of the power of the central government in the colonial scheme. The eventual defeat of the French, and the subsequent 1763 Peace of Paris, posed questions about what England should do with the western lands and how England would pay its staggering war debts. England's solutions, however, only opened the door to tougher questions.

1. *Problematic Solutions*

England sought to finance its war debts through taxing the colonies and tightening its control over colonial trade.⁸⁸ Importantly, these acts came from Parliament, a representative body, rather than the crown. For the colonists, who generally believed they owed allegiance to the crown alone, this violated a basic concept of government.

Almost immediately after their passage, the colonists took strong stances against the acts. For example, a Massachusetts committee led by James Otis drafted and sent a memorial to the colony's agent in England, instructing the agent to repeal the Sugar Act and

88. Not all of the ensuing trade regulations passed during the next seven years were negative. For example, to stimulate the fur trade the old duties were abolished and new duties, an import duty of one pence a skin and an export duty of seven pence per skin were imposed. See BOLTON & MARSHALL, *supra* note 54, at 430. Also, protectionist bounties were paid on hemp, flax and indigo. By allowing Georgia and the Carolinas to ship without restriction to the south, the rice trade was stimulated. Finally, duties on whale fins were repealed outright. These beneficial measures, however, were more than negated by long line of oppressive Acts. See, e.g., 4 Geo. 3, ch. 15 (Sugar Act); 5 Geo. 3, ch. 12 (Stamp Act); 5 Geo. 3, ch. 33 (Quartering Act).

then-proposed Stamp Act.⁸⁹ In the Carolinas, New York, Connecticut, Pennsylvania, Maryland, Virginia and Rhode Island various committees were established to draft instructions for their respective colonial agents in England to complain of the laws of trade.⁹⁰

The colonists complained, not only of Parliament's lack of authority over the colonies, but continued to assert that the people of England possessed no authority over internal colonial matters.⁹¹ For example, the Virginia House of Burgess passed the Virginia Resolves that declared the people of Virginia "have without interruption enjoyed the inestimable right of being governed by such laws respecting their internal polity and taxation . . . and that the same hath never been forfeited but hath been constantly recognized by the kings and people of Great Britain."⁹² Benjamin Franklin, when testifying before the House of Commons in 1766, distinguished between "internal taxes," which were "forced from the people without their consent, if not laid by their own representatives," and the "external tax" used to regulate imperial commerce.⁹³ Hopkins also addressed this issue:

89. See BOLTON & MARSHALL, *supra* note 54, at 432.

90. See 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805 45-61 (Charles S. Hyneman and Donald S. Lutz, eds., 1983). Stephen Hopkins wrote this pamphlet with the approval of the Rhode Island legislature. He also served in the First and Second Continental Congresses and helped write the Articles of Confederation. See *id.* at 45. Rhode Island Governor Stephen Hopkins summed up the colonial position in *The Rights of the Colonies Examined*:

In an imperial state, which consists of many separate governments each of which hath peculiar privileges and of which kind it is evident the empire of Great Britain is, no single part, though greater than another part, is by superiority entitled to make laws for or to tax the lesser part; but all laws and all taxations which bind the whole must be made by the whole Indeed, it must be absurd to suppose that the common people of Great Britain have a sovereign and absolute authority over their fellow subjects in America, or even any sort of power whatsoever over them; but it will still be more absurd to suppose they can give a power to their representatives which they have not themselves.

91. *Id.* at 57-58.

See, e.g., *id.* at 50 ("[E]ach of the colonies has a legislature within itself to take care of its interests and provide for its peace and internal government"); Robert Bland, *An Inquiry into the Rights of the British Colonies*, reprinted in *id.* at 79 ("[The Colonies] were respected as [] distinct State[s], independent, as to their internal Government").

92. JOURNAL OF THE HOUSE OF BURGESSSES OF VIRGINIA, 1761-65 360, lxvii, frontispiece (J.P. Kennedy, ed. 1907), reprinted in SOURCES & DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-88 AND THE FORMATION OF THE FEDERAL CONSTITUTION 17 (Samuel Elliot Morison ed., 1977).

93. Benjamin Franklin, *Examination before the Committee of the Whole of the House of Commons*, February 13, 1766, in 13 THE PAPERS OF BENJAMIN FRANKLIN

[T]here are many things of a more general nature, quite out of the reach of these particular [colonial] legislatures, which it is necessary to be regulated, ordered, and governed. One of this kind is the commerce of the whole British empire, taken collectively, and that of each kingdom and colony in it as it makes a part of the whole. Indeed, everything that concerns the proper interest and fit government of the whole commonwealth, of keeping the peace, and subordination of all the parts towards the whole and one among another, must be considered in this light. Amongst these general concerns, perhaps money and paper credit, those grand instruments of all commerce, will be found also to have a place. These, with other matters of a general nature, it is absolutely necessary should have a general power to direct them, some supreme and overruling authority with power to make laws and form regulations for the good of all, and to compel their execution and observance.⁹⁴

These views reflected the general understanding of the Colonists, that "things of a general nature" were separate from "internal police" and that a central body could only rightfully control the former.

On October 7, 1765, nine colonies⁹⁵ sent delegates to the New York Stamp Act Congress.⁹⁶ On October 19, the Congress adopted a declaration of grievances, arguing, among other things, that the Stamp Act violated the colonists' rights as Englishmen. Specifically, delegates argued that they could not be taxed by anyone but their representatives,⁹⁷ and that the right to a jury trial, a

127, 139 (Leonard Labaree ed., 1959). He continued: "a right to lay internal taxes was never supposed to be in Parliament." *Id.* at 127.

94. Stephen Hopkins, *The Rights of the Colonies Examined in AMERICAN POLITICAL WRITING*, *supra* note 90, at 45-61. While conceding Parliament possesses this role, Hopkins concludes "justice and [] the very evident good of the whole commonwealth" requires American representation in Parliament on all matters "by which their rights, liberties, or interests will be affected." *Id.* at 51. He also argues that as a prudential matter, it behooves the empire to grant American representation:

Had the colonies been fully heard before the late act had been passed, no reasonable man can suppose it ever would have passed at all in the manner it now stands; for what good reason can possibly be given for making a law to cramp the trade and ruin the interests of many of the colonies, and at the same time lessen in a prodigious manner the consumption of British manufactures in them?

Id. at 51-52.

95. Virginia, North Carolina, Georgia and New Hampshire failed to send delegates. See BOLTON & MARSHALL, *supra* note 54, at 436.

96. See *id.*

97. See *id.* at 437.

fundamental right of all Englishmen, could not be infringed upon.⁹⁸ The delegates, however, were unable to persuade Parliament. Parliament repealed the Stamp Act in February 1766, only after the testimony of Benjamin Franklin, the support of William Pitt and protests from English merchants and manufacturers who were losing business through colonial boycotts.⁹⁹

2. *Different Solutions, Identical Problems*

The colonial celebration over the defeat of the Stamp Act was short lived. In June 1767, Parliament passed the Townshend Revenue Act, the most serious threat yet to colonial autonomy.¹⁰⁰ Duties were imposed on tea, glass, red and white lead, painter's colors and paper.¹⁰¹ Writs of assistance were declared legal and the Quartering Acts were strengthened.¹⁰² Further, Parliament passed the infamous Tea Act.¹⁰³ The colonists, however, would not passively acquiesce to such authority.

Through various means, the colonists displayed their displeasure. First, the colonists drafted several responses to the Townshend Acts. The most famous was John Dickinson's "Farmer's Letters," which asserted that while Parliament had authority to regulate imperial trade, Parliamentary regulation of internal trade was a serious threat to American liberty.¹⁰⁴ In response to the Quartering Act, the New York Assembly refused to comply with Governor Moore's request for provisions for troops. After months of bickering between the Governor and Assembly, the Governor prorogued the Assembly in December 1766 and, in June 1767, Parliament sus-

98. The Stamp Act extended the jurisdiction of the admiralty courts to cover all actions under the Stamp Act. 5 Geo. 3, ch. 12. And, similar to its forerunner the Article III courts, the admiralty courts had jurisdiction over matters throughout the colonies. However, unlike the Article III courts, the admiralty courts were not constrained by personal jurisdiction/venue concerns. Thus, while actions brought under the Stamp Act in the admiralty courts afforded defendants jury trials, trials of Georgia defendants were often brought in courts in Maine—predictably resulting in defendants who did not show up for trial. See BOLTON & MARSHALL, *supra* note 54, at 436.

99. See *id.* The repeal of the Stamp Act can be found in 6 Geo. 3, ch. 12.

100. See BOLTON & MARSHALL, *supra* note 54, at 438.

101. See 7 Geo. 3, ch. 46.

102. See BOLTON & MARSHALL, *supra* note 54, at 438-39.

103. See 7 Geo. 3, ch. 56.

104. "Once admit that she [England] may lay duties upon her exportations to us, for the purpose of levying money on us only, she then will have nothing to do but lay duties on the articles which she prohibits us to manufacture, and the tragedy of American liberty is finished." BOLTON & MARSHALL, *supra* note 54, at 440 (quoting Dickinson).

pended the New York Assembly.¹⁰⁵ Predictably, however, the greatest response of all came from Massachusetts. From 1767-1770, James Otis, Samuel Adams and other Bostonians protested the Townshend Acts, held a series of town meetings and drafted numerous letters and petitions to the King and his ministers.¹⁰⁶

By March 1770, the presence of English troops in Boston symbolized all that was wrong with the current system for the colonists.¹⁰⁷ Difficulties between the soldiers and townspeople became increasingly more frequent. On March 5, citizens pelted a sentinel with snowballs. When the sentinel called for assistance, a soldier was knocked down and a guard fired shots at the crowd, killing and wounding several citizens.¹⁰⁸ The Boston Massacre, as it became known, symbolized English intrusions against colonial rights. It also became the rallying cry of the revolution.

D. Revolutionary Rhetoric, 1770-1781

1. Solidifying the Colonial Position

Late in 1774, Joseph Galloway of Pennsylvania presented a plan of union to the Continental Convention.¹⁰⁹ This plan created a Grand Council, a body made of both American and English representatives.¹¹⁰ This plan provided for regulating "all the general police and affairs of the colonies, in which England and the colonies, or any of them, the colonies in general, or more than one colony,

105. See 7 Geo. 3, ch. 59.

106. See Circular Letter from the Select Men of Boston, to the Select Men of several towns in the Province, calling a Convention at Boston, on September 22, 1768, in 3 HISTORY OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY, *supra* note 47, at 356; Resolves of the Assembly, that no laws imposing taxes, and made by any authority in which the people had not their representatives, could be obligatory, &c. &c. July 8, 1769, in *id.* at 361; Massachusetts Circular Letter, Feb. 11, 1768, in SELECT CHARTERS, *supra* note 20, at 330; see also BOLTON & MARSHALL, *supra* note 54, at 440-41.

107. Of course, the troops were there because Britain closed Boston Harbor. In the spring of 1768, the English warship *Romney* was anchored in Boston harbor. On the same day, John Hancock's sloop, *Liberty*, arrived with an illegal shipment of Maderia wine. The *Liberty's* crew locked up the customs collector while the cargo was being landed. Soon after, the *Liberty* was then seized and moored under the guns of the *Romney*. A riot then ensued; the houses of two customs officials damaged and the boat belonging to the controller burned. By September 1768, two English regiments arrived in Boston. See BOLTON & MARSHALL, *supra* note 54, at 441.

108. See *id.* at 443. Interestingly, John Adams and Josiah Quincy defended those soldiers involved in the matter, obtaining an acquittal for all but two soldiers—the two soldiers convicted receiving light sentences.

109. See, e.g., Martin S. Flaherty, *More Apparent Than Real: the Revolutionary Commitment to Federalism*, 45 KANSAS L. REV. 993, 1005 (1997).

110. See *id.*

are in any manner concerned."¹¹¹ Further, the plan compromised away the local right won by past generations by conferring to the Grand Council authority over "civil and criminal matters."¹¹²

The First Congress rejected this plan and, on October 22, had any mention of the plan expunged from the record.¹¹³ To be sure, the events during 1760-1770 solidified the colonists' distrust for English authority. By February 1774, for example, every colony except Pennsylvania created a standing committee of correspondence to watch over Parliamentary action, report on such actions to the colonial Assemblies and discuss any constitutional questions raised.¹¹⁴

The First Congress stated the colonial position and beliefs in the *Declaration of Resolves*.¹¹⁵ In it, accompanying a laundry-list of grievances, Congress articulated the American conception of the proper relationship between governments:

Resolved, That . . . as the English colonists are not represented, and from their local and other circumstances, cannot be represented in British parliament, they [the colonists] are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such a manner as has been heretofore used and accustomed. But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British Parliament as are *bona fide*, restrained to the regulation of our external commerce, for the purposes of securing the commercial advantages of the whole empire to the mother country and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America without their consent.¹¹⁶

John Adams, a few months later, embraced this philosophy:

111. *Galloway's Plan of Union*, September 28, 1774, in 1 JOURNALS OF THE CONTINENTAL CONGRESS 50 (Worthington C. Ford, ed. 1904).

112. *Id.* at 118.

113. See 1 JOURNALS OF THE CONTINENTAL CONGRESS *supra* note 111, at 49-51 ("They not only refused to resume the Consideration of it [Galloway's Plan], but directed both the Plan and Order to be erased from the Minutes, so that no vestige of it might Appear.").

114. See BOLTON & MARSHALL, *supra* note 54, at 446-47.

115. See 1 JOURNALS OF THE CONTINENTAL CONGRESS *supra* note 111, at 63-73.

116. *Id.* at 68-69. Congress, in the same resolves, declared:

That the power of making laws for ordering or regulating the internal polity of these Colonies, is, within the limits of each Colony, respectively and exclusively vested in the Provincial Legislature of such Colony; and that all

America has all along consented, and still consents, and ever will consent that parliament, being the most powerful legislature in the dominions, should regulate the trade of the dominions. This is founding the authority of parliament to regulate our trade upon *compact* and *consent* of the colonies . . . not upon the principle that parliament is the supreme and sovereign legislature over them [the colonies] in all cases whatsoever.¹¹⁷

These works illustrates the general colonial understanding of layered government. That a "national body" should regulate general matters, such as inter-empire trade was widely accepted. Likewise, internal matters were to be left to the individual colonies.

2. *An Early Brush with Statehood*

On July 4, 1776, the Continental Congress signed the Declaration of Independence, thus establishing the American nation. During the ensuing Revolution, the new states showed the Continental Congress a great deal of deference. The national body controlled all matters dealing with the progress of the revolution. Additionally, no state drafted its own constitution without prior permission from Congress.¹¹⁸

Yet, the Revolutionary experience also appealed to a strong sense of statehood. The Declaration of Independence, for example, proclaimed the "Thirteen United States of America,"¹¹⁹ were "Free and Independent States [and] they have the full power to

statutes for ordering or regulating the internal polity of the said Colonies, or any of them, in any manner or in any case whatsoever are illegal and void.

Id. at 67.

117. John Adams, *Novanglus, To the Inhabitants of the Colony of Massachusetts-Bay* (Mar. 6 1775), in 2 PAPERS OF JOHN ADAMS, *supra* note 48, at 307-08. Adams continued: "And therefore I contend, that our provincial legislatures are the only supreme authorities in our colonies. Parliament, notwithstanding this, may be allowed an authority supreme and sovereign over the ocean, which may be limited by the banks of the ocean, or the bounds of our charters." *Id.* at 313. Adams, then summed up his position:

There has been, from the first to last, on both sides of the Atlantic, an idea, an apprehension that it was necessary, there should be some superintending power, to draw together all the wills, and unite the strength of the subjects in all dominions, in case of war, and in the case of trade.

Id. at 321. Although, Adams denied the power of war to the general government, noting that it was only necessary if the local governments were unprepared for war—something he supposed not to be the case in the future America. *See id.* at 322.

118. *See* RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 164 (1996). Indeed, until the general resolutions of May 10 and 15, 1776, no state drafted a constitution without receiving individual permission from Congress. *See id.*

119. THE DECLARATION OF INDEPENDENCE ¶ 1 (U.S. 1776).

levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things independent States may of right do."¹²⁰ Later, the Paris Treaty of 1783 listed each state separately and granted each state international recognition.¹²¹

As a result of this entrenched sense of statehood, the new states faced many interstate difficulties.¹²² New Yorkers and New Hampshireites eagerly questioned each other's loyalty.¹²³ Pennsylvanians feared the mounting Connecticut forces would be used in the dispute over Wyoming.¹²⁴ Carter Braxton of Virginia pointed to several troubles. Connecticut, for example, sent "eight-hundred Men in Arms: to enforce its claims in the Wyoming Valley of Pennsylvania," thus causing "heartburning & Jealousy between these People." In addition he reported that "New York is not without her Fears & Apprehensions from the Temper of her Neighbors," and "even Virginia is not free from Claims on Pennsylvania nor Maryland from those on Virginia."¹²⁵

120. *Id.* ¶ 32.

121. See Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365-92 (1899) (discussing this point).

122. The case of Vermont is but one illustration of the territorial conflicts between states in the young republic. In 1764, New York and New Hampshire asked the British Privy Council to settle the contest for jurisdiction over the area between the Hudson and Connecticut rivers; the Privy Council decided in favor of New York. See PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC, JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775-1787* 127 (1983). The Vermont independence movement was born from the subsequent challenges to the Privy Councils decision on behalf of settlers and speculators holding New Hampshire titles. See *id.* In 1777, Vermont was formally created when representatives of approximately twenty-eight towns in the New Hampshire Grants declared independence from New York and adopted their own constitution. See *id.* Vermont, thus, existed, yet as its own entity from 1777 to 1791, when it was formally admitted to the union. See *id.*

123. See ONUF, *supra* note 122, at 9 ("[The] Tories . . . to a man, through the whole State, are . . . in favour of the government of New-York.") (quoting ETHAN ALLEN, *ANIMADVERSARY ADDRESS TO THE INHABITANTS OF VERMONT* 5 (1778)). Not to be out done, New Yorkers circulated rumors of negotiations between England and Vermont. See, e.g., ONUF, *supra* note 122, at 9 (citing *THE PUBLISHED RESOLUTIONS OF THE TOWN OF GUILFORD*, March 12, 1782 (Vermont Historical Society, Montpelier, James Phelps Scrapbook)).

124. See Letter from Eliphat Dyer to William Judd, July 23, 1775, *reprinted in* 1 *LETTERS OF THE DELEGATES TO CONGRESS: 1774-1789* 654-55 (Paul H. Smith ed., 1996).

125. Letter from Carter Braxton to Landon Carter, April 14, 1776, *reprinted in* 3 *LETTERS OF THE DELEGATES TO CONGRESS: 1774-1789*, *supra* note 124, at 520-23. A report of the time concurred in this estimation: "The uncertainty of the Boundaries between Virginia and Penn[sylvani]a is the Cause of Great uneasiness." Letter from George Ross to Lancaster Committee of Correspondence, May 30, 1775, *reprinted in* 1 *id.* at 421-22. Because of these problems, Braxton advised, in his *Address to the Convention of Virginia*, Congress should "have power to adjust disputes between Colonies, regulate affairs of trade, war, peace, alliances, &c." See ONUF, *supra* note 122,

As illustrated during this period and the following decade, the young America ignored its traditions and localized power to dangerous levels. Such circumstance would force the states into a competition without any national guidelines. It would, however, take a decade of disunity before the young nation would learn from its history.

E. The Articles of Confederation, 1781-1787: Ignoring the Lessons of the Past

The Articles of Confederation¹²⁶ exemplified a weak central government and a strong sense of state sovereignty. Article II ex-

at 8 (quoting Carter Braxton, *Address to the Convention of Virginia*, 23-24 (Philadelphia 1776); *Virginia Gazette* (Dixon and Hunter), June 8, 1776)).

126. The Articles of Confederation, of course, was not the first attempt of the colonies to unify. The New England Confederation of 1643, borne of a limited desire for cooperation and the impression made by the Pequot War of 1637, created a loose association between the colonies of Connecticut, New Haven, Massachusetts and Plymouth. See ARTICLES OF CONFEDERATION (U.S. May 19 1643), *reprinted in* DOCUMENTS OF AMERICAN HISTORY *supra* note 54, at 26-28. Of course, The Dominion of New England was England attempt, albeit unsuccessful, to unite its colonies under one central government. See COLBOURN H. TREVOR, *THE COLONIAL EXPERIENCE READINGS IN EARLY AMERICAN HISTORY* 205-210 (1966). Over the next sixty-five years, various attempts were taken to unify the colonies, including those by Robert Livingston in 1701 and Daniel Coxe in 1722, *see id.* at 215, and William Penn in 1697. See *Penn's Plan of Union*, *reprinted in* DOCUMENTS OF AMERICAN HISTORY *supra* note 54, at 39-40. Interestingly, Penn's plan provided:

That their [the central colonial body] business shall be to hear and adjust all matters of complain or difference between province and province. As 1st, where persons quit their own province and go to another, that they may avoid their just debts, though they be able to pay them; 2d, where offenders fly justice, or justice cannot well be had upon such offenders in the provinces that entertain them; 3d, to prevent or cure injuries in point of commerce; 4th, to consider the ways and means to support the union and safety of these provinces against the public enemies.

Penn's Plan of Union, *reprinted in* DOCUMENTS OF AMERICAN HISTORY *supra* note 54, at 39-40. In 1754, both the colonists, meeting at the Albany Congress, and the English Board of Trade proposed plans at unification. See TREVOR, *supra* note 126, at 215-27 (reprinting the Board of Trade Plan and Benjamin Franklin's Plan, and a discussion of the other various plans for unification). Benjamin Franklin's *Albany Plan of Union* granted to the "Grand Council" the powers to: regulate Indian trade and affairs; make laws for new settlements prior to granting the settlements governments of their own; build forts for the defense of any of the colonies; and lay and levy taxes duties and imposts. Interestingly, Franklin discussed the "free rider" problem as a reason for consolidating the colonies under one colonial government. See Benjamin Franklin, *Reasons and Motives for the Albany Plan of Union*, in 5 *THE PAPERS OF BENJAMIN FRANKLIN*, *supra* note 93, at 399 (noting that a problem of dis-unification is that "one assembly [will be] waiting to see what another will do, being afraid of doing more than its share, or desirous of doing less"). Finally, in 1774, Joseph Galloway advanced the last significant plan for colonial unification before independence. Similar to Benjamin Franklin's Albany Plan, this plan failed by one vote, mostly because

pressed this position best: "Every State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."¹²⁷ A new era of dual-government was at hand, and the states were the senior authority.

The individual states retained the right to regulate commerce¹²⁸ and the right to tax.¹²⁹ All final lawmaking decision rested with them while congressional resolutions remained mere recommendations that states could enforce if each so chose. Moreover, states usurped many "national" powers reserved to the Congress under the Articles. Many states provided for armies, imposed embargoes and, in some cases, carried on separate diplomatic relations in Europe.

Yet, when compared to similar republican confederations throughout history, the Articles of Confederation achieved a great deal of unity. The Articles provided for the equality of all citizens of all states in privileges and immunities,¹³⁰ the reciprocity of extradition and judicial proceedings among the states,¹³¹ and the elimination of travel restrictions and discriminatory trade restrictions between the states.¹³² Importantly, the Articles recognized that the general government should control matters of war and foreign policy and they conferred substantial power upon Congress in Article 9 on those subjects.¹³³

1. *A Thirteen-Headed Monster*

The Articles of Confederation had varying authority in the individual States. In some states, "the Confederation is recognized by, and forms a part of the [State] constitution. In others however it has received no other sanction than that of the Legislative authority."¹³⁴ The arising problems were obvious: first, acts repugnant to

the colonists refused to accept that their legislature would be "an inferior and distinct branch of the British legislature." *Galloway's Plan of Union*, September 28, 1774, in 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 111, at 49-51.

127. ARTICLES OF CONFEDERATION art. 2 (U.S. Mar. 1, 1781).

128. *See id.* at art. 4.

129. *See id.*

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.* at art. 9.

134. James Madison's Notes, April 1787, reprinted in 24 LETTERS OF THE DELEGATES TO CONGRESS: 1774-1789, *supra* note 124, at 265.

the Articles of Confederation remained in force; second, the states could act contrary to the Articles without recourse.¹³⁵

Because of this lack of national influence and authority, the states experienced many problems. Easily the most pervasive problem dealt with state creditor and debtor laws. Simply put, states whose citizens were primarily debtors passed laws favorable to debtors (e.g., permitting payment of debts in devalued currency such as paper money). Such pro-debtor provisions were looked upon as attacks against the sanctity of contracts.

Under the Articles, states could not guarantee their own territorial integrity.¹³⁶ For example, Massachusetts, Virginia, and North Carolina (areas including the future Maine, Kentucky and Tennessee) all experienced separatist movements.¹³⁷ Vermont successfully wrested independence from New York and attracted towns in New Hampshire to it.¹³⁸ In addition, there was a movement to form a new state from Delaware and the eastern shores of Maryland and Virginia.¹³⁹ Similarly, disputes over the western lands (between the Appalachian Mountains and the Mississippi River) caused strife between the states with claims to such lands, as well as between those states without such claims.¹⁴⁰

Without a cohesive national commercial policy, the states engaged in highly competitive trade practices that caused a myriad of problems. Delaware, for example, due to its competitive disadvantages to Pennsylvania, struggled to compete commercially.¹⁴¹ Similarly, New Jersey, in addition to being ravaged by the Revolutionary War,¹⁴² unsuccessfully attempted to compete with New York and Pennsylvania for trade.¹⁴³ Even strong commercial states like Virginia faced commercial difficulties under the Articles. Maryland, due to its location on the Potomac River, levied heavy taxes on ships navigating the river that were destined for Northern

135. *See id.* at 268.

136. For an exhaustive discussion of this area, see ONUF, *supra* note 122, *passim* (discussing the turmoil created by the myriad of territorial disputes during the period before the Constitution).

137. *See id.* at 8-20 (discussing the multitude of interstate territorial conflicts during the period under the Articles of Confederation).

138. *See id.*

139. *See* RAKOVE, *supra* note 118 at 165 (discussing various territorial conflicts).

140. *See, e.g.*, ONUF, *supra* note 122, at 8-20.

141. *See generally* PATRICK T. CONLEY AND JOHN P. KAMINSKI, *THE CONSTITUTION AND THE STATES* 25-26 (1988).

142. *See id.* at 58.

143. *See id.*

Virginia.¹⁴⁴ Virginia, in response, threatened Maryland-bound ships that entered the Chesapeake Bay with taxes as well.¹⁴⁵

2. Early Solutions

Initiatives existed to remedy these problems. In 1781, and again in 1783, Congress entertained measures to increase its authority over commerce.¹⁴⁶ In response to the situation in Virginia, George Washington invited Maryland and Virginia delegates to his Mount Vernon home to discuss the problems.¹⁴⁷ Moreover, the delegates recommended holding annual conferences on commercial disputes.¹⁴⁸ As a result, Pennsylvania and Delaware sent delegates to the following year's convention. On the heels of this success, Congress considered expanding its commercial powers for twenty-five years.¹⁴⁹ Again, due to a lack of unanimous support, the motion failed.¹⁵⁰

Virginia suggested that all the states form a commission "to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony."¹⁵¹ During the proceedings of this commission, the com-

144. *See id.* at 202.

145. *See id.* Perhaps James Madison best articulated the problems with the United States under the Articles. *See* James Madison *Vices of the political system of the U. States*, (April 1787), reprinted in 24 LETTERS OF THE DELEGATES TO CONGRESS: 1774-1789, *supra* note 124, at 265. Of the greatest concern for Madison was the young nation's inability to effectively implement any national policy, the cutthroat competition ongoing among the states and the difficulties the states encountered while experimenting with democracy. *See id.* (listing the following "vices" of the states: "Failure of the States to comply with the Constitutional requisitions"; "Encroachments by the States on the federal authority"; "Violations of the law of nations and of treaties"; "Trespasses of the States on the rights of each other"; "Want of concert in matters where common interest requires it"; "Want of Guaranty to the States of their Constitutions and laws against internal violence"; "Want of sanction to the law, and of coercion in the Government of the Confederacy"; "Want of ratification by the people of the Articles of Confederation"; "Multiplicity of the laws in several States"; "Injustice of the laws of the States"; and "Impotence of the laws of the States").

146. *See* CONLEY & KAMINSKI, *supra* note 141, at 26. Thus, these measures would allow Congress to lay import duties.

147. *See id.* at 203.

148. *See id.* The Maryland legislature suggested that Pennsylvania and Delaware send delegates to the conference as well.

149. *See id.* at 26.

150. *See id.*

151. Resolution of the General Assembly of Virginia Proposing a Joint Meeting of Commissioners From the States to Consider and Recommend a Federal Plan for Regulating Commerce, Jan. 21, 1786, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 38 (Charles C. Tansill, 1927) [hereinafter "DOCUMENTS"].

missioners¹⁵² agreed that the problems of the Union did not concern trade alone.¹⁵³ The New Jersey Commissioners thought that, because commercial interests were so intertwined with other powers, this commission should expand its scope and examine other areas.¹⁵⁴ In the end, the commission suggested that the States appoint commissioners "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."¹⁵⁵

Ironically, what the Americans learned under the Articles of Confederation was that the balance of power between the central and local governments was more efficient under the colonial system. Even from thousands of miles away, by having England exercise control over external matters, the colonies avoided the problems the states faced under the Articles. The lack of central control of interstate commerce, a defect complained of by most states at the time, caused a host of problems. Similarly, whereas the Privy Council adjudicated matters of territorial integrity, there was no such body under the Articles. Consequently, the states engaged in fierce competition among one another.

152. The commissions were: Alexander Hamilton and Egbert Benson of New York, Abraham Clarke, William C. Houston and James Schuarman of New Jersey, Tench Coxe of Pennsylvania, George Reed, John Dickinson, who was unanimously elected Chairman, and Richard Bassett of Delaware and Edmund Randolph, James Madison and Saint George Tucker of Virginia. See *Proceedings of Commissioners to Remedy Defects of the Federal Government*, Sept. 11, 1786, *in id.* at 39.

153. See *Proceedings of Commissioners to Remedy Defects of the Federal Government*, Sept. 14, 1786, *in id.* at 41. Early on it was noted:

That the State of New Jersey had enlarged the object of their appointment, empowering their Commissioners, "to consider how far an uniform system in their commercial regulations and *other important matters*, might be necessary to the common interest and permanent harmony of the several States and to report such an Act on the subject, as was ratified by them would enable the United States in Congress assembled, effectually to provide for the exigencies of the Union.

Id. Although the commissioners noted that such was beyond the scope of their authority, they agreed "[t]hat there are important defects in the system of the Federal Government" that should be addressed at a Convention. *Id.* at 42.

154. See *Proceedings of Commissioners to Remedy Defects of the Federal Government*, Sept. 14, 1786, *in id.* at 42.

[T]hat the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System.

Id.

155. See *Proceedings of Commissioners to Remedy Defects of the Federal Government*, Sept. 14, 1786, *in DOCUMENTS*, *supra* note 151, at 42.

F. The Constitutional Convention, 1787

Born of a desire to remedy the defects in the Articles of Confederation,¹⁵⁶ Congress commissioned a Convention "for the sole and express purpose of revising the Articles of Confederation."¹⁵⁷

Accordingly, the Convention identified both the goals for the new government,¹⁵⁸ as well as the defects with the old one.¹⁵⁹ These became the principles underlying the new government.

One of the fundamental goals for the new government was to retain the advantages of the states while procuring the "various blessings" of a general government. A number of instances show the predilection of the delegates towards preserving the states.¹⁶⁰

156. See Report of Proceedings in Congress, Feb. 21, 1787, *in id.* at 44-45.

That it be recommended to the States composing the Union that a convention of representatives from the said States respectively be held at — on — for the purpose of revising the Articles of Confederation and perpetual Union between the United States of America and reporting to the United States in Congress assembled and to the States respectively such alterations and amendments of the said Articles of Confederation as the representatives met in such convention shall judge proper and necessary to render them adequate to the preservation and support of the Union.

Id.

157. See *id.* at 46.

158. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 18 (Max Farrand ed., 1937) [hereinafter FARRAND]. Randolph told the Convention that the new government should:

secure 1., against foreign invasion: 2., against dissentions between members of the Union, or seditions in particular states: 3., to p[ro]cure to the several States, various blessings, of which an isolated situation was i[n]capable: 4., to be able to defend itself against incroachment: and 5. to be paramount to the state constitutions.

1 *id.* at 18.

159. 1 *id.* at 19. Randolph told the delegation:

[T]hat the confederation produced no security agai[nst] foreign invasion; congress not being permitted to prevent a war nor to support it by th[eir] own authority . . . that the federal government could not check the quarrels between states, nor a rebellion in any not having constitutional power Nor means to interpose according to the exigency . . . that there were many advantages, which the U.S. might acquire, which were not attainable under the confederation - such as a productive impost - counteraction of the commercial regulations of other nations - pushing commerce ad libitum . . . that the federal government could not defend itself against incroachments from the states . . . that it was not even paramount to the state constitutions, ratified, as it was in many of the states.

1 *id.* at 19.

160. Even such an ardent nationalist as James Wilson observed:

that by a Nat[iona]l Government he did not mean one that would swallow up the State Governments as seemed to be wished by some gentlemen. He was tenacious of the idea of preserving the latter. . . . [States] were absolutely necessary for certain purposes which the former could not reach. All large Governments must be subdivided into lesser jurisdictions.

Likewise, the Convention expanded national authority to address the problems faced by the states under the Articles — most often parroting the powers commonly wielded by England. For example, the Convention voted to grant powers to the national body necessary to preserve harmony between the States¹⁶¹ and thought it wise for the general government to protect the governments of the states, such that it may suppress rebellions in the states and protect against foreign invasions.¹⁶²

1. *Setting the Boundaries*

Although the delegates generally understood the principle of dual-government, defining the boundaries of the national and state powers became increasingly difficult.¹⁶³ Roger Sherman attempted to define the jurisdiction, suggesting that Congress should:

make laws binding on the people of the United States in all cases which may concern the common interests of the Union; but not to interfere with the Government of the individual States in any matters of internal police which respect the Gov-

1 *id.* at 322-23. John Dickinson of Delaware noted “one source of stability is the double branch of the Legislature. The division of the Country into the distinct States formed the other principal source of stability. This division ought therefore to be maintained, and considerable powers to be left with the States.” 1 *id.* at 86. Indeed, James Madison would “preserve the State rights, as carefully as the trials by jury.” 1 *id.* at 490. General Pinckney “wished to have a good national Gov[ernmen]t and at the same time leave a considerable share of power in the States.” 1 *id.* at 137. Rufus King suggested that Congress provide a bill of rights for the states, as between the layers of government. 1 *id.* at 493 (“As the fundamental rights of individuals are secured by express provisions in the State Constitutions; why may not a like security be provided for the Rights of the States in the National Constitution.”).

161. See 1 *id.* at 54.

162. See 2 *id.* at 47-48. Luther Martin thought that the states should suppress rebellions themselves, although this was quickly dismissed. See 1 *id.* at 48.

163. Such difficulties eventually doomed the proposed provision that the national government should legislate “in all cases to which the State Legislatures were individually incompetent.” 1 *id.* at 53. Mr. Pinkney and Mr. Rutledge objected to the vagueness of incompetent and required Mr. Randolph to elaborate. “Mr. Randolph disclaimed any intention to give indefinite powers to the national Legislature, declaring he was entirely opposed to such an inroad on the State jurisdictions, and that he did not think any considerations whatever could ever change his determination.” See 1 *id.* at 53. After this elaboration, the delegation unanimously voted for the clause, with Connecticut divided. On July 16, however, the vote was retaken, now with a frame for what the houses of Congress and the rest of the government would look like. Again, two delegates objected to the term “incompetent” and this time the motion failed, with the vote ending in a tie. See also 2 *id.* at 17 (“Mr. Butler calls for some explanation of the extent of this power: particularly of the word *incompetent*. The vagueness of the terms rendered it impossible for any precise judgment to be formed.”); see 2 *id.* at 17 (“Mr. Rutledge, urged the objection started by Mr. Butler . . .”).

ernment of the such States only, and wherein the general welfare of the United States is not concerned.¹⁶⁴

Although this resolution failed,¹⁶⁵ the national and state governments eventually possessed separate and distinct jurisdictions, similar to those Sherman proscribed.¹⁶⁶

Indeed, many of the Delegates agreed with Sherman's concept of layered government.¹⁶⁷ John Dickinson "compared the proposed National System to the Solar System, in which the States were the planets, and ought to be left to move freely about their proper orbits."¹⁶⁸ The Committee of Eleven recommended to the Convention that the general welfare provision not interfere with the State's "internal police."¹⁶⁹ Oliver Ellsworth thought that the "Nat[ional] Gov[ernment]t could not descend to the local objects

164. 2 *id.* at 25. James Wilson seconded the amendment, as "better expressing the general principle." 2 *id.* at 26. Roger Sherman elaborated on this point:

The objects of the Union he thought were few: 1. defence ag[ain]st foreign danger. 2. ag[ain]st internal disputes & a resort to force. 3. Treaties with foreign nations 4 regulating commerce & drawing revenue from it. These & perhaps a few lesser objects alone rendered a Confederation of States necessary. All other matters civil & criminal would be much better in the hands of the States.

1 *id.* at 133.

165. See 2 *id.* at 25 (the resolution failed by a vote of seven to two). Perhaps more interesting is the ensuing debate, in particular the early understanding of "internal police" to mean more than criminal enforcement. Moreover, Gouverneur Morris categorized issuing paper money as part of the "internal police" as understood by the States. See 2 *id.* at 26 (he noted that such a power "ought to be infringed"). Roger Sherman continued, noting that the levying of taxes on trade was also an internal police power. See 2 *id.* at 26.

166. See 1 *id.* at 133 (Roger Sherman "was for giving the General Gov[ernment]t power to legislate and execute within a defined province.").

167. In particular, George Mason noted that the "General Government could not know how to make laws for every part—such as respect agriculture [etc]." 1 *id.* at 160. James Wilson observed that "War, Commerce and Revenue were the great objects of the General Government. All of them connected with money." 2 *id.* at 275. As Wilson later explained:

Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.

2 ELLIOT'S DEBATES, *supra* note 2, 424. Such was the common view of the delegates. George Mason, for example, said that the "General government could not know how to make laws for every part—such as respect agriculture &c." 1 FARRAND, *supra* note 158, at 160. Roger Sherman later related this point to why the national government was not given authority to establish a university: "it was thought sufficient that this power should be exercised by the States in their separate capacity." 3 *id.* at 362.

168. 1 FARRAND, *supra* note 158, at 152-53.

169. 2 *id.* at 367.

on which this [domestic happiness] depended. It could only embrace objects of a general nature," such as "national security."¹⁷⁰ Although the Convention failed to accept any provision explicitly protecting state police powers,¹⁷¹ later clarifications by the delegates show this to be their actual intention.¹⁷²

2. *Negative on State Laws*

Perhaps the most illuminating debate on national and state authority took place when James Madison proposed to grant the national government a "negative" over improper state laws.¹⁷³ Not surprisingly, this national legislative veto was derived from the colonial experience under England.¹⁷⁴ Madison himself referred to this power as "a negative in all cases whatsoever on the legislative act of States, as heretofore exercised by the Kingly prerogative."¹⁷⁵ Madison likened it to the British example where "harmony & subordination of the various parts of the empire" were maintained thanks to "the prerogative by which means the Crown, stifles in the birth every Act of every part tending to discord or encroachment."¹⁷⁶ This, however, was one instance when the Framers rejected the ways of the past.

Certainly Madison garnered some minimal support for the provision. Charles Pinckney, for example, supported the provision from the beginning.¹⁷⁷ The veto, however, was vigorously attacked. Mr. Williamson argued that the negative should not extend to the

170. 1 *id.* at 492.

171. Even though the Convention held a vote on such a provision twice. See 2 *id.* at 25, 630.

172. See, e.g., *infra* notes 178-185 and accompanying text.

173. 1 FARRAND, *supra* note 158, at 164-65. Madison thought it necessary to give this power over all state laws because "[a] discrimination [between categories of laws] w[oul]d only be a fresh source of contention between the two authorities." 1 *id.* at 165. The "negative" on state laws resembled the kingly prerogative over colonial laws, as it served as a federal veto power over state laws.

174. 1 *id.* at 164 (Mr. Pinckney noted "that under the British Gov[ernmen]t the negative of the Crown had been found beneficial . . ."); 1 *id.* at 168 (Mr. Madison observed "[t]his was the practice [the negative] in Royal Colonies before the Revolution and would not have been inconvenient; if the supreme power of negating had been faithful to the American interest, and had possessed the necessary information.").

175. Letter to George Washington, Apr. 16, 1787, in 9 THE PAPERS OF JAMES MADISON 383-84 (Robert Rutland et al. eds., 1975).

176. 2 FARRAND, *supra* note 158, at 28.

177. On June 8, Mr. Pinckney moved that the national legislative veto extend to "all Laws which they [the members of the national legislature] sh[oul]d judge to be improper." 1 *id.* at 164.

state's internal police.¹⁷⁸ Elbridge Gerry thought that a "Nat[ional] Legislature with such a power may enslave the States. Such an idea as this will never be acceded to."¹⁷⁹ Even the staunch nationalist Governor Morris opposed the power "as likely to be terrible to the States, and not necessary, if sufficient Legislative authority should be given to the Gen[eral] Government."¹⁸⁰ Ultimately, despite two votes on the subject, the negative on state laws failed to become part of the Constitution.¹⁸¹

This debate more than illustrates that the Framers rejected bestowing open-ended national authority as a means for controlling the states. It also shows that the Framers intended to restrain the states by granting the union sufficient powers, over which it was supreme.¹⁸² Indeed, Governor Morris stated just that proposition.¹⁸³ Moreover, recall that the Committee of Detail replaced the original Virginia Plan,¹⁸⁴ and its broad categories of national powers, with a detailed list of powers that the national legislature would exercise.¹⁸⁵ Consideration of such evidence strongly exhibits that the Framers intended the allocation of authority to serve as the limit on the state governments.

178. 1 *id.* at 165.

179. 1 *id.* at 165 ("Mr. Gerry c[oul]d not see the extent of such a power, and was ag[ain]st every power that was not necessary. He thought a remonstrance ag[ain]st unreasonable acts of the States w[oul]d reclaim them. . . . He had no objection to authorize a negative to paper money and similar measures.").

180. 2 *id.* at 27.

181. 1 *id.* at 168. This vote was taken twice and each time the Convention rejected the proposal. *See* 1 *id.* at 168; 2 *id.* at 28.

182. *See* U.S. CONST. art. VI, § 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

183. *See supra* note 180 and accompanying text.

184. The Virginia Plan provided that the national government "legislate in all Cases for the general interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation." 2 FARRAND, *supra* note 158, at 25.

185. *See* Draft IV, in 2 *id.* at 142-44; *see also* Note, John C. Hueston, *Altering the Course of the Constitutional Convention: the Role of the Committee of Detail in Establishing the Balance of State and Federal Powers*, 100 YALE L.J. 765-83 (1990) (discussing the Committee of Detail's role in defining the powers of the national legislature). Historian Clinton Rossiter writes: "The most important contribution of the committee of detail was to convert the general resolution on the law-making authority of the proposed government to a list of eighteen specific powers of Congress . . ." CLINTON ROSSITER 1787: THE GRAND CONVENTION 208 (1966).

3. *Forming the Senate*

A number of resolutions on the formation of the Senate further illustrate the intended separateness between governments. The best example was the institution of per capita voting. Previously, as well as in the Constitutional convention, delegates voted in bloc fashion, meaning each State possessed one vote, regardless of the delegates a State sent to the convention. Governor Morris and Rufus King, however, moved for providing each Senator with a separate vote—per capita voting.¹⁸⁶ The motion passed with only Maryland, Luther Martin's State, disapproving.¹⁸⁷ Thus, the States, as a political body, would have much less influence in the Senate, than they possessed in previous conventions.

One hotly debated topic during the Convention concerned the payment of Legislators, particularly of Senators.¹⁸⁸ The debate, however, ultimately centered on the role of the Senate in relation to the States. If the several states were to compensate their respective Senators, then the Senate would serve to represent the states.¹⁸⁹ Alternatively, if Senators were paid out of the national treasury, then the Senate would be regarded as a national body.¹⁹⁰ The Convention resoundingly voted to pay all federal legislators out of the national treasury.¹⁹¹ In so doing, the Convention seems to have desired that the Senate not represent the States, despite state selection of Senators.¹⁹²

Finally, the Convention discussed the selection process for Senators, specifically, "that the members of the second branch ought to be chosen by the individual Legislatures."¹⁹³ During this discussion, Mr. Sherman noted that if the States selected one branch of

186. 2 FARRAND, *supra* note 158, at 94. Luther Martin opposed the motion, on the grounds that it departed from "the idea of the *States* being represented in the second branch [the Senate]." 2 *id.* at 94.

187. *See* 2 *id.* at 95. This provision was brought up again on August 9, and was agreed upon without debate on the merits of the provision. *See* 2 *id.* at 233-34.

188. *See* 2 *id.* at 287-92.

189. *See* 2 *id.* at 292 (Mr. Luther Martin noted "[a]s the Senate is to represent the States, the members of it ought to be paid by the States.>").

190. *See* 2 *id.* at 292 (Mr. Carrol countered Mr. Martin's comment noting, "[t]he Senate was to represent and manage the affairs of the whole, and not to be the advocates of State interests. They ought then not to be dependent on nor paid by the States.>").

191. *See* 2 *id.* at 292.

192. *But see* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), reprinted in 24 LETTERS OF DELEGATES TO CONGRESS 500, 504 (Paul Smith ed., 1996) ("The Senate will represent the States in their political capacity; the other House will represent the people of the States in their individual capacity.>").

193. 1 FARRAND, *supra* note 158, at 150.

the government, they would have an interest in the national government, thus promoting harmony between the two governments.¹⁹⁴ Colonel Mason articulated another reason for giving the States a voice in the composition of the national legislature:

The State Legislatures also ought to have some means of defending themselves against encroachments of the National Government. In every other department we have studiously endeavored to provide for its self-defence. Shall we leave the States alone unprovided with the means for this purpose? And what better means can we provide than the giving them some share in, or rather to make them a constituent part of the National Establishment.¹⁹⁵

James Wilson disagreed, observing that the government rested on the people at large. Thus, because the government was meant for individuals, the Senate should not become a body representing the States.¹⁹⁶ Mr. Pierce had a different understanding. He looked to allow the state legislatures to select Senators because then "the Citizens . . . would be represented both *individually* [in the House of Representatives] and *collectively* [in the Senate]."¹⁹⁷ This, in turn, would create dissension in Congress. Despite Wilson's observations, the delegates twice voted in favor of allowing the states to appoint senators.¹⁹⁸

194. See 1 *id.* at 150. Sherman later added that the character of Senators would likely be better if chosen by the State legislatures than if chosen by the people. See 1 *id.* at 154. Pinkney "thought the second branch [the Senate] ought to be permanent and independent and that the members of it would be rendered more so by receiving their appointment from the State Legislatures." 1 *id.* at 155. Sherman admitted that the States and National Governments "ought to have separate and distinct jurisdictions, but that they ought to have a mutual interest in supporting each other." 1 *id.* at 150. Thus, allowing the states to select Senators would ensure that the governments would support each other.

195. 1 *id.* at 155-56.

196. See 1 *id.* at 405-06. By allowing the State legislatures to select Senators, argued Wilson, the government would then rest on different foundations. See 1 *id.* at 405-06.

197. See 1 *id.* at 137.

198. The first vote was unanimous, see 1 *id.* at 156, the second by a nine to two vote. See 1 *id.* at 408. Based on the debates, one cannot be sure if the Senate was the states' voice in the national government or not. That the states were permitted to select their Senators shows intent of the Convention to grant considerable influence over national policy to the states. Measures like per capita voting work to strengthen the independence of individual Senators, decreasing Senator's dependence on their home states. Additionally, paying Senator's wages from the national government's treasury increases senatorial allegiance to the national government at the states' expense. The importance of this bears on whether the Framers intended for the national political process to work out federalism concerns, or whether the Supreme Court should mediate such disputes. See Herbert Weschler, *The Political Safeguards of Federalism: The*

4. *The Final Document*

The final draft of the Constitution granted to the national government various powers, most of which relate to the defects of the Articles of Confederation. For example, one of the nation's greatest deficiencies under the Articles was the lack of a national commerce authority. The new commerce power extended to Congress the powers to lay imposts, excises and duties.¹⁹⁹ Similarly, the Constitution conferred to Congress the power to coin money and regulate its value, thereby answering the problem of the various paper money laws throughout the states.²⁰⁰

The Articles permitted the states to maintain their own militias and ratify treaties, thus indicating a lack of a national foreign policy power. The Constitution rectified these defects by providing for a national military and foreign policy power. The Constitution also conferred the power to Congress to punish piracies, felonies on the high seas and offenses against the laws of nations — all crimes that effect the nation as a whole, rather than its constituent parts.

Moreover, all the objects of the general government were those that affected the nation as a whole. While the delegation rejected a proposal for the national government to create universities,²⁰¹ it supported a proposition to “promote the Progress of Science and useful Arts.”²⁰² This illustrates a line of demarcation the delegates observed between management and funding. While creating a university was a local act, as it would necessitate management within a state, supporting science and the arts implies funding, an act that does not require management on the level of a university.²⁰³

The Supremacy Clause, however, remedied the most obvious defect in the Articles. It protected the pursuits of the national government, thereby preventing the states from legislating on general matters. Any state attempts to legislate on matters proper for the national government would stand only at the whim of the national government.

Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954).

199. See U.S. CONST. art. I, § 8, cl. 1.

200. See U.S. CONST. art. I, § 8, cl. 5.

201. See 2 FARRAND, *supra* note 158, at 616. Although the only debate on the subject suggested that Congress had the power to do so within its other powers—although this was only the view of Gouverneur Morris. See 2 *id.* at 616.

202. U.S. CONST. art. I, § 8, cl. 8.

203. The only example of the Constitution granting Congress a power that would require “management” of a local institution was the power to establish post offices. See U.S. CONST. art. I, § 8.

In a letter to Thomas Jefferson, James Madison discussed the now completed debates:

[T]he great objects which presented themselves [in the convention] were 1. to unite a proper energy in the Executive and a proper stability in the Legislative departments, with the essential characteristics of Republican Government. 2. to draw a line of demarkation which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered by them. 3. to provide for the different interests of different parts of the Union. 4. to adjust the clashing pretensions of the large and small States.²⁰⁴

He described the second object, partitioning power between governments, as "the most nice and difficult."²⁰⁵ As this discussion shows, while the delegates differed as to the importance of states,²⁰⁶ the grand majority sought to balance governmental power between the states and national government.²⁰⁷ This debate over the role of the states, however, was far from over when the Convention closed; it was in fact, just getting under way.

G. The Ratifying Conventions, 1787-1789

Perhaps the most hotly contested issue in the ratification conventions was the role of the states and the national government in this new federal system. The Antifederalists feared what this new, strengthened national government would do to the states.²⁰⁸ Most

204. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 24 *LETTERS OF THE DELEGATES TO CONGRESS*, *supra* note 124, at 500, 501.

205. 24 *id.* at 502.

206. "A few contended for the entire abolition of the States; Some for indefinite power of Legislation in the Congress, with a negative on the laws of the States: some for such a power without a negative: some for a limited power of legislation, with such a negative: the majority finally for a limited power without the negative." 24 *id.* at 502-03.

207. *See, e.g.*, 24 *id.* at 507 ("In the extended Republic of the United States, The General Government would hold a pretty even balance between the parties of the particular States, and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interests.").

208. Surprisingly, the role of the new courts, and how the courts would impact on the states, was a heavily debated topic. *See* 3 *ELLIOT'S DEBATES*, *supra* note 2, at 57, 319, 446, 539-46 (speeches of Henry in the Virginia Convention); 3 *id.* at 66-67, 517, 546-49, 570-72 (speeches Pendleton in the Virginia Convention); 3 *id.* at 247, 443 (speeches of Nicolas in the Virginia Convention); 3 *id.* at 468 (speech of Randolph in the Virginia Convention); 3 *id.* at 521-29 (speech of Mason in the Virginia Convention); 3 *id.* at 532-36 (speech of Madison in the Virginia Convention); 3 *id.* at 551-55 (speech of Marshall in the Virginia Convention); 2 *id.* at 109 (speech of Holmes in the Massachusetts Convention); 2 *id.* at 112 (speech of Gore in the Massachusetts Con-

of the Antifederalists scoffed at this balance between governments, relying largely on the doctrine of *imperium ad imperio*: the impossibility of having two sovereigns rule one country. The Federalists, however, conceived layered government differently.

vention); 2 *id.* at 113-14 (speech of Dawes in the Massachusetts Convention); 2 *id.* at 144 (speech of Thatcher in the Massachusetts Convention); 2 *id.* at 469, 480, 486-94, 517, 518 (speeches of Wilson in the Pennsylvania Convention); 2 *id.* at 517 (speech of Smile in the Pennsylvania Convention); 4 *id.* at 136-38, 154, 155, 164 (speeches of Spencer in the North Carolina Convention); 4 *id.* at 140, 144 (speech of Spaight in the North Carolina Convention); 4 *id.* at 141, 150 (speech of Johnston in the North Carolina Convention); 4 *id.* at 143, 151, 166 (speeches of Bloodworth in the North Carolina Convention); 4 *id.* at 143 (speech of McDowell in the North Carolina Convention); 4 *id.* at 145-47, 152, 165, 170-72 (speeches of Iredell in the North Carolina Convention); 4 *id.* at 151, 162, 172 (speeches of Maclaine in the North Carolina Convention); 4 *id.* at 156-59 (speech of Davie in the North Carolina Convention). In particular, sixteen of the seventy-nine suggested Amendments to the proposed Constitution were proposals for changes in the Judiciary Article. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 55 (1923-24). The Virginia ratification agreement contained a proposed amendment suggesting that "those clauses which declare that Congress shall not exercise certain powers, be not interpreted in any manner whatsoever to extend the powers of Congress; but that they be construed either as making exceptions to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution." 3 ELLIOT'S DEBATES, *supra* note 2, at 661. North Carolina suggested that amendment, verbatim, in its ratification agreement. See DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1050 (Meyer ed. 1923). South Carolina proposed a similar proposition: "This convention doth also declare that no section or paragraph of the said Constitution warrants a construction that the States do not retain every power not expressly relinquished by them, and vested in the general government of the Union." *Id.* at 1023. Two states (Pennsylvania and Maryland) had substantial minorities who favored such amendments as well. See HORACE A. DAVIS, *THE JUDICIAL VETO* 69-113 (1914). This illustrates the fear of many early-Americans that encroachment on state powers was inevitable. Passages in state amendments to the Constitution alluding to *construction* of the Constitution illustrate the fear that the Federal Judiciary, in granting great deference to Congress, as a fellow member of the national government, would expand Congress' powers at the expense of the states. Many thought that the new Federal Judiciary would work to subvert the states and reinforce national supremacy. So penned Robert Yates, writing under the pseudonym "Brutus":

That judicial power will operate to effect in the most certain but silent and imperceptible manner what is evidently the tendency of the Constitution - I mean, an entire subversion of the legislative, executive and judicial powers of the individual States. Every adjudication of the Supreme Court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the State jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted. That the judicial power of the United State will lean strongly in favor of the general government, and will give such an explanation to the Constitution, as will favor an extension of its jurisdiction, is very evident from a variety of considerations.

in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 295 (Paul Leicester Ford ed., UMI ed. 1989) (1892).

James Wilson, in his speech on November 26, 1787,²⁰⁹ described the interplay between the state and the proposed national government.²¹⁰ He told the Pennsylvania Convention:

It was easy to discover a proper and satisfactory principle on the subject [the proper line between the national and state governments]. Whatever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States.²¹¹

He later explained his position in his lecture on the History of Confederacies, while a professor of law at the college of Philadelphia in the winter of 1790-91.²¹²

In this kind of republic [the United States], the rights of internal legislation may be reserved to all the states, of which it is composed; while the adjustment of their several claims, the power of peace and war, the regulation of commerce, the right of entering into treaties, the authority of taxation, and the direction and government of the common force of the confederacy may be vested in the national government.²¹³

The Federalist Papers took this position as well:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.²¹⁴

Madison explained that "it is only within a certain sphere that the federal power can in the nature of things, be advantageously administered."²¹⁵ Moreover,

[t]he powers delegated in the proposed constitution to the federal government are few and defined. Those which are to re-

209. Historians often say that but for this speech, the Constitution would not have been adopted. See *PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788* 758 (John B. McMaster & Frederick D. Stone eds., 1970).

210. See 1 *THE WORKS OF JAMES WILSON* 533 (James DeWitt Andrews ed., 1896).

211. 1 *id.* at 535.

212. See 1 *id.* at xvii.

213. 1 *id.* at 312.

214. See *THE FEDERALIST* No. 51, *supra* note 2, at 323 (James Madison).

215. See *THE FEDERALIST* No. 46, *supra* note 2, at 295 (James Madison).

main in the State governments are numerous and indefinite. The Former will be exercised principally on external objects as war, peace, negotiations and foreign commerce The powers reserved to the States will extend to all objects which, in the course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State.²¹⁶

Hamilton agreed with this proposition. He explained that this allocation of powers provides state and national leaders with enough power to oppose the other's abuse of power.²¹⁷

Madison added an interesting twist to the notion of layered government. Where earlier periods saw fighting and disobedience between governments, due to perceived encroachments on each other's spheres of authority, Madison proposed that the jurisdiction of both governments might change.²¹⁸ He anticipated that, although commerce, war, and foreign affairs were amongst the general concerns of 1787, local objects could one day become matters of a "general concern." Conversely, objects once general may devolve to make state control beneficial. This aspect of federalism may be the most original innovation of the Framers.

H. A Summary

Federalism, a system of layered government that divides authority among levels of government, has existed throughout America's history. Generally speaking, the central body, be it the King or the national government, must control matters of general interest.²¹⁹

216. THE FEDERALIST NO. 45, *supra* note 2, at 303. In the Virginia Convention Madison repeated, "The powers of the general government relate to external objects, and are but few, but the powers in the State relate to those great objects which immediately concern the prosperity of the people." 3 ELLIOT'S DEBATES, *supra* note 2, at 259.

217. See THE FEDERALIST NO. 26, *supra* note 2, at 177 (Alexander Hamilton).

218. THE FEDERALIST NO. 46, *supra* note 2, at 295 ("If . . . the people should in the future become more partial to the federal than the State governments . . . the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due.").

219. Interestingly, from 1789 to 1792 Congress exercised its authority over the following matters in the general interest: Oath of Affirmation, *see* Act of June 1, 1789, ch. 1, 1 Stat. 23; establishment of the Department of War, *see* Act of Aug. 7, 1789, ch. 7, 1 Stat. 50; Northwest Territory government, *see* Act of Aug. 7, 1789, ch. 8 1 Stat. 50; Indian Negotiations, *see* Act of Aug. 20, 1789, ch. 10, 1 Stat. 59; Judiciary, *see* Act of Sept. 24, 1789, ch. 20, 1 Stat. 73; Naturalization of Citizens (limited naturalization to whites only) Act of Mar. 26, 1790, ch. 3, 1 Stat. 103; Patents, *see* Act of Apr. 10, 1790, ch. 7, 1 Stat. 109; Piracy, *see* Act of Apr. 30, 1790, ch. 9, 1 Stat. 112; Copyrights, *see* Act of May 31, 1790, ch. 15, 1 Stat. 124 (current version in various sections of 17 U.S.C.); Presidential Electoral College, *see* Act of Mar. 1, 1792, ch. 8, 1 Stat. 239;

The individual colonies or states, on the other hand, must represent matters of local interest. This paradigm existed under the colonies, and clearly influenced the Framers' version of federalism. This is evident through comparing the colonial jurisdictions with the anticipated constitutional ones.

Perhaps the great innovation to federalism was the idea these jurisdictions are not permanent. Indeed, the Framers intended that the jurisdictions change with time as the needs of the people demand. Lastly, the Constitution should not be viewed as favoring central government or local government; the Constitution is merely a return to the wisdom of the ages before the Articles of Confederation, an age when governments acted upon objects best suited to their particular advantages.

II. Congressional Federalism in the Courts

Prior to 1937, the Supreme Court used federalism as the means for invalidating a myriad of national laws.²²⁰ The New Deal, however, changed federalism forever. Cases such as *NLRB v. Jones & Laughlin Steel Co.*,²²¹ *United States v. Darby*²²² and *Wickard v. Filburn*,²²³ refused to limit the national legislative power due to federalism concerns. As Professor Laurence Tribe remarked, "[f]or almost four decades after 1937, the conventional wisdom was that federalism in general — and the rights of states in particular — provided no judicially — enforceable limits on congressional power."²²⁴

Federal Pension Claims, see Act of Mar. 23, 1792, ch. 11, 1 Stat. 243; Presidential federalization of the militia, see Act of May 2, 1792, c. 28, 1 Stat. 269.

220. See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 11-13 (1888) (precluding application of federal antitrust laws to production); *Hammer v. Duggenhardt*, 247 U.S. 251, 272 (1918) (invalidating federal laws regulating the use of child labor) (*overruled* by *United States v. Darby*, 312 U.S. 100, 117 (1941)); *United States v. Butler*, 297 U.S. 1, 68, 78 (1936) (invalidating federal subsidies for agriculture); *Carter v. Carter Coal Co.*, 298 U.S. 238, 310 (1936) (invalidating the Bituminous Coal Conservation Act of 1935 because the act regulated production and not commerce); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (invalidating provisions of the National Industrial Recovery Act of 1933 because the regulated activities were indirectly connected to interstate commerce); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330, 374 (1935) (invalidating the Railroad Retirement Act because Congress did not have the power to establish a compulsory retirement and pension plan, because it had no reasonable relationship to commerce).

221. 301 U.S. 1, 27 (1937).

222. 312 U.S. 100, 113 (1941).

223. 317 U.S. 111, 115 (1942).

224. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 378 (2d ed. 1988).

For the next thirty years, Congress was permitted to regulate nearly every human industry. This became strikingly clear in *Heart of Atlanta Motel, Inc. v. United States*,²²⁵ where the Court upheld Title II of the Civil Rights Act of 1964 through congressional authority under the Commerce Clause.²²⁶ There, despite the original objective for the Act,²²⁷ the Court found that "the applicability of Title II is carefully limited to enterprises having direct and substantial relation to the interstate flow of goods and people . . ."²²⁸ To wit, the Court allowed Congress to regulate race relations under the Commerce Clause, even though Congress did not consider the regulation to be commercial.²²⁹

A. *National League of Cities v. Usery*

After *Heart of Atlanta*, federalism hit an all-time low. Indeed, the Supreme Court read into a law a commercial intent regardless of Congress' original intention. Yet, federalism lay dormant rather than dead. In 1976, Justice Rehnquist revived federalism in *National League of Cities v. Usery*.²³⁰ And although *Usery* was later overturned, it is known as the Supreme Court case most responsible for the judicial rebirth of federalism.²³¹

At issue in *Usery* was a 1974 amendment to the Fair Labor Standards Act extending minimum wage and maximum hours provi-

225. 379 U.S. 241 (1964).

226. *See id.* at 242-44.

227. *See id.* at 250 (quoting the Senate Commerce Committee) ("[T]he fundamental object of Title II was to vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'").

228. *Id.*

229. Congress did note that it thought this regulation was permissible under the Commerce Clause, just that it was not commercial in nature. *See id.* (noting that Congress thought its moral objective could be achieved "by congressional action based on the commerce power of the Constitution").

230. 426 U.S. 833 (1976). This opinion did not come as a complete shock however. The Supreme Court had issued a series of decisions that trumpeted the virtues of federalism. *See New York v. United States*, 326 U.S. 572, 582 (1946) ("There are . . . State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations."); *Maryland v. Writz*, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting) (arguing that the wage guarantees in the Fair Labor Standards Act did not apply to state employees previously exempted from the Act); *Oregon v. Mitchell*, 400 U.S. 112, 117 (1970) (holding that Congress could not establish a minimum voting age in state elections due to federalism concerns); *Fry v. United States*, 421 U.S. 542 (1975) (Rehnquist, J., dissenting) ("The Courts' decision in *Hans v. Louisiana* . . . offers impressive authority for the principle that the States as such were regarded by the Framers of the Constitution as partaking of many attributes of sovereignty quite apart from the provisions of the Tenth Amendment.").

231. *See John R. Vile, Truism, Tautology or Vital Principle? The Tenth Amendment Since United States v. Darby*, 27 CUMB. L. REV. 445, 487 (1996-97).

sions to the majority of state and local employees.²³² Justice Rehnquist, writing for the Court, explained that "Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in the federal system."²³³ Having announced this principle, Rehnquist bounded it within, the "traditional-state functions" test.²³⁴ Thus, where federal legislation "directly displace[s] the States' freedom to structure integral operations in areas of traditional governmental functions[.]" it is not within congressional authority.²³⁵

In an important concurrence, Justice Blackmun, who would later author the opinion overruling *Usery*, indicated that he understood that the majority "adopted a balancing approach."²³⁶ This approach, he continued, should not disrupt national authority over areas where the national interest was paramount to the local

232. See *Usery*, 426 U.S. at 837-38.

233. See *id.* at 843 (quoting *Fry* 421 U.S. at 547, n.7).

234. Traditionally, States held nearly exclusive jurisdiction over areas concerning the health, safety and welfare of its citizens, but defining the scope of these state powers was very difficult. Compare *Gold Cross Ambulance v. City of Kansas City*, 538 F. Supp. 956, 967-969 (W.D.Mo. 1982) (regulating ambulance services is a traditional governmental function); *United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (licensing automobile drivers is a traditional state function); *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1037-38 (6th Cir. 1979) (operating a municipal airport is a traditional governmental function); *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1196 (6th Cir. 1981) (performing solid waste disposal is a traditional governmental function); and *Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841, 845-46 (1st Cir. 1982) (operating a highway authority is a traditional governmental function) with *Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982) (holding that the state-owned Long Island Railroad did not constitute a traditional governmental function); *Woods v. Homes and Structures of Pittsburgh, Kan., Inc.*, 489 F. Supp. 1270, 1296-1297 (Kan. 1980) (issuing industrial development bonds is not a traditional governmental function); *Oklahoma ex rel. Derryberry v. FERC*, 494 F. Supp. 636, 657 (W.D. Okla. 1980) (regulating intrastate natural gas sales is not a traditional governmental function); *Friends of the Earth v. Carey*, 552 F.2d 25, 38 (2d Cir. 1977) (regulating traffic on public roads is not a traditional governmental function); *Hughes Air Corp. v. Pub. Util. Comm'n of California*, 644 F.2d 1334, 1340-41 (9th Cir. 1981) (regulating air transportation is not a traditional governmental function); *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 700-01 (1st Cir. 1977) (operating a telephone system is not a traditional governmental function); *Pub. Serv. Co. of North Carolina v. FERC*, 587 F.2d 716, 721 (5th Cir. 1979) (leasing and selling natural gas is not a traditional governmental function); *Williams v. Eastside Mental Health Ctr., Inc.*, 669 F.2d 671, 680-681 (11th Cir. 1982) (operating a mental health facility is not a traditional governmental function); and *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1472 (9th Cir. 1983) (providing in-house domestic services for the aged and handicapped).

235. See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 856 (1976). Rehnquist noted that traditional state functions included "fire prevention, police protection, sanitation, public health, and parks and recreation." *Id.* at 851.

236. *Id.* at 856 (Blackmun, J., concurring).

one.²³⁷ The principle dissent, on the other hand, accused the majority of “usurp[ing] [] the role reserved for the political process” by discovering a limitation on Congress’ commerce authority in the Tenth Amendment.²³⁸ Furthermore, this dissent rejected any and all restraints on the congressional commerce powers due to federalism.²³⁹

B. *Garcia v. San Antonio v. Metropolitan Transit Authority*

Over the next nine years, the Supreme Court chiseled away at what *Usery* tried to accomplish.²⁴⁰ In 1985, however, *Garcia v. San Antonio Metropolitan Transit Authority*²⁴¹ overruled *Usery* and seemed to destroy federalism. Justice Blackmun, a member of the *Usery* majority, now writing for the Court, declared it was not the province of the federal courts to enforce the Tenth Amendment.²⁴² He labeled the “traditional state functions” test impossible to apply and pointed to the disparate holdings of the lower courts as proof.²⁴³ He further argued that judicial attempts to label one

237. *See id.* (“I may misinterpret the Court’s opinion, but it seems to me that it . . . does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where the state facility compliance with imposed federal standards would be essential.”).

238. *Id.* at 858 (Brennan, J., dissenting); *see also* Vile, *supra* note 231, at 488 (discussing Brennan’s opinion).

239. “[T]here is no restraint” declared Justice Brennan, “based on state sovereignty requiring or permitting judicial enforcement anywhere expressed in the Constitution; our decisions over the last century and a half have explicitly rejected the existence of any such restraint on commerce power.” *Usery*, 426 U.S. at 858. Justice Stevens, agreed, saying he could not “identify a limitation on . . . federal power that would not also invalidate federal regulation of state activities that I consider unquestionably permissible.” *Usery*, 426 U.S. at 881 (Stevens, J., dissenting).

240. *See, e.g.,* *Hodel v. Virginia Surface & Mining Reclamation Association, Inc.* 452 U.S. 264 (1981) (upholding a federal regulation requiring states to either comply with federal strip mining standards or to submit to a federal mining plan). *Hodel* attempted to institute a three-part test for invalidating the exercise of federal commerce powers. First, the challenged statute must regulate the “States as States.” Second, the federal legislation must address matters that are indisputably “attribute[s] of state sovereignty.” Lastly, state compliance with the federal legislation must directly impair their ability “to structure integral operations in areas of traditional governmental functions.” *Id.* at 287-88. *See United Transportation Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982) (holding that Congress could regulate interstate railways, despite a state owning and operating the railroad), *FERC v. Mississippi*, 456 U.S. 742 (1982) and *EEOC v. Wyoming* 460 U.S. 226 (1983) (upholding the application of the 1974 amendments to the Age Discrimination Employment Act of 1957, which prevented the use of mandatory retirement ages for employees prior to their seventieth birthday, to the states) for other cases in this line.

241. 469 U.S. 528 (1985).

242. *See id.* at 550-52.

243. *See id.* at 538-39.

function as "traditional" and others as "non-traditional" "invite[d] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."²⁴⁴

Importantly, Justice Blackmun relied on the writings of Professor Herbert Wechsler²⁴⁵ in arguing that the constitutional scheme protects the states through the political process. Justice Blackmun noted many of the political safeguards inherent to the federal system,²⁴⁶ including the states ability to direct large portions of federal revenues into state treasuries²⁴⁷ and federal assistance to state and local governments minimize the burdens that the States bear under the Commerce Clause.²⁴⁸ These safeguards, Justice Blackmun argued, show that federalism is being protected by the current system,²⁴⁹ and judicial enforcement is unnecessary.²⁵⁰

244. *Id.* at 546.

245. See *Garcia* 469 U.S. at 554 ("[W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). See also, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS, 171-259 (1980) (discussing the "political safeguards of federalism"); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 300 (1978) ("[T]he conventional wisdom was that, since 1937, there have been no judicially enforceable limits on congressional power which derive from considerations of federalism.").

246. See *Garcia*, 469 U.S. at 550-51 (citing to Wechsler and the institutional safeguards).

247. See *id.*

248. See *id.* at 553. Justice Blackmun lists: the Federal Power Act, 16 U.S.C. § 824(f); the National Labor-Relations Act, 29 U.S.C. § 152(20); the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 402(E); the Occupational Safety and Health Act, 29 U.S.C. § 652(5); the Employee Retirement Income Security Act, 29 U.S.C. §§ 1002(32), 1003(b)(1); and the Sherman Act, 15 U.S.C. § 1, which contain express exemptions for states and their subdivisions. See *id.*

249. Indeed, the federal government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." *Garcia*, 469 U.S. at 551 (quoting THE FEDERALIST NO. 46, *supra* note 2, at 292 (James Madison)). The national representatives would infallibly bring a "local spirit" and favorable attitude towards the states with them to Congress. See THE FEDERALIST NO. 46, *supra* note 2, at 296 (James Madison). As a result, Congress would be "disinclined to invade the rights on the individual States, or the prerogatives of their governments." *Id.* at 219. See also Wechsler, *supra* note 245, 559-60 ("Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands. . . . The Court makes the decisive judgment only when-and to the extent that-Congress has not laid down the resolving rule."); CHOPER, *supra* note 245, at 171-259. Professor Wechsler's theory, based largely on Madison's FEDERALIST NOS. 45 and 46, asserts that despite the rise of the national party system and the direct election of Senators, see Wechsler, *supra* note 245, at 546 ("Indeed, the problem of the Congress is and always has been to attune itself to national opinion and produce majorities for action called for by the voice of the entire nation.") the "crucial role" of the States in composing the national govern-

In his dissenting opinion, Justice Powell complained that the majority "effectively reduced the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause."²⁵¹ Powell was equally disturbed with the Court's willingness to end

ment adequately protects the states from federal encroachment. *See id.* (noting that members of each branch are chosen, in one way or another, by the States); *see also* CHOPER, *supra* note 245, at 176. Weschler places emphasis on facts such as: the Senate consists of representatives of the States, *see* Wechsler, *supra* note 245, at 546 ("Representatives no less than Senators are allotted by the Constitution to the States."), the States create the voting districts and voter qualifications for elections of members of the House, *see id.* at 548 ("Even the House is slanted somewhat in the same direction [towards the States], though the evidence is less severe. . . . It is due rather to the states' control over voter qualifications, on the one hand, and of districting on the other."); *see also* CHOPER, *supra* note 245, at 177, and the electoral college casts votes for the presidency on the basis of state units. *See* Weschler, *supra* note 245, at 552-53 (noting the role of the electoral college, as an arm of the States, in selecting the President); *see also* CHOPER, *supra* note 245, at 177-78. He contends that, due to these factors, States "are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics." Weschler, *supra* note 245, at 542-43. Thus, states are adequately protected in the federal system without the help of the federal courts.

Although not relied on by Justice Blackmun, Professor Jesse Choper, who agrees with a Weschlerian processed-based protection of federalism, also argues that the Court's difficulty in identifying state viewpoints weighs against judicial enforcement of federalism. *See* CHOPER, *supra* note 245, at 181-84. When opinions of federal representatives differ from the opinion of other federal representatives from the same state, the "state's view" is difficult to ascertain. *See id.* at 181. Even more confusing is when States split over support of legislation that supposedly violates the Tenth Amendment. *See id.* at 182.

250. *See Garcia*, 469 U.S. at 554. Notably, *Garcia* may be the best illustration of the political process at work protecting federalism. Nine months after *Garcia* was decided, Congress enacted amendments to the Fair Labor Standards Act ("FLSA"). *See* John E. DuMont, *State immunity From Federal Regulation—Before and After Garcia; How Accurate was the Supreme Court's Prediction in Garcia v. SAMTA that the Political Process Inherent in Our System of Federalism was Capable of Protecting the States Against Unduly Burdensome Federal Regulation?*, 31 DUQ. L. REV. 391, 396 (1993). The States and Congress worked to create an amendment, providing an exception for States and their political subdivisions to the controversial overtime requirement at issue in the case. *See id.* This exception is codified in 29 U.S.C. § 207.

251. *Garcia*, 469 U.S. at 560 (Powell, J., dissenting). Powell further argued that the majority "propound[ed] a view of federalism that pays only lip service to the role of the States" and that:

The Court recasts the language [of the Tenth Amendment] to say that the States retain their sovereign powers 'only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.' This rephrasing is not a distinction without a difference; rather, it reflects the Court's unprecedented view that Congress is free under the Commerce Clause to assume a State's traditional sovereign power, and to do so without judicial review of its action.

Id. at 574-75.

judicial protection of federalism.²⁵² Also in dissent, Justice

252. See *id.* at 567 n.12 (Powell, J., dissenting) ("This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process."). See generally Zoe Baird, *State Empowerment After Garcia*, 18 URB. LAW. No. 3, 491, 502 (1986) (Just as "[m]ediating inter-branch conflicts is at the core of the judiciary's work," "resolving federalism questions of all sort is a steady part of what federal judges do."). Wechsler's theory is often challenged on a number of grounds. Under the Wechsler model, absence of vocal opposition from state government permits Congress to pass legislation that wholly encroaches on State authority. See Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW 301, 334 (1988) (noting that Congress never once discussed the substantial fiscal impact placed on the states as a result of the Superfund amendment to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)). The ambiguity over the role of the states as players in the national government, even at the time of the drafting of the Constitution, seriously undermines this theory. See *supra* notes 186-198 and accompanying text. In addition, various changes have occurred from the time of the adopting of the Constitution, changes that make reliance on FEDERALIST NOS. 45 and 46 equally dubious. For example, the Framers originally provided that Senators would be elected by state legislatures. See U.S. CONST. art. I, § 3. Yet, even this system was never able to insure the preservation of state interests. Senators had been paid out of the federal treasury and served six-year terms. See THE UNITED STATES SENATE 1787-1801, S. Doc. No. 64 87th Cong., 1st Sess. 154 (1961); see also, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1466 n.170; 4 ELLIOT'S DEBATES, *supra* note 2, at 60; Diamond, *The Federalist on Federalism: Neither a National nor a Federal Constitution, but a Composition of Both*, 86 YALE L.J. 1273, 1281-82 (1977). Senators votes had been conducted *per capita* rather than through State "bloc voting" (where each State casts one vote for the State). See *id.* Virtually all limitations on reelection have been eliminated and, early on, States lost the right to recall their Senators. Consequently, after a number of state legislatures tried to instruct their Senators, Senators simply refused to comply. See THE UNITED STATES SENATE, *supra* note 237, at 162-72. These Senators took the position that they were "constitutionally bound to act in accordance with the general interests of the Union" and could not follow the instructions of the state legislatures. *Id.* at 164 (quoting Letter from Senators Benjamin Hawkins and Samuel Johnson to the North Carolina legislature (Feb. 22, 1791)). Finally in 1913, the Seventeenth Amendment removed the remaining control the state governments held over its Senators, providing for the direct election of Senators by the people. See U.S. CONST. amend. XVII. In addition, federal election requirements have eroded State control over elections, undermining the political safeguards of federalism. Direct selection of candidates in the primary system challenges the electoral college as a viable protector of federalism as well. See William Denny, *Breakdown of the Political Safeguards of Federalism: A Response to Garcia v. San Antonio Metropolitan Transit Authority*, 3 J. LAW & POL. 749, 759 (1986). Candidates now compete for party support, rather than state support. See *id.* These party-minded candidates, owing little to state alliances, are more inclined to follow the "party line", in an effort to win future party support. See *id.* Such practice is just one of the many indicia that the importance of the states as states, in national politics, has greatly diminished.

A historical example illustrates the problems with Wechsler's contention that institutional safeguards will always protect the states. In 1986, Congress passed the Superfund Amendments and Reauthorization Act of 1986. 42 U.S.C. § 9607(a) (1982) (amended 1986) [hereinafter "Superfund"]. Superfund permits lawsuits in federal

O'Connor shared this concern, declaring that federalism "requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power."²⁵³

C. *New York v. United States*

Federalism, however, would recover in the subsequent years. In *New York v. United States*,²⁵⁴ Justice O'Connor invalidated the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985²⁵⁵ that required states without provisions for waste disposal to take title and assume all liability for such waste.²⁵⁶ Justice O'Connor held this provision unconstitutional because Congress was attempting to "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."²⁵⁷ This action would consequently interfere with the accountability of the state officials.²⁵⁸

court to recover cleanup costs from "any person" (elsewhere in the statute, "person" includes "state") who owned or operated a hazardous waste site. See 42 U.S.C. § 9601(21). A subsequent modification clarified the amendment, providing that "a unit of government caused or contributed to the release or threatened release in question, then such unit is subject to the provisions of CERCLA, . . . including liability under section 107 and contribution under section 113." H.R. REP. NO. 962, 99th Cong., 2d Sess. 3, 185-86. This modification, though important, went unnoticed and was not mentioned at any point in the floor debates on the conference bill. See 132 CONG. REP. S14895-14938 (daily ed. Oct. 3, 1986); 132 Cong. Rep. H9550-54, H9562-9634 (daily ed. Oct. 8, 1986); 132 CONG. REP. H9551 (daily ed. Oct. 8, 1986). Despite the serious financial burdens placed on States under this Act, the possible justifications and ramifications of the provision were never debated. Moreover, if States are adequately protected by the system, as is suggested, the system should, at minimum, have considered the States' interests in this case.

253. *Garcia*, 469 U.S. at 587 (O'Connor, J. dissenting): She also cautioned that the commerce power should not become a means for swallowing the states. See *id.* ("As a result [of increases in the national commerce power], there is a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic.").

254. 505 U.S. 144, 181-82 (1992).

255. § 5(d)(2)(C), as amended, 42 U.S.C.A. § 2021e(d)(2)(C).

256. See *New York*, 505 U.S. at 153-54.

257. *Id.* at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

258. See *id.* at 168.

[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished But where the Federal Government directs the States to regulate, it may by state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decisions. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with

Due to the importance of holding our state officials politically accountable, not even unified state acquiescence to Congress could permit this provision.²⁵⁹

The dissenters, on the other hand, focused chiefly on the general agreement of the states to the bill.²⁶⁰ Moreover, the law "resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal preemption or intervention, but rather congressional sanction of interstate compromises they had reached."²⁶¹

D. *United States v. Lopez*

In *United States v. Lopez*,²⁶² the Supreme Court affirmatively limited congressional commerce power.²⁶³ Specifically, the Court found the Gun-Free School Zones Act did not have the required "nexus with interstate commerce",²⁶⁴ and did not "substantially affect[] interstate commerce".²⁶⁵ Moreover, "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."²⁶⁶

Justice Rehnquist, discussed three legitimate categories within which Congress may legitimately legislate under the Commerce Clause:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' com-

the views of the local electorate in matters not pre-empted by federal legislation.

Id.

259. *See id.* at 181-82. Justice O'Connor explained:

[t]he Constitution does not protect the sovereignty of the States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. . . . Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials.

Id.

260. *See id.* at 189-90.

261. *Id.*

262. 514 U.S. 549 (1995).

263. *See id.* at 555-568.

264. *Id.* at 562 (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971)).

265. *Id.* at 561.

266. *Id.* at 551.

merce authority includes the power to regulate those activities having a substantial relation to interstate commerce.²⁶⁷

Under this formula, the legislation in question fell into the last category. The Court characterized the law as a criminal statute “[having] nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms.”²⁶⁸ Consequently, the Court rejected the government’s contention that, as the majority put it, Congress could regulate “all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce” and “any activity that it [Congress] found was related to the economic productivity of individual citizens”²⁶⁹

In an important concurrence, Justice Kennedy, taking up the torch lit by Justice Powell in his *Garcia* dissent, focused on and explicitly refuted the process-based protections of federalism.²⁷⁰ Although he noted that Professor Wechsler’s interpretation of federalism is a reasoned one,²⁷¹ Justice Kennedy concludes that federalism is vital to the American government, and the Court must be active in the face of violations of federalist principles.²⁷² Indeed, the Court’s duty to declare “what the law is,”²⁷³ for Justices Kennedy and O’Connor, compelled the Court to resolve the difficult constitutional question of federalism role in American government.²⁷⁴

The principle dissent, written by Justice Breyer, argued that the “substantial effects” test unduly restricted congressional power and that “the question of degree (how much effect) requires an esti-

267. *Lopez*, 514 U.S. at 558-59.

268. *Id.* at 561.

269. *Id.* at 564.

270. *See id.* at 575-79.

271. *See id.* at 577 (“To be sure, one conclusion that could be drawn from *The Federalist Papers* is that the balance between national and state power is entrusted in its entirety to the political process.”).

272. *See id.* at 578 (“[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for [the Court] to admit inability to intervene when one or the other level of Government has tipped the scales too far.”).

273. *See Lopez*, 514 U.S. at 579 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

274. *See id.* at 578:

Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

Id. (citations omitted) (Kennedy, J., concurring).

mate of the 'size' of the effect that no verbal formulation can capture with precision."²⁷⁵ To wit, Justice Breyer opted for a rational basis test: "[w]e must ask whether Congress could have had a rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate commerce."²⁷⁶ Consequently, after noting the connection between education and commerce²⁷⁷ and citing numerous studies on the effects of gun violence in schools,²⁷⁸ Justice Breyer concluded Congress would have a rational basis for determining that this law was connected to commerce and, thus, valid.

E. *United States Term Limits v. Thornton*

Much of federalism jurisprudence deals with infringements on "state's rights" by the national government. In *United States Term Limits, Inc. v. Thornton*,²⁷⁹ however, Arkansas amended its Constitution to impose term limits on its members of Congress,²⁸⁰ thus interfering with the "rights" of the national government.²⁸¹ Through its interpretation of history,²⁸² the majority rejected Arkansas' claim that this amendment was an exercise of its reserved powers under the Tenth Amendment.²⁸³ The Court claimed that "the power to add qualifications is not part of the 'original powers' of sovereignty that the Tenth Amendment reserved to the States."²⁸⁴ Additionally, the majority continued, even if the states originally possessed this power, the "Framers intended the Constitution to be the exclusive source of qualifications for members of

275. *Id.* at 615.

276. *Id.* at 618.

277. *See id.* at 620 ("Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy.").

278. *See Lopez*, 514 U.S. at 619.

279. 514 U.S. 779 (1995).

280. *See id.* at 783-84 (citing ARKANSAS CONST. amend. 73).

281. Recall the discussion of England's attempts to control the colonial assemblies and the colonial elections. *See supra* notes 52, 76-82 and accompanying text. The right to control elections became synonymous with the body holding the election: states were to control state elections, the national government to control national elections. This situation was noted in 1970, when the national government tried, via statute, to lower the voting age to eighteen in all elections, national and state. *See Oregon v. Mitchell*, 400 U.S. 112, 117 (1970) (discussing the Voting Rights Act Amendments of 1970), *overruled* by U.S. CONST. amend. XXVI. Indeed, *Mitchell* relied on Colonial history in invalidating that section of the amendment. *Id.* at 124-25.

282. The Court undertook a lengthy discussion of the Framers' intent, focusing on THE FEDERALIST PAPERS, the State Ratification Debates, and various letters of the Framers on the subject. *See Thornton*, 514 U.S. at 801-822.

283. *See id.* at 800.

284. *Id.*

Congress . . . thereby 'divest[ing]' States of any power to add qualifications."²⁸⁵

Justice Kennedy, in his concurrence, pointed out that "the National Government is and must be controlled by the people without collateral interference by the States."²⁸⁶ He then likened his position to that taken in *McCulloch v. Maryland*:²⁸⁷ the actions of a single state should not interfere with properly exercised national powers, because in doing so, one state would affect all the states.²⁸⁸ Reconciling this stance with his prior opinions on the importance of the states in the federal system, Justice Kennedy noted that both governments, national and state, are equally sovereign and must operate within their respective spheres of sovereignty, free from interference by the other.²⁸⁹

The dissenters first argued that "where the Constitution is silent, it raises no bar to action by the States or the people."²⁹⁰ Further, as they viewed the situation, the states inherently possessed the power at issue as, "the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them."²⁹¹ Lastly, the dissenters argued that the qualifications for members of Congress, as listed in the Constitution, were minimum requirements and that the Framers intended that Congress not add to these qualifications.²⁹² Accordingly, the dissenters saw no reason for barring states from imposing restrictions on who may run for national office.

F. *Printz v. United States*

*Printz v. United States*²⁹³ explored whether the national government could impress upon the states a duty to enforce a national law.²⁹⁴ In this case, the Brady Handgun Violence Prevention Act²⁹⁵ required local Chief Law Enforcement Officers ("CLEOs")

285. *Id.* at 800-01.

286. *Thornton*, 514 U.S. at 841.

287. 4 Wheat. 316 (1819).

288. *See id.* at 430-32; *Thornton*, 514 U.S. at 840-42.

289. *See id.* at 841 ("That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.")

290. *Id.* at 848 (Thomas, J., dissenting).

291. *Id.* at 849.

292. *See id.* at 868, 869.

293. 117 S. Ct. 2365 (1997).

294. *See id.* passim.

295. 18 U.S.C. §§ 921-925A (1994 & Supp. 1997).

to receive and evaluate permit applications²⁹⁶ and to report, upon request, their reasoning for rejecting any application.²⁹⁷ Predictably, the Court affirmed its holding that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."²⁹⁸

Justice Scalia, writing for the majority, first discussed the history of congressional legislation that required state actors to perform national duties.²⁹⁹ Justice Scalia further noted that each duty so performed by the states at the behest of the national government was of a judicial nature.³⁰⁰ Thus, there was no prior example on which Congress could rely for requiring the CLEOs to implement national policy.³⁰¹

Justice Souter, in dissent, relied heavily on *The Federalist No. 27*.³⁰² There, Hamilton explained that the national government will have "authority . . . when exercising an otherwise legitimate power . . . to require state 'auxiliaries' to take appropriate action."³⁰³ Such language, according to Justice Souter, is strong evidence that the national government could require state officials to enforce national law and that the provision at issue was valid.³⁰⁴

G. *Cedar Rapids Community School District v. Garret F.*

Recently, the pendulum has swung away from the states and toward favoring congressional authority. A series of cases coming under the Spending Clause has afforded Congress greater authority. This increase in national authority, however, has come at the expense of that most local of concerns, namely education.

In *Cedar Rapids Community School v. Garret F.*,³⁰⁵ the Court held that the Individuals with Disabilities Education Act³⁰⁶ ("IDEA") required a public school to provide a disabled student

296. See 18 U.S.C. §§ 922(s)(1)(A)(i)(III) (IV) (Supp. 1997).

297. See 18 U.S.C. § 922(s)(6)(C) (Supp. 1997).

298. *Printz*, 117 S. Ct. at 2380 (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

299. See *id.* at 2370-79.

300. See *id.* at 2371.

301. See *id.*

302. See THE FEDERALIST NO. 27, *supra* note 2, at 177 (Alexander Hamilton).

303. *Printz*, 117 S.Ct. at 2403-04 (Souter, J., dissenting).

304. Although, Justice Souter continued to agree with the Court's holding in *New York v. United States*, as there, the regulation attacked the legislative function of the states. See *id.* at 2404.

305. 119 S.Ct. 992 (1999) (holding that the Individuals with Disabilities Education Act required continuous nursing services for a ventilator-dependent quadriplegic who needed such services).

306. § 602(a)(17), as amended, 20 U.S.C.A. § 1401(a)(17); C.F.R. § 300.16(b)(4).

with continuous nursing service.³⁰⁷ Generally, as a condition of receiving federal funding, the IDEA requires schools to provide "related services" to disabled students, in order to provide disabled students with "free appropriate public education."³⁰⁸ Schools, however, are not required to provide "medical services;" thus, the case turned on what whether the services in issue were "related" or "medical."

The majority considered whether the nursing service was a "related service" under the statute.³⁰⁹ The Court looked to various regulations defining "related services"³¹⁰ and noted that the term "related services" broadly encompasses those supportive services that 'may be required to assist a child with a disability to benefit from special education.'³¹¹ Further, the Court noted the similarities between the services at issue in *Irving Independent School Dist. v. Tatro*³¹² and those at issue here.³¹³ Consequently, the Court found the services were "related" and, thus, the school was required to provide them.

Importantly, for federalism purposes at least, the Court dismissed the school district's "multi-factor test" that focused on the burden the proposed service would place on the school district.³¹⁴ Noting that the proposed test "is not supported by any recognized source of legal authority,"³¹⁵ the Court made short work of the policy concerns brought up by the school district: "The District may have legitimate financial concerns, but our role in this dispute is to interpret existing law."³¹⁶

The crux of the dissent rested largely on federalism.³¹⁷ Because the law at issue, wrote Justice Thomas, "condition[ed] an offer of federal funding on a promise by the recipient," pursuant to the Spending Clause it "amounts essentially to a contract between the

307. *Garret F.*, 119 S. Ct. at 997.

308. *Id.* at 996 (discussing the lower court's decision).

309. *See id.*

310. *See id.* at 997-98.

311. *Id.* at 997.

312. 468 U.S. 883 (1984).

313. *Garret F.*, 119 S. Ct. at 998 ("While more extensive, the in-school services Garret needs are no more "medical" than was the care sought in *Tatro*.").

314. *Id.* The school proposed a test "which the outcome in any particular case would 'depend upon a series of factors, such as [1] whether the care is continuous or intermittent, [2] whether existing school health personnel can provide the service, [3] the cost of the service, and [4] the potential consequences if the service is not properly performed.'" *Id.* (quoting Brief for Petitioner 11).

315. *Id.*

316. *Id.* at 999.

317. *See id.* at 1000-03 (Thomas, J., dissenting).

Government and the recipient of funds.”³¹⁸ Thus, the state receiving funding must have “voluntarily and knowingly accept[ed] the terms of the ‘contract’”³¹⁹ As a result, Spending Clause legislation should be interpreted narrowly, “in order to avoid saddling the States with obligations they did not anticipate.”³²⁰ Here, the dissent argued that the proper result, considering the federalism concerns underlying Spending Clause jurisprudence, was to require schools provide handicapped children health-related services consistent with what school nurses can perform as part of their “normal duties.”³²¹ This would lighten the burden placed on schools³²² and was consistent with the Spending Clause jurisprudence.³²³

H. *Davis v. Monroe County Board of Education*

Building on the increase in Spending Clause authority gained in *Garret F.*, the Supreme Court recently implied a private right of action under Title IX of the Education Amendments of 1972³²⁴ (“Title IX”), for inaction by a school when one student sexually harasses another student.³²⁵ In so holding, the Court recalled the wisdom of *Pennhurst*:³²⁶ that Spending Clause legislation must exhibit a clear intent by Congress to require state to comply with any particular condition.³²⁷ Justice O’Connor, writing for the majority, also noted that “a recipient of federal funds may be liable . . . for its

318. *Id.* at 1002 (quoting *Gesber v. Lago Vista Independent School Dist.*, 524 U.S. 274, 276 (1998)).

319. *Garret F.*, 119 S. Ct. at 1002 (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.”)).

320. *Id.*

321. *Id.* at 1003.

322. The dissent noted that the cost of the services required by the respondent would cost a “minimum of \$18,000 per year.” *Id.* at 1003.

323. *See id.* (“This [majority’s] approach disregards the constitutionally mandated principles of construction applicable to Spending Clause legislation and blindsides unwary States with fiscal obligations that they could not have anticipated.”).

324. 86 Stat. 373, as amended, 209 U.S.C. § 1682.

325. *Davis v. Monroe County Bd. of Ed.*, 119 S.Ct. 1661, 1669 (1999) (“We must determine whether a district’s failure to respond to student-on-student harassment in its schools can support a private suit for money damages.”).

326. 451 U.S. 1 (1981).

327. *Davis*, 119 S.Ct. at 1670.

In interpreting language in spending legislation, we thus “insts[t] that Congress speak with a clear voice,” recognizing that “[t]here can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.”

Id. (quoting *Pennhurst*, 451 U.S. at 17, 24-25).

own misconduct.”³²⁸ The Court, however, found that a school board’s decision not to act, in the face of known student-on-student sexual harassment, rose to this level of misconduct and was actionable in federal court.³²⁹

Mindful of the burden this could place on the nation’s school system, the Court announced that the “deliberate indifference” standard should apply to this case.³³⁰ This test, already employed in *Gesber v. Lago Vista Independent School Dist.*,³³¹ would eliminate the risk of being liable “‘not for its own official decision but instead for its employees’ independent actions.’”³³² Cognizant of likely criticisms, Justice O’Connor noted that “[s]chool administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed ‘deliberately indifferent’ . . . only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of known circumstances.”³³³

The dissent, authored by Justice Kennedy, vigorously attacked the majority opinion for “eviserat[ing] the clear-notice safeguard of our [the Supreme Court’s] Spending Clause jurisprudence,”³³⁴ and the issuing a heavy blow to federalism.³³⁵ Justice Kennedy first noted that although Congress could pursue objectives outside its enumerated powers through the Spending Clause,³³⁶ the safeguard against federal intrusion into state affairs is that “when Congress imposes a condition on the States’ receipt of federal funds, it [Con-

328. *Id.* at 1670.

329. *See id.* (“Here, petitioner attempts to hold the [School] Board liable for its own decision to remain idle in the face of known student-on-student harassment in its schools.”).

330. *See id.* at 1671-73 (discussion of “deliberate indifference” standard and its implications).

331. 524 U.S. 274, 290-91 (1998).

332. *Davis*, 119 S.Ct. at 1671 (quoting *Gesber v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998)).

333. *Id.* at 1674.

334. *Id.* at 1677 (Kennedy, J., dissenting).

335. *See id.* at 1692 (“As its holding makes painfully clear, the majority’s watered-down version of the Spending Clause clear-statement rule is no substitute for the real protections of state and local autonomy that our constitutional system requires. . . . Federalism and our struggling school systems deserve better support from this Court.”).

336. *See id.* at 1677 (“Congress can use its Spending Clause power to pursue objectives outside of ‘Article I’s ‘enumerated legislative fields’” by attaching conditions to the grant of federal funds.”) (quoting *South Dakota v. Dole*, 483 U.S. 207 (1987); *United States v. Butler*, 297 U.S. 1, 65 (1936)).

gress] 'must do so unambiguously.'"³³⁷ Otherwise, states will be unable to "guard against excessive federal intrusion into state affairs."³³⁸

The dissent attacked the majority on both legal³³⁹ and policy grounds.³⁴⁰ Moreover, the failings of the majority's standard for liability, namely, its broad scope,³⁴¹ lack of clarity,³⁴² and low threshold for requiring a trial,³⁴³ all worked to subject school districts to "limitless liability."³⁴⁴ Most problematic of all for Justice

337. *Id.* (quoting *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981)). Indeed, Justice O'Connor, in her *South Dakota v. Dole* dissent, noted the rational for this rule:

If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'

South Dakota v. Dole, 483 U.S. 207, 217 (1987) (O'Connor, J. dissenting) (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

338. *Davis*, 1999 S.Ct. at 1677 (U.S. 1999).

339. *See, e.g., id.* at 1678.

Schools cannot be held liable for peer sexual harassment because Title IX does not give them clear and unambiguous notice that they are liable in damages for failure to remedy discrimination by their students. As the majority acknowledges, Title IX prohibits only misconduct by grant recipients, not misconduct by third parties.

Id. *See also id.* at 1679 ("It is not enough, then, that the alleged discrimination occur in a 'context subject to the school district's control.' The discrimination must actually be 'controlled by' -- that is, be authorized by, pursuant to, or in accordance with, school policy or actions.") (citations omitted) (quoting *id.* at 1672); *id.* at 1686 ("[R]espondents have made a cogent and persuasive argument that the type of student conduct alleged by petitioner should not be considered 'sexual harassment,' much less gender discrimination actionable under Title XI."); *id.* ("In reality, there is no established body of federal or state law on which courts may draw in defining the student conduct that qualifies as Title IX gender discrimination.").

340. *See, e.g., id.* at 1682 ("The practical obstacles schools encounter in ensuring that thousands of immature students conform their conduct to acceptable norms may be even more significant than the legal obstacles.").

341. *See id.* at 1688 ("The majority's test for actionable harassment will . . . sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life.").

342. *See id.* (noting that while the majority attempts to limit liability to "known" acts of student harassment, this begs an obvious question: "known to whom?").

343. *See id.* at 1688 ("[T]he majority's test, in fact, invites courts and juries to second-guess school administrators in every case, to judge in each instance whether the school's response was 'clearly reasonable.' A reasonableness standard, regardless of the modifier, transforms every disciplinary decision into a jury question.").

344. *Id.* at 1689 ("The limitless liability confronting our schools under the implied Title IX cause of action puts schools in a far worse position than businesses.").

Kennedy was that, while “this case is about federalism,”³⁴⁵ the majority ignored this consideration entirely.³⁴⁶

Part II Conclusion

The last sixty years of the federalism in the Supreme Court has been confusing. Congressional authority vis-à-vis the states has contracted, expanded, and contracted again, all the while *Garcia*, the case that explicitly stated that federalism did not bar congressional authority, remains relevant law. Comparing “congressional federalism” to other federalism concerns, such as Article III federalism, only magnifies its inconsistencies.³⁴⁷

345. *Id.* at 1691.

346. *See id.* (“Yet the majority’s decision today says not one word about the federal balance. Preserving our federal system is a legitimate end in itself.”).

347. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995) (discussing the inconsistencies between Commerce Clause federalism and Article III federalism). It should be noted that this Note does not tackle three other major areas of federalism. First, federalism as it exists in the Article III courts is largely characterized by grand limitations on national authority. *See, e.g.,* *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996) (reestablishing Eleventh Amendment “sovereign immunity” as a bar to suits against states in federal courts); *Younger v. Harris*, 401 U.S. 37 (1971) (limiting the reach of the federal courts through the abstention doctrine); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (same); *Railroad Comm’n of Texas v. Pullman Co.*, 312 U.S. 491 (1941) (same); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (establishing the primacy of state law in federal forums); *Michigan v. Long*, 463 U.S. 1032 (1983) (requiring federal courts to dismiss cases if an adequate and independent state ground in state law exists for recovery); *Murdock v. City of Memphis*, 87 U.S. 590 (1875) (same); *Teague v. Lane*, 489 U.S. 288, 310 (1989) (recognizing frustration caused in state courts by federal habeas corpus review and subsequent constitutional commands); *McKleskey v. Zant*, 499 U.S. 467, 491 (1991) (holding that federal habeas corpus review of state convictions frustrates the sovereign power of a state to punish); *Rizzo v. Goode*, 423 U.S. 362, 366 (1976) (limiting the ability of federal courts to hear allegations of abusive police practices by local police departments due to federalism concerns); *Welch v. Texas Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 493 (1987) (noting that the court has recognized the broad bar against suits against state governments “without exception . . . for almost a century”); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-99 (1984) (holding that sovereign immunity is a limitation on suits against a state). Conversely, federalism as it operates against the Treaty Clause may be characterized as a non-issue. *See, e.g.,* *Missouri v. Holland*, 252 U.S. 416 (1920) (noting that a valid treaty is binding over all the states, regardless of Tenth Amendment concerns); *Reid v. Covert*, 354 U.S. 1 (1957) (noting that while some amendments may override a treaty, the Tenth Amendment does not); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 1999 WL 155689 (U.S. 1999) (noting that “treaty rights are irreconcilable with state sovereignty”). Somewhere in the middle, which government may create and enforce these rights is also a question. *See, e.g.,* *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (holding the Fourteenth Amendment did not permit Congress to enact measures to prevent constitutional violations); *Lopez v. Monterey County*, 119 S. Ct. 693 (1999) (federalism and voting rights).

Perhaps the one constant in the midst of this confusion is the Supreme Court's formalistic approach. In all recent cases, the Court systematically outlines major premises from which it deduces minor ones, eventually arriving at a conclusion.³⁴⁸ The problem with this approach is that, because the Constitution is ambiguous as to the allocation of power between government, the major premises the Supreme Court conjures up are little more than arbitrary guidelines. Thus, it is impossible to achieving any clear premises for reasoning.³⁴⁹ As Part III of this Note discusses, employing a functional approach, one that maximizes the benefits of the federal union, can solve this problem.

III. A New Method for a New Millenium

Federalism is based on certain values. Throughout America's history, both as a colony and a country, objects of a grand scope have always been allocated to the central government, while issues of local concern have been left to the subordinate units. James Madison discussed this point, noting "it is only within a certain sphere that the federal power can in the nature of things, be advantageously administered."³⁵⁰ Moreover, Madison gave federalism definition; by explaining that some governmental units can "advantageously administer[]" object in one sphere, he prescribes allocating responsibility over a sphere to the government that can "advantageously administer[]" it. This is both wise public policy and true to the Framers' intent.

Armed with this insight constitutional analysts are left at square one. Indeed, how is it determined which governments can "advantageously administer[]" which objects? To answer this question, the benefits of federalism must be analyzed.

A. What Are the Values of Federalism?

As Justice O'Connor points out, federalism has both sociopolitical and economic benefits:

This federalist structure . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experi-

348. See Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U.L. REV. 959 (1997).

349. See *infra* notes 409-411 and accompanying text for an illustration of this problem.

350. See THE FEDERALIST NO. 46, *supra* note 2, at 295 (James Madison).

mentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.³⁵¹

Federalism is theory of decentralization in government.³⁵² As such, it shares a number of the economic benefits of decentralization.³⁵³ Indeed, one of federalism's greatest benefits is that it is a means to efficient management.³⁵⁴

The essence of federalism, as a political concept, differs from mere decentralization. In a federal system, the subordinate units of government operate within a prescribed area that the central authority may not invade.³⁵⁵ Equally important, the leaders of the subordinate units draw their power from sources independent of the central authority.³⁵⁶ The point of granting such independence

351. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

352. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910-12 (1994); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 557 (1994); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1, 4 (1995). Decentralization is a policy choice, spreading decision-making authority between smaller sub-units to gain a multitude of advantages, such as increased efficiency. See *id.* Federalism, as a political concept, is a structuring principle for a government that divides and allocates power over particular issues to political sub-units. See *id.* Thus, federalism is merely a method of decentralization.

353. Aside from the various social science studies conducted on the effects of decentralization, the Supreme Court has recently discussed the "values of federalism." See *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 788-791 (1982) (O'Connor, J., concurring in part and dissenting in part) ("Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas. . . . [F]ederalism enhances the opportunity of all citizens to participate in representative government. . . . [O]ur federal system provides a salutary check on governmental power."); *Garcia*, 469 U.S. at 528 (O'Connor, J., dissenting) ("The States were to retain authority over those local concerns of greatest relevance and importance to the people. . . . [P]roduc[ing] efficient government and protect[ing] the rights of the people."); *New York*, 505 U.S. at 157 (cataloging the benefits of the federal structure); *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) ("[T]he theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

354. See, PETER M. BLAU & W. RICHARD SCOTT, *FORMAL ORGANIZATIONS* (1962); ERNEST DALE, *ORGANIZATION*, 104-30 (1967); MANFRED KOCHEN & KARL W. DEUTSCH, *DECENTRALIZATION: SKETCHES TOWARD A RATIONAL THEORY* (1980); WILLIAM J. MORRIS, *DECENTRALIZATION IN MANAGEMENT SYSTEMS* (1968).

355. See Rubin & Feeley, *supra* note 352 at 911; WALTER BENNETT, *AMERICAN THEORIES OF FEDERALISM* 10 (1964); DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 2 (3d ed. 1984); CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY* 224-26 (4th ed. 1968); RICHARD H. LEACH, *AMERICAN FEDERALISM* 1-10 (1970).

356. See, e.g., Rubin & Feeley, *supra* note 352, at 911.

is to allow disagreement amongst the subordinate units. Each unit thus may subscribe to different value systems, consequently leading to experimentation.³⁵⁷ Additionally, this independence serves to check the power of the national government by limiting its jurisdiction, just as the Framers intended.³⁵⁸

1. *The Sociopolitical Benefits of Federalism*

Generally, because social tastes and preferences differ, most often along geographic lines,³⁵⁹ a basic shortcoming of unitary forms of government is an "insensitivity to varying preferences among the residents of the different communities."³⁶⁰ Where governmental units are small, however, legislators can more adequately respond to local preferences.³⁶¹ Many modern scholars recognize this increase in responsiveness as one of the greatest values of decentralized government.³⁶² This increased

357. See *id.* at 912; Kim Lane Scheppele, *The Ethics of Federalism in POWER DIVIDED* 51, 52 (Harry N. Scheiber & Malcolm Feely eds., 1989).

358. See, e.g., THE FEDERALIST NO. 51, *supra* note 2, at 323 (James Madison) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among district and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

359. See Michael W. McConnell, *Federalism: Evaluating the Founder's Design*, 54 U. CHI. L. REV. 1484, 1493 (1987). Economists and sociologists have documented the impact of various government policies upon migration patterns of demographic subsections of society. For surveys of the literature see Richard J. Cebula, *A Survey of the literature on the Migration-Impact of State and Local Government Policies*, 34 PUB. FIN. 69 (1979); JOHN J. WALLIS & WALLACE E. OATES, *Decentralization in the Public Sector: An Empirical Study of State and Local Government*, FISCAL FEDERALISM: QUANTITATIVE STUDIES 5 (Harvey S. Rosen ed., 1988).

360. WALLACE D. OATES, FISCAL FEDERALISM, 11 (1972). See Gordon and Tullock, *Federalism: Problems of Scale*, 6 PUB. CHOICE 19, 21 (1969); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW, 600 (3d ed. 1986).

361. See *Gregory*, 501 U.S. at 458 (noting that federalism assures "that a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society . . ."); see also McConnell, *supra* note 359, at 1491-1511 (noting the three objectives of dual sovereignty: "(1) to secure the public good, (2) to protect private rights, and (3) to preserve the spirit and form of popular government") (quoting THE FEDERALIST NO. 10, *supra* note 2, at 80 (James Madison)); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 9-10 (1988) (noting the three main advantages of federalism are its check on the national government, its ability to draw citizens into the political process and the political and cultural diversity it fosters).

362. See, e.g., George Stigler, *Tenable Range of Functions of Local Government*, in Joint Economic Committee, 85th Cong. 1st Sess., *Federal Expenditure Policy for Economic Growth and Stability: Papers Submitted By Panelists Appearing Before the Subcommittee on Fiscal Policy*, 213 (1957) ("[A] good political system adapts itself to

responsiveness, in turn, better satisfies the desires of the populace.³⁶³

Consequently, the desire to satisfy the populace compels jurisdictions to compete with one and another in an effort to win citizens, valuable tax dollars and jobs.³⁶⁴ This economic reality yields increased social experimentation. Charles Tiebout's economic theory of jurisdictional competition addresses this situation.³⁶⁵ According to the "Samuelson condition," public goods³⁶⁶ are allocated efficiently when the sum of a citizen's marginal rate of substitution of income for the good equals the marginal cost of an additional unit of the good.³⁶⁷ Nevertheless, this condition is not easily met. With private goods, market competition exerts downward pressure on producers' marginal costs, and market prices provide concrete information about consumers' rates of substitution.³⁶⁸ With public goods, however, no obvious market forces exert such pressure on governmental producers' marginal

the differing circumstances and mores of different localities . . .") (cited in LeBoeuf, *supra* note 352, at 558-59, n.10); OATES, *supra* note 360 at 11 (1972).

363. See Charles M. Tiebout *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 14 YALE J. ON REG. 1, 13 (1996) ("This American diversity also possesses a strong regional aspect. States (and the regions in which they cluster) differ in many important ways It is this regional heterogeneity that our political institutions in general, and the system of federalism in particular, were meant to preserve."); Steven Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 775 (1995).

364. Professor Tiebout showed that, like the conventional market place for goods where buyers reveal their preferences for various goods by their willingness, or refusal, to pay the going price, citizens indicate their preferences for public goods and policies in a similar manner. See Tiebout, *supra* note 363, at 416-24. The mechanism that allowed this "market-type" preference-revelation system to occur was the citizens' right to move freely among jurisdictions. Thus, as social utility is maximized in a unrestrained market, so too will social welfare be maximized, where citizens can move between jurisdiction, each offering different social policies. See LeBoeuf, *supra* note 352, at 559-60 and VINCENT OSTROM, *THE MEANING OF AMERICAN FEDERALISM* 137-61 (1991) for a further discussion of the Tiebout model.

365. See Tiebout, *supra* note 363, at 416-24.

366. This includes both goods conventionally provided by local government and public services.

367. See Paul A. Samuelson, *The Pure Theory of Public Expenditures*, 36 REV. ECON. & STAT. 387, 387-88 (1954). This material is discussed at length in William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in the Second-Best World*, 86 GEO. L.J. 201, 207 (1997).

368. See Bratton & McCahery, *supra* note 367, at 207.

costs.³⁶⁹ Nor does an obvious mechanism force taxpayers to truthfully reveal their rates of substitution.³⁷⁰

The Tiebout model claims to satisfy the "Samuelson condition" by identifying the machinery that disciplines governmental producers and matching citizen preferences with levels of public goods provision and taxation.³⁷¹ Simply, Tiebout explains that citizens, unhappy with the policies of their state, may move to another state capable of better providing for their desires and needs.³⁷² This competition amongst jurisdictions allows citizens to decide what public goods and rights are desirable and at what cost.³⁷³

This "responsiveness-competitiveness" model illustrates the role of voice and exit in government. Individuals seek governments that respond to their needs, or voice.³⁷⁴ If their government does not respond, citizens may exercise their exit option and relocate to another jurisdiction that will.³⁷⁵ Conversely, governments may select membership by resisting some voices and being more responsive to citizens who have remained or recently entered.³⁷⁶

369. *See id.*

370. Taxpayers will not state their rates of substitution accurately because of the "free-rider" problem that arises in cases of collective political action. An actor, for example, will overstate her demand if she believes that her level of payment will remain unchanged, with the additional cost of providing the good falling on others. *See* Bratton & McCahery, *supra* note 367, at 207, n.16, (citing Theodore Groves, *Incentive in Teams*, 41 *ECONOMETRICA* 617, 624 (1973)).

371. Note here the assumptions Tiebout makes before applying his model. Tiebout assumes: (1) a large number of communities exist and the public goods of each reflect the range of public goods available; (2) mobility is free for all relocating actors who choose a jurisdiction based on a taxes-public goods balancing; (3) perfect information is available, as to each jurisdiction's public goods offerings; (4) every jurisdiction is of optimal size, that is, having the number of residents for which the public goods can be produced at the lowest average cost; (5) communities below optimal size will try to attract new citizens to reduce the average cost of producing goods and services; and (6) there are no externalities, monopolies or spillover effects across jurisdictions. *See* Tiebout, *supra* note 363, at 419. Understandably, such questionable assumptions have brought criticism, *see* Susan Rose-Ackerman, *Tiebout Models and the Competitive Ideal: An Essay on the Political Economy of Local Government*, 1 *PERSPECTIVES ON LOCAL PUBLIC FINANCE AND PUBLIC POLICY* 23, 28 (1983) (characterizing the theory as "simply not very robust"), although a great deal of empirical research appears to support the thesis. *See* Cebula, *supra* note 359; WALLIS & OATES, *supra* note 359.

372. *See* LeBoeuf, *supra* note 352, at 561.

373. *But see* Rubin & Feeley, *supra* note 352, at 918 ("There is something a bit fanciful in the image of people choosing a place to live the way shoppers choose their favorite breakfast cereal . . .").

374. *See* ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970); Rubin & Feeley, *supra* note 352, at 917.

375. *See id.*

376. *See id.*

Inevitably, the consequence of this economic benefit is an increase in social experimentation.³⁷⁷ In particular, states, due to their small size, are better equipped to experiment because experimentation is best conducted on a small scale.³⁷⁸ State governments have blazed trails with new social and economic reforms, such as women's suffrage,³⁷⁹ unemployment insurance,³⁸⁰ minimum wage laws,³⁸¹ child labor laws,³⁸² accident-insurance plans that benefit victims of on-the-job accidents³⁸³ and prohibitions against employment and housing discrimination.³⁸⁴ As these theories are tested, more desirable techniques are discovered, allowing jurisdictions to adopt the successful policies, thus increasing efficiency throughout society.³⁸⁵

377. As Justice Brandeis observed, each of the states "serve as a laboratory" that may "try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (observing the unique phenomenon of "the making of social experiments that an important part of the community desires [] in the insulated chambers afforded by the several States . . ."); LeBoeuf, *supra* note 352, at 561 ("Just as the competitive firms engage in experimentation and innovation in providing private goods, so too will competitive jurisdictions experiment with various methods of providing public goods."). But see Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 *LEGAL STUD.* 593 (1980) (suggesting that local politicians will be loathe to experiment with social policies).

378. See LeBoeuf, *supra* note 352, at 562. Most central governments, for example, cannot determine which subordinate jurisdiction should attempt experiments. See DAVID N. KING, *FISCAL TIERS: THE ECONOMICS OF MULTI-LEVEL GOVERNMENT* 23 (1984); LeBoeuf, *supra* note 352, at 562. Equally important is the threat of disaster posed if the central government implements the experiment and it fails — bringing misery to all citizens.

379. See Act of Jan. 21, 1891, ch. 100 § 4, 1890-1891 Wyo.Sess.Laws 394 (Wyoming grants women the right to vote).

380. See Unemployment Ins. Act of Jan. 28, 1932, ch. 20, 1931-1932 Wis.Laws 57; Act of June 1, 1933, ch. 186, 1933 Wis.Laws 448; Act of June 2, 1933, ch. 194 Wis.Laws 491 (Wisconsin codifies unemployment insurance).

381. See Act of June 4, 1912 ch. 706, 1912 Mass., Acts 780 (Massachusetts enacts minimum wage laws for women and minors).

382. See Commission on Intergovernmental Relations, *The Question of State Government Capability*, 23-24 (1985) (noting that state governments have experimented with "sunset legislation, zero based budgeting, equal housing, no-fault insurance . . . gun control, pregnancy benefits for working women, limited access highways, education for handicapped children, auto pollution standards and energy assistance for the poor.").

383. See *id.*

384. See *id.*

385. See Wallace E. Oates, *Decentralization of the Public Sector: An Overview*, in *DECENTRALIZATION, LOCAL GOVERNMENTS AND MARKETS* 43, 53 (R. Bennett ed., 1990); OATES, *supra* note 360, at 12.

Decentralization through federalism provides greater citizen participation in government and increases accountability among elected officials. As the physical distance between legislators and their constituents decreases, the familiarity between them increases. This results in citizens becoming more aware of their elected officials.³⁸⁶ Citizen participation in government also increases.³⁸⁷ This situation, in turn, yields further benefits: enhanced voter confidence in the political process,³⁸⁸ minimized influence of interest groups and political action committees³⁸⁹ and increased diversity among elected officials.³⁹⁰

2. *The Economic Benefits of Federalism*

In addition to the economic gains realized by the Tiebout Model, by creating separate spheres of authority for the central and subordinate governmental units, federal governments have the ability to realize economies of scale. Central governments, for example, are better suited to perform governmental functions where

386. See THE FEDERALIST NO. 45, *supra* note 2, at 291 (Madison):

The members of the legislative, executive, and judiciary departments of thirteen and more States, . . . with all county, corporation, and town officers, . . . having particular acquaintance with every class and circle of people, must exceed, beyond all proportion, both in number and influence, those of every description who will be employed in the administration of the federal system.

Id.; LeBoeuf, *supra* note 352, at 564 (“[P]hysical proximity nonetheless continues to promote some sort of closeness between citizens and legislators. Additionally, as the ratio of citizens to representatives falls, the citizens become more aware of the activities of their elected officials.”).

387. See *Garcia*, 469 U.S. at 575-77 & n.18 (Powell, J., dissenting) (“Participation is likely to be more frequent, and exercised at more different stages of a governmental activity at the local level, or in regional organizations.”) (quoting Advisory Commission on Intergovernmental Relations, *Citizen Participation in the American Federal System* 95 (1980)).

388. See Merritt, *supra* note 361, at 7-8.

389. See F.H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 SUP. CT. ECON. REV. 141, 153 (1997) (“The relative clout of entrenched interest groups is weaker at the local level, where it is easier to organize dispersed voters. In contrast, voters are more dispersed at the federal level, and interest group clout is more likely to be overpowering.”). This explains why public sector wages are higher in larger jurisdictions. See PAUL E. PETERSON, *THE PRICE OF FEDERALISM* 21 (1995).

390. The relatively high proportion of women holding positions in state and local government illustrates this increased diversity. In 1992, women held approximately 22% of the seats in the state legislature almost double the proportion in Congress. . See WORLD ALMANAC BOOK OF FACTS, 337 (Robert Famighetti ed., 1997); *id.* at 111-18. That newcomers can participate in government at the state level at double the rate of the national offices tends to suggest that state governments are more receptive to citizen participation, which adds new ideas and solutions to the political landscape. See Merritt, *supra* note 361, at 7.

the average cost lessens with the greater number of citizens for which the function is performed.³⁹¹ Similarly, the average cost of performing a service remains constant or goes up in proportion to the increase in citizens receiving the service.³⁹² Factoring such considerations of scale into determining government responsibilities increases efficiency throughout government.

Federal governments also reduce cross-boundary externalities. For example, if country A generated pollution that imposed costs on country B, the two might bargain in the Coasean sense, attempting to internalize the externalities.³⁹³ Thus, Country B could pay Country A's polluters not to pollute. Problems arise in the first instance due to the costs of negotiating the agreement, identifying the cross-boundary cost and enforcing the agreement. In federal governments, however, a central government acts to coordinate such efforts and work to limit interstate difficulties.³⁹⁴

Because federalism separates power between multiple jurisdictions, there is a limit as to how much power each jurisdiction can amass between both subordinate jurisdictions and between the central and subordinate governments. The benefit of these mutual constraints is the limitation of the monopolistic tendencies of government.³⁹⁵ Suppose, for example, it is just as efficient for the subordinate governments to perform the function as it is for the central government. In such instances, subordinate units should be given the authority to provide the service, on the ground that competition between the subordinate governments will benefit the country in ways that centralizing the service will not. Now, if a subordinate unit abuses its monopolistic position, for example, by imposing a confiscatory tax, citizens can migrate to another subordinate jurisdiction with a more reasonable tax. This corrective migration is not nearly as possible when responding to bad

391. See Thomas S. Ulen *Economic and Public-Choice Forces in Federalism*, 6 GEO. MASON U. L. REV. 921, 924-30 (1998). For example, collecting national taxes or providing for a national defense are functions properly placed in the hands of the central government. See *id.* at 929.

392. See *id.*

393. See *id.*

394. Indeed, the Framers actively thought of such consideration at the time. James Madison observed such problems in the United States under the Articles of Confederation, problems he sought to remedy in the Constitution. See James Madison, *Vices of the political system of the U. States* (April 1787), in 24 LETTERS OF THE DELEGATES TO CONGRESS: 1774-1789, *supra* note 124, at 265 (discussing the "Trespasses of the States on the rights of each other" and "Want of concert in matters where common interest requires it"). Years earlier, Benjamin Franklin commented on the free-rider problem in America. See *supra* note 126.

395. See Ulen *supra* note 391, at 939-34.

policies taken by the central government. Indeed, it is far more likely for a citizen to migrate from Illinois to Ohio to avoid a burdensome Illinois policy than it is to leave the United States over a similarly burdensome national policy.

All of these factors are designed to increase efficiency and maximize social utility. Social utility most often is maximized when smaller governmental units implement policy.³⁹⁶ For example, Oregon, in response to local desires, enacted legislation granting its citizens the right to physician-assisted suicide.³⁹⁷ Considering the heated debate around the topic, a federal law permitting this action would anger millions of citizens. However, because the law only affects Oregonians, at most 49% of Oregon could be upset with the law. Thus, social utility and the public good are maximized through jurisdictional differences by limiting the citizenry upon which policy affects.

Most importantly, federalism makes government more efficient. Nobel Laureate James Buchanan demonstrated mathematically that centralized decision-making over local projects results in local government spending more than it would freely choose to spend.³⁹⁸ Moreover, policy makers in local government are simply more aware of the costs of their policies, as the flow of information improves.³⁹⁹ Thus, policymakers and citizens alike are more likely to weigh the benefits of any program against its actual cost.⁴⁰⁰ Once in place, monitoring the effects of policies is easier and enforcement costs are lower as government downsizes.⁴⁰¹

B. Functional Analysis v. Formal Analysis

Federalism's two greatest benefits are that each government may serve as a check on the other one and that the union of central and subordinate governments yields the benefits of both unitary and

396. As Richard Henry Lee, writing under the pseudonym "Federal Farmer" noted, "one government and general legislation alone, can never extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the different states, by which a uniform system of laws would be unreasonably invaded." Richard Henry Lee, Letter I (Oct. 8, 1787) *THE FEDERALIST AND OTHER CONTEMPORARY PAPERS ON THE CONSTITUTION OF THE UNITED STATES* 839, 847 (E.H. Scott ed., 1894).

397. 13 OR. Rev. Stat. § 127.800 (Supp. 1998). This legislation is commonly known as the "Death with Dignity Act."

398. See JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 135-40 (1962).

399. See McConnell, *supra* note 359, at 1509-10.

400. OATES, *supra* note 360, at 13.

401. See McConnell, *supra* note 359, at 1504.

decentralized governments. Consequently, in a functional analysis of federalism, the focus must be on allocating tasks to state or national governments based promoting these values. Simply, because some tasks are better accomplished on a national scale while others are better handled at the state or local level, courts should inquire as to the "utility" of one government regulating a matter over another, while, at the same time, maintaining the socio-political benefits of federalism.⁴⁰² In this manner, federalism would seek to let the each level of government do what it does best.

In so doing, a court should evaluate the economic and socio-political gains, via the entire nation, of promoting either local or national authority in the questioned area. Moreover, the base-line inquiry must be whether the problem complained, which provoked the questioned law's passage, is a "national" problem. In so doing, responsibility will be allocated to the government where the most gains, nationally, can be realized, thereby, realizing the advantages of both national and state governments. By approaching questions with the formal analysis, however, the crucial policy goals of federalism become secondary matters. As a result, a constitutional policy is disregarded and the nation suffers as a whole.

As proof, consider the Violence Against Women Act of 1994⁴⁰³ ("VAWA"). This Act, recently invalidated by the Fourth Circuit on federalism grounds,⁴⁰⁴ was a "response to the problems of domestic violence, sexual assault, and other forms of violence against women."⁴⁰⁵ The controversial provision extends a federal substantive right to "[a]ll persons within the United States . . . to be free from crimes of violence motivated by gender."⁴⁰⁶ To enforce this right, the law creates a private cause of action against any "person . . . who commits a crime of violence motivated by gender"⁴⁰⁷ and allows any victim of such a crime to obtain compensatory damages,

402. See SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 386-87 (1993).

The argument from utility had provided a rationale for the division of authority between the colonies and Westminster when the prerevolutionary debate turned to the federal option. Reflecting the way economists think . . . it was and has continued to be a sensible and practical premise for deciding what functions should be assigned to central and to local governments.

Id.

403. 42 U.S.C. § 13981 (1999).

404. See *Brzonkala v. Virginia Polytechnic Inst. and State Univ.*, 169 F.3d 820 (1999).

405. *Id.* at 827.

406. 42 U.S.C. § 13981(c).

407. *Id.*

punitive damages, and injunctive, declaratory or other appropriate relief.⁴⁰⁸

Now under traditional, formal, Supreme Court review, the Fourth Circuit invalidated the VAWA. The formal Supreme Court approach would first announce that the Constitution dictates that Congress may only legislate in areas that substantially affect commerce. One should question the validity of this premise. Why is it that the constitutional grant of power to regulate commerce⁴⁰⁹ is limited to objects that "substantially affects" commerce? The Constitution says nothing on the matter, and historical evidence is rather ambiguous on what included "commerce."⁴¹⁰ Thus, one encounters the first flaw in the Court's reasoning.

Next, the formal approach would look at VAWA and, perhaps comparing it to the Gun Free School Zone Act, declare that it has nothing to do with commerce. Again, one should question the application of the substantially affects commerce "principle" to this situation. It is plausible for Congress to find that the effects of gender violence could deter commerce. The necessary nexus may be the psychological effects of gender violence on one's ability to travel or purchase goods. Likewise, the power imbalances inherent to relationships marred by gender violence could restrict the abused partner's access to income, again potentially affecting interstate commerce.

Lastly, just as the Fourth Circuit did, the formal approach would declare the law void on federalism grounds. Moreover, the Fourth Circuit's reasoning follows the formal model perfectly:

[T]o sustain section 13981 as a constitutional exercise of the Commerce power, not only would we have to hold that congressional power under the substantially affects test extends to the regulation of noneconomic activities in the absence of jurisdictional elements, but we would also have to conclude that violence motivated by gender animus substantially affects interstate commerce by relying on arguments that lack any principled limi-

408. *See id.*

409. U.S. CONST. art. I, § 8, cl. 3.

410. Justice Thomas aptly demonstrated that some viewed manufacturing and agriculture as wholly distinct from "commerce" and thus not under the purview of the Commerce Clause. *See United States v. Lopez*, 514 U.S. 549, 590-94 (1995) (Thomas, J., concurring). *But see* Alexander Hamilton, *Report on Manufactures*, (Dec. 5, 1791), reprinted in *POLITICAL THOUGHT IN AMERICA* 161 (Andrew M. Scott ed., 1959) (noting that the United States should encourage manufactures to improve its domestic and foreign commerce, and hinting that Congress should make labor policies).

tations and would, if accepted, convert the power to regulate interstate commerce into a general police power.⁴¹¹

It is interesting to note the lack of discussion on how this law actually affects federalism. The policy rationale underlying VAWA, as it relates to federalism is never discussed. Further, the court never even considered if gender abuse has risen to levels beyond which a state can effectively rectify the situation. Thus, to remedy this defect, the proposed test has as its underlying purpose to find what types of problems should be handled nationally and at the state level, and allocating responsibility accordingly.

C. Putting the Test to the Test

Continuing with the VAWA example, a functional analysis would first consider the national gains for allowing this law. VAWA grants citizens a remedy for a heinous wrong, a wrong that the states might not compensate victims for specifically. In addition, granting a federal remedy will uniformly address this wrong, thus making recoveries across the nation relatively equal. Note, however, that few of the typical benefits for large government action are realized. Cross-boundary externalities, for example, will most likely not be decreased, as it is unlikely that defendants under this law would move to one jurisdiction on the basis that it did not have the law. Economies of scale are certainly not realized, as the costs for trials based on this new cause of action, both in terms of court costs and other litigation expenses, will not go down proportionately to the increase in people taking advantage of the law.

Next, a court should consider the gains for localizing this matter. Because safety and other social concerns change based on the needs of particular jurisdictions, it usually makes sense to leave both the creation of a new tort and a new crime to the states. Residents and local officials, for whom monitoring this law will be more efficient, for example, will be able to better value the gains and weaknesses of the policy, as compared to national lawmakers. Such monitoring could permit changes in the permitted value of the award, or perhaps to explicitly include attorney's fees. In addition, a jurisdiction might think its rape and assault laws sufficient, while still another locale might wish to make this remedy available, but lower the burden of proof, thus making recovery easier. All in all, local officials will be able witness the effects of the law and address problems with it much faster, thus increasing accountabil-

411. *Brzonkala*, 169 F.3d at 838.

ity and efficiency in government throughout the nation. Additionally, because the costs for enforcing this law grow in proportion to the size of its citizenry, it makes more economic sense to allocate such responsibility to local government, both to enact such cost-inducing legislation, and to enforce it.

This test is an easily applied mechanism to achieve the Framers' goal: to let the national government legislate over national concerns and permit the states to control matters of local concern. Thus, the test attempts to answer whether gender abuse has evolved, from what was once a local problem, to an issue of national concern. Based on the brief exposition of economic and socio-political benefits derived from VAWA, the answer seems to be no. Yet, one must consider the effect this problem has on the nation as a whole. If there is evidence that the combined effects of gender violence affects the nation, much like, even in the absence of the Fourteenth Amendment, the effects of racial discrimination affect the entire nation, then Congress may have the proper basis for the law.

In the end, laws must succeed or fail not due to a lack of a nexus with interstate commerce, but due to their connection to the national interest. As a result, state governments will be more proactive, forced to perform their constitutionally prescribed task of providing for local concerns. Likewise, the national government will be responsible for performing its intended objectives, without interfering in matters best left to the states. The benefits of federalism will be realized as a result, the Framers' vision better effectuated and the nation will be better off as a whole.

Conclusion

As America enters the new millennium, it should reevaluate the structure of its government. To best maximize the utility of the current structure, the Supreme Court should employ a functional test emphasizing the values of federalism. To its credit, this test retains the Framers' vision by dividing powers among local and national entities. Importantly, this division can change over time. Additionally, this test can be applied to all federalism concerns, thus yielding its greatest benefit — uniformity in the Court's federalism jurisprudence. Consequently, the Court should adopt such a test and support the purposes of federalism, thereby safeguarding its values.

MORE TREES PLEASE: UTILIZING NATURAL RESOURCES IN THE URBAN ENVIRONMENTAL MANAGEMENT OF NEW YORK CITY

Vivian D. Encarnacion*

Introduction

Trees are an invaluable commodity to any community, capable of increasing the value of property¹ and also enhancing the physical terrain of a neighborhood, thereby attracting more residents and visitors.² Aside from aesthetic appeal, trees also serve an important role in the ecological system by cleansing the air,³ reducing pollution,⁴ mitigating extreme temperatures,⁵ conserving energy⁶ and preventing excessive stormwater runoff.⁷ In recognition of these benefits, many urban environmental strategists desire to in-

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1. See Steve Goldman, *Preserve a Tree, Add Value to Property*, LEDGER (Lakeland, Fla.), Apr. 19, 1997, at 12L ("Properties with saved and transplanted trees have proven to sell or rent faster and better than properties without trees.").

2. See N.Y. ENVTL. CONSERV. LAW § 53-0301(5) (McKinney 1997) ("Improved and expanded urban tree programs for planting and maintenance of trees and associated vegetation in urban areas would make urban areas more pleasant and healthful places to live, work and visit[.]").

3. See Janine Benyus, *Click Here For Cleaner Air: CITYgreen Software Program*, 103 AM. FORESTS 34 (1997) ("[T]rees clean our atmosphere . . . by storing carbon.").

4. See Lynn MacDonald, *Global Problems, Local Solutions: Measuring the Value of the Urban Forest*, 103 AM. FORESTS 26, 26 (1996) ("[T]rees absorb and store carbon and remove numerous other particulates from the air."). See also Kyle Niederpruem, *Group Says City that Values Trees Has It Made in the Shade*, INDIANAPOLIS NEWS, Mar. 17, 1998, at C05 ("If the [tree] canopy was increased to just 10 percent, the pollution benefits would increase annually by over 1,100 percent[.]").

5. See Gary Moll & Cory Berish, *Atlanta's Changing Environment*, 102 AM. FORESTS 26 (1996) (noting that Atlanta's downtown and airport temperatures soared up to twelve degrees higher than the surrounding tree-laden areas).

6. See Dora Ann Reaves, *Tree Planting Goes Online*, POST AND COURIER (Charleston, S.C.), July 2, 1998, at 1 (CITYgreen program helped Dade County, Florida, determine that "its trees provide \$5.3 million in direct summer energy savings.").

7. See Johns Hopkins, *Deluged: Value of Urban Trees*, 103 AM. FORESTS 24 (1997) ("[A] tree is like a huge straw: It draws water through its roots and facilitates evaporation through its leaves. The physical barriers it provides - its roots and fallen branches - regulate the flow of runoff, reducing the water's speed and spreading out its flow.").

corporate trees and other vegetation into their cities' development.⁸ However, given the limited space available for additional housing, a city will opt for increased development at the expense of its urban greenery.⁹

In an urban setting such as New York City, where the growing population is clustered on so few square miles, open space for future development is at a premium.¹⁰ To meet the demands of the expanding urban community, the City has received approval from the New York City Department of Housing Preservation and Development and the City Council to condemn several of its existing green spaces to build affordable housing.¹¹ Not surprisingly, this move prompted an impassioned response from those communities benefiting from the green sites and from several environmental groups. These concerned New Yorkers formed the New York City Coalition for the Preservation of Gardens (the "Coalition") to enjoin the condemnation and prevent the construction of residential units over their garden plots.¹² The Coalition sought help from the judicial system, demanding environmental impact review of the proposed construction and compliance with all applicable land use laws.¹³

The First Department of New York's Appellate Division affirmed the lower court's dismissal of the Coalition's petition for an injunction.¹⁴ According to the Appellate Division, the Coalition

8. Although local public policymakers rank natural resources, growth and development as their highest priorities, almost half of these officials do not use geographic information system ("GIS") data as part of urban environmental management. A GIS survey can be used for comprehensive planning, zoning and subdivision review as well as drainage and floodplain management. See *Corporations Go Green: Global ReLeaf Forest Projects of Mobil Corp. and American Forests*, 104 AM. FORESTS 3 (1998).

9. See Douglas Martin, *City Takeover Looms for Gardens on Vacant Lots*, N.Y. TIMES, May 1, 1998, at B1. See also Taft Wireback, *City Considers Tree Ordinance, Traffic Changes*, NEWS & RECORD (Greensboro, NC), May 27, 1998, at B1 (Councilman Earl Jones stated that he wanted his city to stay "green and beautiful . . . [b]ut at the same time, I don't want to do anything that could stifle development."); Maria Saporta, *Development Concerns Often Winning Out Over Trees*, ATLANTA J. & CONST., May 18, 1998, at 8E ("[M]etro governments all too often are willing to give permission to cut down trees so they won't obstruct development.").

10. See *New York City Coalition for the Preservation of Gardens v. Giuliani*, 670 N.Y.S.2d 654, 657 (1997) (noting that the City program sought to reclaim garden lots for the needed development of low cost housing).

11. See *id.*

12. See *id.* at 656-57.

13. See *id.* at 660-61.

14. See *New York City Coalition for the Preservation of Gardens v. Giuliani*, 666 N.Y.S.2d 918 (1998).

lacked standing to bring the action because it could not demonstrate a "legally cognizable injury."¹⁵ Even if the Coalition could bring such a suit, the Appellate Court indicated that the case would not survive on its merits.¹⁶ Because the Department of Housing Preservation and Development determined that the project would not have a significant impact on the environment, it designated the proposed construction as a "Type II"¹⁷ action under the State Environmental Quality Review Act ("SEQRA"),¹⁸ and stated that the action would not require an environmental impact assessment, nor would it violate existing land use regulations.¹⁹

The issue of whether the Coalition had standing to sue New York City runs deeper than the statutory qualification to challenge a municipality's action. The Coalition's attempted injunction raises questions concerning the City's environmental strategy for further urban development. Will the City continue to construct housing at the expense of its scarce green spaces if the development qualifies as a "Type II" action under SEQRA? In zoning and planning appropriate land use, has the City forgotten the purposes set forth in its Urban Forestry Program some twenty years ago?²⁰ How can the City meet the housing needs of continued urban growth while also preserving the maximum benefits from natural resources? Although the City's action did not qualify for classification as a "Type I" action,²¹ are there other less onerous methods of assuring increased environmental consideration in development decisions?

This Note contemplates some of the foregoing questions and proposes potential solutions to New York City's green space issues.

15. *Id.*

16. *See id.*

17. *See infra* note 18.

18. N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 1997). In compiling the rules and regulations for SEQRA, the legislature defined certain classes of actions as "Type II," which the legislature determined would not have a significant impact on the environment or which it could otherwise be precluded from environmental review under SEQRA. Pertinent to the 1997 *Coalition v. Giuliani* case are actions which consist of "replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site, including upgrading buildings to meet building or fire codes." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(c)(2) (1998).

19. *See Giuliani*, 666 N.Y.S.2d at 918.

20. *See* N.Y. ENVTL. CONSERV. LAW § 53-0301(1) (McKinney 1997). The legislature found and declared that: "It is the purpose of this [law] to promote a comprehensive urban forestry program to assure positive benefit from urban trees planned and managed with adequate recognition of the physical, biotic and social surroundings in which they are encouraged to grow and provide their benefits." *Id.*

21. *See infra* notes 68-70 and accompanying text. The replacement or reconstruction in kind of buildings which previously existed on a site as "Type II," not "Type I" actions. *See* N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(c)(2).

Part I provides an overview of the environmental impact of trees as well as New York City's current policies with respect to environmental conservation and urban development. Part II examines alternate policies implemented by other cities and communities to meet the challenges of increased development and their environmental impact. Part III proposes solutions to New York City's green space issues, suggesting reliance on the incorporation of trees and other natural resources into urban planning instead of following the recommendations by SEQRA for the preparation of the lengthy environmental impact statement ("EIS")²² for certain activities. Finally, this Note concludes that the development of an urban forestry program will effectuate the benefits inherent in an urban forest most successfully.

I. Overview

A. Benefits of Preserving Trees in an Urban Community

Research continually reveals that trees benefit urban communities in a number of ways. First, with respect to air quality, trees remove damaging pollutants from the atmosphere and replenish it with oxygen.²³ Through the process of transpiration and photosynthesis, trees sequester grams of ozone, sulfur dioxide, nitrogen dioxide and carbon monoxide every hour, amassing several tons of carbon storage each year.²⁴ This carbon sequestration process in turn reduces the harmful effect of these noxious gases that cause global warming as well as lung-related ailments.²⁵ Researchers also have been able to quantify the value of this carbon removal through the use of a carbon storage and sequestration model called UFORE-C.²⁶ In fact, utilizing the figures economists employ to estimate the effect pollutants cost society, one research ecologist was

22. The requirements for the preparation of an EIS are contained in N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 1997). For rules regarding the content of an EIS, see N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9 (1998).

23. See E. Gregory McPherson & David J. Nowak, *Value of Urban Greenspace for Air Quality Improvement: Lincoln Park, Chicago*, 2 ARBORIST NEWS 30-32 (1993); David J. Nowak, *Urban Forest Structure and the Functions of Hydrocarbon Emissions and Carbon Storage*, in PROCEEDINGS OF THE 5TH NATIONAL URBAN FOREST CONFERENCE 48-51 (P.D. Rodbell ed., 1992).

24. See Benyus, *Click Here For Cleaner Air*, *supra* note 3.

25. See John H. Cushman, Jr., *Scientists Are Turning to Trees to Repair the Greenhouse*, N.Y. TIMES, Mar. 3, 1998, at F4.

26. See Benyus, *Click Here For Cleaner Air*, *supra* note 3; see also Rowan A. Rowntree & David J. Nowak, *Quantifying the Role of Urban Forests in Removing Atmospheric Carbon Dioxide*, 17 J. ARBORICULTURE 269-75 (1991); David J. Nowak, *Atmospheric Carbon Reduction by Urban Trees*, 37 J. ENVTL. MGMT. 207-17 (1993).

able to compute carbon sequestration into a tangible "dollar value."²⁷

Carbon sequestration, however, is not the only role trees play in the urban ecosystem. Researchers also have found that trees alter the urban ecosystem by decreasing air temperatures.²⁸ Studies indicate that a ten percent increase in tree canopy cover results in a one to two degree Fahrenheit reduction in air temperature.²⁹ In addition, a one degree decrease in temperature will reduce the possibility of smog by six percent.³⁰ Furthermore, increased tree canopy coverage protects urban dwellers from the harmful effects of ultraviolet radiation ("UV").³¹

Nevertheless, researchers have recognized some drawbacks in utilizing trees to mitigate the effects of UV.³² For example, trees can become a public hazard if they interfere with above- or below-

27. Nowak, *Atmospheric Carbon Reduction*, *supra* note 26. One economist cautions against reliance on "dollar values" to emphasize the importance of urban forestry programs. See, e.g., John F. Dwyer, *The Role Economics Can Play as an Analytical Tool in Urban Forestry*, in URBAN FOREST LANDSCAPES: INTEGRATING MULTIDISCIPLINARY PERSPECTIVES 88, 88-90 (Gordon A. Bradley ed., 1995). According to his view, public decisionmaking with respect to urban forestry involves more than "estimates of the monetary value of urban trees and forests." *Id.* at 89. It entails the "emotional attachment" of the community to its trees as well as the "net benefit" expected from tree planting programs. *Id.* at 89, 92 (For more on the emotional ties people feel with their urban landscape, see John F. Dwyer et al., *The Deep Significance of Urban Trees and Forests*, in ECOLOGICAL CITY 137, 137-49 (Rutherford H. Platt et al. eds., 1994)). In his opinion, the role of economics in promoting urban forestry should be expanded to encompass not only "dollar values" but also a framework for evaluating changes in urban forestry programs in context with other public initiatives. See *id.* at 96.

28. See C.S.B. Grimmond & T.R. Oke, *Comparison of Heat Fluxes From Summer-time Observations in the Suburbs of Four North American Cities*, 34 J. APPLIED METEOROLOGY 873-89 (1995); E. Gregory McPherson, *Cooling Urban Heat Islands with Sustainable Landscapes*, in ECOLOGICAL CITY 151, 155-56 (Rutherford H. Platt et al. eds., 1994).

29. See Nancy Anne Dawe, *Sprinting Toward Sustainability: Tree Planting Programs in Atlanta, GA*, 102 AM. FORESTS 22 (1996). See also McPherson, *Cooling Urban Heat Islands*, *supra* note 28, at 158 (showing in a study that vegetation consistently lowered wall surface temperatures by about seventeen degrees Celsius and reduced air-conditioning costs by twenty-five to eighty percent).

30. See Moll & Berish, *supra* note 5.

31. Excessive exposure to UV can lead to skin cancer, cataracts and immune system disorders. If pollutants are allowed to reduce the ozone level, these problems are intensified. One study shows that trees reduce UV by twenty-five to forty percent in sunny locations between street trees. In the shade, UV is reduced fifty-five to eighty percent. See R.H. Grant & G.M. Heisler, *Solar Ultraviolet-B and Photosynthetically Active Irradiance in the Urban Sub-canopy: A Survey of Influences*, 39 INT'L J. BIOMETEOROLOGY 201-212 (1996).

32. See McPherson, *Cooling Urban Heat Islands*, *supra* note 28, at 162.

ground utility lines.³³ In addition, increased tree planting can amplify the amount of pollen that affects allergy sufferers, and also can constrain the use of scarce water supplies.³⁴ Furthermore, canopy coverage can trap some harmful pollutants and serve to reduce beneficial "country-city air flow."³⁵ Despite these potential problems, however, researchers believe that careful planning and proper selection of trees will minimize the possible damaging impacts of an urban forest.³⁶

Strategic planting of trees also can increase a city's energy efficiency.³⁷ Research conducted since the mid-1980s has quantified the energy saving potential of urban forests.³⁸ According to the Energy Information Administration, household heating and cooling cost consumers \$180 billion in 1987.³⁹ Studies have found that a twenty-five foot tall tree could save ten to twenty-five dollars annually on these energy costs alone.⁴⁰

Because trees release cool vapor into the air during photosynthesis, the need for artificial cooling devices is reduced.⁴¹ In fact, according to one study, the air-conditioning savings from a deciduous tree near a well-insulated home ranged from ten to fifteen percent, while an eight to twelve percent savings was reported during peak cooling periods.⁴² Landscape vegetation around individual buildings also can result in heat savings of five to fifteen percent and cooling savings of ten to fifty percent.⁴³

33. *See id.*

34. *See id.*

35. *Id.* "Country-city air flow" describes the pattern of air currents that travel between the suburban and urban areas.

36. *See id.*

37. *See* Gary Moll, *Urban Ecosystems: Breakthroughs for City Green*, 101 AM. FORESTS 23 (1995) (energy savings could double if trees were planted in vacant strategic locations); MacDonald, *supra* note 4 (adding one mature tree in the right location at each home will increase energy savings).

38. *See* E. Gregory McPherson et al., *Energy-Efficient Landscapes*, in URBAN FOREST LANDSCAPES: INTEGRATING MULTIDISCIPLINARY PERSPECTIVES 150, 153-54 (Gordon A. Bradley ed., 1995); G.M. Heisler, *Energy Savings with Trees*, 12 J. ARBORICULTURE 113-25 (1986); E. Gregory McPherson & Rowan A. Rowntree, *Energy Conservation Potential of Urban Tree Planting*, 19 J. ARBORICULTURE 321-31 (1993); E. Gregory McPherson, *Using Urban Forests for Energy Efficiency and Carbon Storage*, 92 J. FORESTRY 36-38, 40-41 (1994).

39. *See* McPherson et al., *Energy-Efficient Landscapes*, *supra* note 38, at 151.

40. *See id.* at 152-53.

41. *See* MacDonald, *supra* note 4.

42. *See* McPherson et al., *Energy-Efficient Landscapes*, *supra* note 38, at 152-53.

43. *See id.* at 153.

Moreover, scientists have recognized that trees also can serve as a tool in the reduction of stormwater runoff.⁴⁴ The incorporation of trees and other vegetation costs five to ten times less than using solely manmade stormwater infrastructures.⁴⁵ The leaves on trees keep large quantities of rain and snow from falling to the ground and tree roots absorb excess surface water, thereby stabilizing ground soil.⁴⁶ Street trees provide the greatest annual benefit in avoiding stormwater runoff by diverting 327 gallons of water compared with the 104 gallons averted by park trees.⁴⁷

Irrespective of such obvious benefits, some critics view the utilization of trees to combat the greenhouse effect with skepticism. Michael Oppenheimer of the Environmental Defense Fund believes, for instance, that the carbon sequestration power of trees can produce many benefits, but warns that if the sequestration project is implemented poorly, it actually could do more harm to the ecosystem and exacerbate the greenhouse problem.⁴⁸ The head of climate programs at the Sierra Club likewise holds tree sequestration proposals with reservation. He believes one would need to plant enough trees to cover the area of Australia in order to offset U.S. industrial emissions.⁴⁹ Advocates of natural resource use do agree that trees can handle only a fraction of the greenhouse gas problem, but point out that failure to replace "hard-scape" with some tree cover contributes to permanent environmental predicaments.⁵⁰

44. See Benyus, *Click Here for Cleaner Air*, *supra* note 3.

45. See Hopkins, *supra* note 7.

46. See *id.*

47. See E. Gregory McPherson, *Net Benefits of Healthy and Productive Urban Forests*, in *URBAN FOREST LANDSCAPES: INTEGRATING MULTIDISCIPLINARY PERSPECTIVES* 180, 188 (Gordon A. Bradley ed., 1995).

48. See Cushman, *supra* note 25 (noting that improperly placed trees can increase building energy use and power plant emissions and that care and removal of trees will expend some fuel use which also emits carbon dioxide into the air); see also USDA Forest Service, *Current Research: Tree Influences on Carbon Dioxide* (visited Mar. 20, 1999) <<http://svinet2.fs.fed.us/ne/syracuse/unit.html#air>>.

49. See Cushman, *supra* note 25.

50. "Hard-scape" refers to roads, sidewalks and other concrete or asphalt areas of a city. See Benyus, *Click Here For Cleaner Air*, *supra* note 3. Permanent environmental hazards include poor air quality, depletion of the ozone layer, inefficient energy use and unmitigated urban air temperatures.

B. New York City's Current Policies and Goals

New York State adopted its environmental conservation law, SEQRA, in 1975.⁵¹ SEQRA was modeled after the National Environmental Policy Act of 1969 ("NEPA").⁵² Both SEQRA and NEPA contain similar provisions regarding the content of an EIS and which agencies would enforce compliance with the act.⁵³ SEQRA allows various "lead agencies" to determine whether or not a particular action requires an EIS.⁵⁴ This policy has resulted in inconsistent and unpredictable treatment of proposed activity. For example, while one lead agency may require an EIS for single family home construction, another may not require an EIS for a large industrial project, a venture that ostensibly would have a significant impact on the environment.⁵⁵

The New York State legislature has attempted to correct these incongruities and provide some predictability in the process through numerous amendments to SEQRA.⁵⁶ The state now designates some activities as warranting automatic preclusion from environmental assessment review while insisting on an assessment

51. See 1975 N.Y. Laws ch. 612, § 2, amended by 1976 N.Y. Laws ch. 228, § 4. Shortly after enactment of SEQRA, New York City promulgated the City Environmental Quality Review ("CEQR"), 62 R.C.N.Y. ch. 5, app. A (1997). CEQR resulted from Executive Order No. 91 of 1977, which was superseded by 62 R.C.N.Y. ch. 5 (1997), in recognition of the city's continuing policy that "environmental, social and economic factors be considered before governmental approval is given to proposed activities that may significantly affect [the] urban environment." 62 R.C.N.Y. ch. 5, app. A. Authorization for CEQR stems from N.Y. ENVTL. CONSERV. LAW § 8-0113(3) (McKinney 1997).

52. § 102, 42 U.S.C.A. § 4332(2)(C)(i)-(v) (1995). NEPA sets forth the requirements for a detailed statement whenever major Federal actions will have a significant effect on the quality of the human environment. SEQRA duplicates each of these requirements and adds a few additional requirements of its own. See N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(f)-(j).

53. See 42 U.S.C.A. § 4332(2) (all agencies of the Federal Government are authorized to oversee the integrated use of natural science and the environmental design arts in planning and in decisionmaking as well as the preparation of a detailed statement on the environmental impact of proposed actions); cf. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (agencies, including any state and local municipalities, are responsible for the preparation of an EIS on any action that may have a significant effect on the environment).

54. "Agency means a state or local agency." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2(c) (1998). A "state agency means any state department, agency, board, public benefit corporation, public authority or commission." *Id.* § 617.2(ah). A local agency includes "any local agency, board, authority, district, commission or governing body, including any city, county and other political subdivision of the state." *Id.* § 617.2(v).

55. See Michael B. Gerrard & Monica Jahan Bose, *Possible Ways to "Reform" SEQRA*, N.Y. L.J., Jan. 23, 1998, at 3.

56. See *id.*

for certain activities by classifying as either "Type II" or "Type I" actions.⁵⁷ For example, the maintenance or repair of an existing structure involving no substantial changes qualifies as a "Type II" action, legislatively precluded from environmental assessment review.⁵⁸ SEQRA, however, requires an assessment for any "Type I" action, such as the adoption of a municipal land use plan.⁵⁹

Even these modifications to SEQRA have failed to provide the assurance of preclusion from review sought by some developers whose projects ostensibly qualify as "Type II" activities. A trial court still can invalidate an EIS it finds "arbitrary and capricious" even though courts generally accord great deference to lead agencies' judgments on the EIS' adequacy.⁶⁰ Furthermore, most "Type II" actions with respect to development involve changes to existing facilities or construction of nonresidential structures with only a limited allowance for new construction.⁶¹ Because the significant effort necessary to prepare an EIS may be squandered in these ways, developers in areas such as New York City may choose to forego certain construction activities if they must prepare an EIS.⁶²

SEQRA is not the only measure the New York State legislature has enacted to inject an environmental focus in municipal planning. In 1978, the State added a tree conservation provision to its general

57. See N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.5 and 617.4, respectively.

58. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(c)(1). CEQR contains a list of its own "Exempt Actions," which are less numerous than those posed by SEQRA. Compare 43 R.C.N.Y. § 6-04 (1997), with N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5. Exempt actions under CEQR include those necessary on a limited emergency basis and certain modifications to projects classified as "Type I" which occur after 1977. See 43 R.C.N.Y. §§ 6-04(a), (b) and (h). Nevertheless, "Type II" actions under SEQRA are included within CEQR's exemption list by legislative fiat. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(a)(2) ("An agency may not designate as Type I any action identified as Type II [under SEQRA].").

59. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(b)(1). CEQR has similar "Type I" actions. See 43 R.C.N.Y. § 6-15 (1997).

60. See Gerrard & Bose, *supra* note 55, at 3; see also *South Bronx Clean Air Coalition v. New York State Dep't of Transp.*, 630 N.Y.S.2d 73 (1995); *People for Westpride, Inc. v. Board of Estimate*, 568 N.Y.S.2d 732 (1991).

61. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.5(c)(1), (4) and (7). There does exist "Type II" activity that permits new development, however, the structure must be either a reconstruction "in kind" and on the same site or construction of a single-, two- or three-family residence. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.5(c)(2) and (9).

62. "[F]ew developers want to bet on whether their EISs are thrown out by errant trial-level judges. Thus they either pay the insurance of preparing a massive EIS that covers almost every conceivable issue, or they quietly forgo the pleasure and invest their money in something that does not require SEQRA review." Gerrard & Bose, *supra* note 55, at 3.

municipal law.⁶³ The legislature found a "direct relationship between the *planting of trees*, shrubs and associated vegetation in sufficient number in populated areas and the health, safety, and welfare of communities,"⁶⁴ and empowered the legislative body of any county, city, town or village to promulgate any specific rules or regulations that protect and conserve trees and related vegetation.⁶⁵

Despite the enactment of this law, New York City has not adopted any rules or regulations providing for the planting of trees. Instead, it has created a limited protection of trees which may be affected by construction or which lie on public property.⁶⁶ To date, the City has not brought any proceeding against a person who may have violated these laws. For the most part, environmental conservation of the City's urban forest rests on its local version of SEQRA,⁶⁷ which restricts or permits development activity based on its classification as either a "Type I" or "Type II" action.⁶⁸

C. "Type I" and "Type II" Actions under SEQRA

"Type I" development projects involve the construction of residential units in excess of 2500 where a connection to the public water and sewage system is required.⁶⁹ A "Type I" classification of a development project may entail the preparation of an EIS.⁷⁰ An EIS involves a detailed description of the proposed activity along with its short- and long-term environmental effects.⁷¹ There are several other requirements for completion of the EIS, including

63. See N.Y. GEN. MUN. LAW § 96-b (McKinney 1986).

64. *Id.* § 96-b(1) (emphasis added).

65. See *id.* § 96-b(2).

66. See N.Y.C. ADMIN. CODE § 18-107 (1997) (mandating that trees removed during construction must be replaced with 2½ to 6 inch caliper trees at the remover's expense); N.Y.C. ADMIN. CODE § 27-1030 (1997) (mandating that trees outside the street line may not be disturbed or removed without permission from the commissioner of parks and recreation); N.Y.C. ADMIN. CODE §§ 10-148 and 10-149 (1997) (imposing a fine of up to \$15,000 and imprisonment of not more than one year on any person, firm, corporation or agent who unlawfully cuts trees on city property).

67. See Richard L. Schaffer, *Reflections on Planning and Zoning*, in *PLANNING AND ZONING NEW YORK CITY: YESTERDAY, TODAY AND TOMORROW* 239, 248-50 (Todd W. Bressi ed., 1993).

68. A "Type I" action indicates that the project or action will more likely require the preparation of an EIS while a "Type II" action (or "Exempt Action" under CEQR) has been determined to not have a significant impact on the environment or is otherwise precluded from environmental review. See N.Y. COMP. CODES R. & REGS. tit. 6, §§ 617.4 and 617.5, respectively; see also R.C.N.Y. § 6.04.

69. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(b)(5)(v).

70. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(a)(1).

71. See N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(b).

studies on issues such as energy conservation and solid waste management.⁷²

Once the lead agency determines that the EIS adequately covers all potential types of environmental impact, or that it will issue a negative declaration under SEQRA, there is no guarantee that the project will continue unchallenged.⁷³ A developer may still face legal obstacles from the community which can delay the project for months or years at the developer's expense.⁷⁴ One commentator has suggested the elimination of EISs for proposed structures in New York City.⁷⁵ Alternatively, if a developer's plans do not threaten the environment according to SEQRA and are classified as one of the "Type II" actions, the potential delay and cost of litigation may be prevented.

Designation of an activity as "Type II" under SEQRA, however, will not shield it from a private legal challenge. Pursuant to New York law, a party can challenge an agency's determination that a specified action does not require an EIS or that the action is exempt under SEQRA.⁷⁶ Courts, however, are reluctant to sustain a challenge to a "Type II" designation because the legislature has declared that such a designation is "not subject to review under SEQRA."⁷⁷ A party must demonstrate "injury in fact" or some "actual legal stake" in the matter to bring an action before the court.⁷⁸

Furthermore, regulations stipulate that an agency "may not designate as 'Type I' any action identified as 'Type II.'"⁷⁹ Therefore, no environmental review will ensue for "Type II" activities although there may exist measures to improve the local environment. For example, the in kind replacement of buildings, irrespec-

72. See N.Y. ENVTL. CONSERV. LAW §§ 8-0109(2)(h) and (i).

73. See *Hoffman v. Town Bd. of Queensbury*, 680 N.Y.S.2d 735 (1998) (concerning an Article 78 proceeding seeking to annul town board's resolution of negative declaration for proposed subdivision).

74. See *Gerrard & Bose*, *supra* note 55, at 3 (indicating that an erroneous trial court decision over the adequacy of an EIS can delay a project for months or years, making the project "extremely costly").

75. See Peter D. Salins, *Zoning for Growth and Change*, in *PLANNING AND ZONING NEW YORK CITY: YESTERDAY, TODAY AND TOMORROW* 164, 179-81 (Todd W. Bressi ed., 1993).

76. See N.Y. C.P.L.R. § 7801 (McKinney 1994); see also, e.g., *King v. County of Monroe*, 679 N.Y.S.2d 779 (1998) (holding that landowner had standing to challenge a county's negative declaration of a proposed sports complex).

77. *Coalition for the Preservation of Gardens v. Giuliani*, 670 N.Y.S.2d 654, 661 (quoting N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(a)).

78. *Id.* at 659.

79. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(a)(1).

tive of any intervening use of the property, is a "Type II" activity.⁸⁰ Where communities have utilized the property for several years as garden lots, adverse environmental contingencies may flow from converting the natural landscape into concrete and asphalt.⁸¹ If the conversion qualifies as a "Type II" activity, however, SEQRA will not require an environmental impact assessment nor make suggestions on ways to preserve the benefits conferred by the garden lots.⁸²

Consequently, a petitioner must demonstrate that the proposed activity is either a "Type I" action or an "Unlisted" action that exceeds certain threshold requirements.⁸³ While "Unlisted actions" do not carry the presumption that they will have a "significant adverse impact on the environment and may require an EIS,"⁸⁴ an agency must make a determination of significance by "comparing the impacts which may be reasonably expected to result from the proposed action."⁸⁵

Although New York City's population will approach close to 7.5 million people by the year 2000,⁸⁶ it has not adopted any other environmental review strategy. The City Planning Commission intends to change its local version of SEQRA in an effort to eliminate separate review by each lead agency of every action and to develop procedures to conduct "meaningful environmental reviews of proposed areawide rezonings."⁸⁷ Aside from these initiatives, the City appears content to rely on the current environmental safeguards for its urban planning and development.

80. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(c)(2).

81. This was the argument advanced by the Coalition for the Preservation of Gardens in the 1997 *Coalition v. Giuliani* case. The Coalition contended that the use of the vacant lots as community gardens for periods ranging from five to ten years essentially re-characterized the nature of those lots. Therefore, the proposed condemnation of the lots for residential development would "present serious environmental consequences requiring review under SEQRA" even though SEQRA classifies such action as "Type II." *Coalition v. Giuliani*, 670 N.Y.S.2d at 660.

82. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5 (stating "Type II" actions are not subject to SEQRA review, hence will not require EISs nor any other environmental conservation efforts).

83. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(a)(1).

84. *Id.*

85. *Id.*

86. See CITY AND THE WORLD: NEW YORK'S GLOBAL FUTURE 102-03 (Margaret D. Crahan & Alberto Vourvoulias-Bush, eds., 1997); New York City Department of Planning, *Population Projections for the Year 2000*, Technical Report 1.

87. Schaffer, *supra* note 67, at 250.

II. Various Responses

A. Alternate Policies Implemented by Other Cities and Communities

New York City is not the only community faced with the formidable task of urban environmental development. Several cities and communities nationwide have attempted to address the needs of their growing populations' infrastructure while preserving their urban forests.⁸⁸ For example, in preparation for the 1996 Summer Olympics, Atlanta, Georgia faced an environmental crisis. By converting sixty-five percent of its urban forest into a "built environment,"⁸⁹ Atlanta created a palpable "urban heat island."⁹⁰ The Atlanta Committee for the Olympic Games ("ACOG") feared that the increased air temperature and accompanying humidity would result in "bad experiences and major emergencies for the 15,000 athletes, trainers and Olympic officials" expected that summer.⁹¹ Although the city planned to counterbalance the urban heat island effect with increased air conditioner use, it realized that these measures were temporary and limited, at best.⁹²

Recognizing the need to develop a sustainable strategy which would not drain the municipal coffers, Atlanta took advantage of a recently developed program called CITYgreen to devise a solution to its problem.⁹³ Analyzing data taken by a Landsat satellite from 1972-1993, the CITYgreen program highlighted the fact that rapid deforestation had produced more pollution, reduced water quality and resulted in more expensive summer cooling bills.⁹⁴ ACOG uti-

88. See, e.g., Moll & Berish, *supra* note 5 (Atlanta responded by utilizing CITYgreen software); MacDonald, *supra* note 4 (Milwaukee, Wisconsin and Austin, Texas conducted UEA of their cities); Jennifer Radcliffe, *Committed to Saving Trees: Keller Joins Area Cities in Preservation Effort*, FORT WORTH STAR-TELEGRAM, Dec. 4, 1998, at 1 (Keller, Texas enacted a strict tree preservation ordinance).

89. A "built environment" consists of buildings, roadways and other improvements that replace the natural landscape. See Moll & Berish, *supra* note 5.

90. "Urban heat islands" result from a city's reduction in its tree canopy coverage. As urban infrastructure needs increase, natural resources are removed for the sake of developing buildings and roadways. These structures create "heat islands" that adversely affect air quality and drain utility resources because they absorb the sun's heat and retain it longer than natural resources would. As a result, air temperatures increase which in turn increase smog and air pollution. See *id.* The structure of urban heat islands is explained in McPherson, *Cooling Urban Heat Islands*, *supra* note 28, at 152-55.

91. Dawe, *Sprinting Toward Sustainability*, *supra* note 29.

92. See *id.*

93. See Moll & Berish, *supra* note 5.

94. See *id.*; see also Michelle Robbins, *Thinking Sustainably: Sustainable Ecosystems*, 102 AM. FORESTS 7 (1996).

lized the CITYgreen data to influence the construction of Centennial Olympic Park, the largest urban green space developed in over a quarter of a century.⁹⁵ The environmental analysis also acted as an impetus for the Atlanta Regional Commission to pass and enforce new tree conservation ordinances.⁹⁶

Prior to 1995, however, cities had few analytical tools to quantify the environmental impact of their development.⁹⁷ Although most planners intuitively knew that trees and other natural resources play a vital role in the urban environment, they could not place an actual value on natural resource use.⁹⁸ Developed in response to this problem, the CITYgreen program utilizes computerized land-use planning software to enable every community to determine the value of its local ecosystem.⁹⁹ Without a sufficient cost-benefit analysis like that made possible by CITYgreen, many city officials simply could not justify creating a budgetary allowance for natural resources.¹⁰⁰

Atlanta was among the first communities to utilize the CITYgreen software program.¹⁰¹ Studies revealed that a tree canopy increase of only ten percent would yield a one to two degree reduction in air temperatures.¹⁰² CITYgreen models also demonstrated how Atlanta could reduce stormwater runoff which contributed to an increase in flooding and poorer water quality.¹⁰³

In light of CITYgreen's notable success in Atlanta, other communities have employed the computerized mapping tool.¹⁰⁴ Mil-

95. See Nancy Anne Dawe, *Atlanta: Positive Energy, Positive Future? Georgia*, 103 AM. FORESTS 22 (1997) (noting that satellite images showed the dramatic tree loss and temperature build-up between 1972 and 1993).

96. See Dawe, *Sprinting Toward Sustainability*, *supra* note 29.

97. See Moll, *Urban Ecosystems*, *supra* note 37.

98. Gary Moll, Vice President of Urban Forestry at American Forests stated, "Instinctively, we knew that paving paradise and putting up a parking lot was a bad idea, . . . but now, with scientific and engineering data, we can prove it." Janine Benyus, *Saving For a Rainy Day: Forests and Trees as Helpers in Fighting Floods and Pollution*, 104 AM. FORESTS 24 (1998) (internal quotations omitted).

99. See Moll, *Urban Ecosystems*, *supra* note 37.

100. See *Helping Cities Save the Green: Desktop Geographic Information System CITYgreen*, 103 AM. FORESTS 10 (1997).

101. See Moll & Berish, *supra* note 5.

102. See Dawe, *Sprinting Toward Sustainability*, *supra* note 29.

103. "Runoff from developed areas typically causes water flow to increase [thereby] increasing the risk of flooding, more sediment in the water, and reduced water quality." Moll & Berish, *supra* note 5.

104. See *Urban Ecosystem Analysis & CITYgreen: Success Stories from Cities and Individuals* (visited July 5, 1999) <<http://www.amfor.org/ufc/cgreen/success.html>>. CITYgreen was developed by American Forests, a nonprofit citizen conservation organization founded in 1875.

waukee, Wisconsin and Austin, Texas used CITYgreen to perform an Urban Ecosystem Analysis ("UEA") of those cities.¹⁰⁵ CITYgreen enabled these communities to visualize definitive "what if" scenarios from the loss or addition of urban trees.¹⁰⁶ Moreover, CITYgreen provided "dollar values" to increased canopy coverage.¹⁰⁷

In addition to its use of CITYgreen, Atlanta also enacted one of the state's most stringent tree ordinances.¹⁰⁸ The executive director of the Atlanta Regional Commission believed that the City no longer could afford to take its trees for granted.¹⁰⁹ State Representative Mark Burkhalter likewise supported the drafting of legislation that would require each Georgian county to enact tree preservation laws.¹¹⁰ Unfortunately, Atlanta's existing ordinance has never been enforced.¹¹¹ Unless local authorities make enforcement a "budget priority," even the strictest ordinances may prove ineffective.¹¹²

B. Environmental Conservation Ordinances

1. Effective Ordinances

Communities in Texas are experiencing less resistance to the enactment and enforcement of the state's environmental protection ordinances than other urban communities, such as Baltimore, Maryland and Chicago, Illinois.¹¹³ One of Texas' fastest growing

105. See MacDonald, *supra* note 4.

106. See Benyus, *Click Here For Cleaner Air*, *supra* note 3.

107. To compute this "dollar value," David Nowak, research ecologist with the U.S. Forest Service's Northeastern Forest Experiment Station, multiplies the tons of pollutants removed through canopy coverage by the figure economists use to estimate the effect pollutants cost society: \$6750 per metric ton ("pmt") for nitrogen dioxide and ozone, \$1650 pmt for sulfur dioxide, \$950 pmt for carbon monoxide and \$4500 pmt for particulate matter smaller than 10 microns. See *id.* Carbon sequestration is valued according to the price for carbon dioxide emission credits traded on the commodities market. See *id.*

108. See Editorial, *Things Looking Up for Atlanta's Trees*, ATLANTA J. & CONST., Dec. 2, 1998, at 22A. The ordinance requires "inch-for-inch replacement of trees destroyed by developers and builders or contributions to a tree bank for planting in other areas of the city when that's impossible." *Id.*

109. See Saporta, *supra* note 9.

110. See Editorial, *Things Looking Up*, *supra* note 108. The mandate to create tree ordinances will not stipulate what the ordinances must contain, but will allow local officials to design them to suit local needs. See *id.*

111. See Saporta, *supra* note 9.

112. Editorial, *Things Looking Up*, *supra* note 108.

113. Compare Radcliffe, *supra* note 88 (stating tree preservation ordinances enacted in Tarrant County to ensure leafy community remains green), and Vikas Bajaj, *Seeing Green: Laws Increasingly Require Builders to Consider Trees*, DALLAS MORN-

cities, Keller, passed a tree preservation law without encountering the friction that traditionally exists between developers and conservationists.¹¹⁴ The ordinance that the Keller City Council approved obliges developers to obtain the City's permission before cutting down trees.¹¹⁵ Residents who own more than five acres of land also must seek city permission before removing their trees.¹¹⁶ Violations of the ordinance subject a developer or resident to fines of \$100 per diameter inch of the tree illegally removed.¹¹⁷ While at least one resident expressed dismay over the inclusion of residents in the city ordinance,¹¹⁸ city planners believe the ordinance will ensure that their leafy communities remain "leafy."¹¹⁹

Another Texan community won a significant environmental victory defending its water pollution control ordinance.¹²⁰ In *Quick v. City of Austin*,¹²¹ developers challenged an ordinance that prohibited home construction surrounding the City's watershed area.¹²² The City maintained that the strictures it placed on converting its natural resources to an "impervious cover"¹²³ were rationally related to the protection of its water quality.¹²⁴ The Texas Supreme Court agreed, upholding the ordinance despite its determination that the ban on development would have the effect of significantly lowering property values in the area.¹²⁵ Two developers, however,

ING NEWS, Jan. 16, 1999, at 35A (noting that developers, residents and city planners worked together to craft tree ordinance), with Richard O'Mara, *The Shrinking Canopy: Asphalt Covers More of Baltimore Every Year, Making Summers Hotter, Air Fouler, Costs Higher*, BALTIMORE SUN, Dec. 29, 1997, at 1D (reporting that Baltimoreans do not like trees because they are too "messy"), and Gary Washburn, *Red Tape May Grow on Trees*, CHI. TRIB., May 19, 1998, at 1 (describing how residents protested proposed ordinance which would require homeowners to plant trees).

114. See Bajaj, *supra* note 113.

115. See KELLER, TEX., ORDINANCE NO. 935 §§ 1(D)-(E) (1998).

116. See *id.* § 1(F).

117. See *id.* § 1(R)(1).

118. A Keller resident, Raymond Nolte, raised a potential constitutional challenge to the city's dictation of what property owners could do with their own property. This constitutional challenge could rest on issues of governmental taking, equal protection or due process. See *infra* notes 153-165 and accompanying text.

119. Radcliffe, *supra* note 88.

120. See AUSTIN CITY CODE OF 1992, ch. 13-7, art. I, § 13-7-36.1 (1992).

121. No. 96-1154, slip op., 1998 WL 236304 (Tex. May 8, 1998).

122. See *id.* at *1.

123. "Impervious cover" consists of non-porous material on the natural landscape, such as brick, concrete or asphalt. See O'Mara, *supra* note 113.

124. See *Quick*, 1998 WL 236304, at *9 (finding that under federal law, the city is required to monitor pollutant constituents in the water that result from runoff).

125. "[T]he fact that the Ordinance severely impacts some property values does not make it invalid, arbitrary, unreasonable, inefficient, or ineffective in its attempt to control water quality." *Id.*

testified that compliance with the ordinance actually saved them money because the impervious cover limitation decreased the need for stormwater retention facilities.¹²⁶

The city of Austin also has conducted a UEA to increase its energy savings by expanding tree planting in appropriate locations.¹²⁷ A city's tree canopy coverage is essential to the effectuation of carbon sequestration.¹²⁸ According to the UEA, proper placement of the tree canopies in Austin could absorb thousands of tons of carbon each year, yielding an annual benefit of \$5.3 to \$9.2 million.¹²⁹ As a result of the UEA's cost-benefit analysis, the City's Office of Environmental Quality proposed the implementation of planting programs.¹³⁰

As early as 1989, communities around Washington, D.C. recognized the need for sustained planting programs.¹³¹ Despite the fact that tree ordinances existed in areas such as Takoma Park and Alexandria for several years, local officials pushed for greater tree protection.¹³² In response to the disappearance of its shade trees, a Maryland delegate introduced a bill in the Maryland General Assembly to protect trees on state highway rights-of-way.¹³³ Coupled with Washington, D.C.'s aggressive tree-planting program, local communities hoped to profit from the many benefits that their trees provide.¹³⁴

The benefits of an urban forest likewise have not escaped the attention of cities in Louisiana. Although New Orleans has never formed a comprehensive policy to protect its natural resources, a local environmental group has rallied the citizenry behind a proposed tree ordinance.¹³⁵ If passed, the ordinance would require persons involved with construction and maintenance projects to

126. *See id.* at *8.

127. *See Urban Ecosystem Analysis, supra* note 104.

128. *See supra* notes 23-26 and accompanying text.

129. For information relating to the computation of the annual benefit, *see supra* note 107.

130. *See Urban Ecosystem Analysis, supra* note 104.

131. *See* Editorial, *Save Our Trees*, WASH. POST, Feb. 26, 1989, at C8.

132. *See id.*

133. *See id.*

134. *See id.* (discussing benefits such as energy savings, increased property values, noise abatement and air pollution control).

135. *See* James Cohen, *Support Ordinance That Would Protect City's Trees*, TIMES-PICAYUNE, Apr. 18, 1998, at B6. The ordinance is supported by New Orleans Citizens for Urban Trees. *See id.*

obtain permits from the City's Department of Parks and Parkways before removing trees.¹³⁶

Baton Rouge has the distinction of being known as a "Tree City, USA."¹³⁷ Its Tree and Landscape Commission has operated for several years to implement tree planting programs.¹³⁸ Both Baton Rouge Green, a grass-roots environmental group, and the Louisiana Urban Forestry Council have educated residents about the role trees play in their lives and the continued importance of incorporating trees into the planning process.¹³⁹ Baton Rouge treats its trees as a necessary part of the city's infrastructure and plans its urban forest "just as a community plans for development, roads and bridges."¹⁴⁰

Not many communities plan their urban forests with the same enthusiasm with which they plan other infrastructures. For example, in an attempt to reorganize Indianapolis' development department and re-evaluate municipal priorities, its mayor discontinued development of a tree conservation ordinance in 1992.¹⁴¹ No further developments have occurred since this temporary cessation in drafting the ordinance despite a county health department report revealing that residents placed a high priority on trees and green spaces.¹⁴² The city of Indianapolis replaces only one in four trees lost on public property.¹⁴³ Urban forester John Parry lamented that "trees removed for development [often] fail to be replaced."¹⁴⁴ Currently, there are no plans to enact protective measures in Indianapolis.

136. *See id.* The proposed ordinance also provides for enforcement, "giving the proper officials the right to issue citations to those violating the city's tree ordinances." *Id.*

137. In order to garner the label of a "Tree City," a municipality must "spend at least \$2 a resident on urban forestry[,] . . . have a legally designated individual or group in charge of a tree program and an arboreal ordinance." Rachel Melcer, *Economies Really Do Grow On Trees, Towns Discover: Nature's Forgotten "Infrastructure" Gets Ringing Endorsement*, CHI. TRIB., Apr. 22, 1997, at 1.

138. *See* Bob Souvestre, *Trees Make Major Contribution to Landscape, Quality of Life*, ADVOCATE (Baton Rouge, La.), Aug. 30, 1998, at 10H.

139. *See id.*

140. *Id.*

141. *See* Clarke Kahlo, *The Public's Interest in Tree Protection*, INDIANAPOLIS STAR, Jan. 19, 1997, at B4.

142. *See id.* (noting that residents ranked the importance of flowers, trees and green spaces more highly than good school systems or a good economy).

143. *See* Niederpruem, *supra* note 4.

144. *Id.*

2. Enforcement of Ordinances

Even cities that have protective ordinances in effect may be unable to enforce them or may refuse to enforce them where they stifle development.¹⁴⁵ In Orland Park, Illinois, despite the city's stringent tree protection ordinance, a developer removed 100-year-old oak trees in a preservation area without incurring a fine.¹⁴⁶ Orland Park's attorney believed that the fine would not be upheld in court because the developer's annexation agreement predated the village's ordinance.¹⁴⁷ In a compromise with the village, the developer agreed to replace some trees with smaller and younger ones.¹⁴⁸

Still other communities with active tree protection laws encounter resistance from the ordinances' beneficiaries. Expenditures aimed at maintaining Chicago and its suburbs as "Tree Cities" have "drawn flak" from area residents who believed that the money should be appropriated to other programs.¹⁴⁹ Similarly, some Baltimore residents expressed an outright dislike for their trees and did not react when its arboreal department was repositioned to a less influential office within the city.¹⁵⁰ Counties in Virginia generally require that developers leave a stand of trees as a buffer between a housing development and an office park, but most have not mandated that landowners replace trees lost to home construction, notably the largest source of tree loss.¹⁵¹

145. See, e.g., Darlene Gavron Stevens, *Builder Isn't Fined For Axing Old Oaks: Orland Park Doubts Penalty Enforceable*, CHI. TRIB., Jan. 19, 1999, at 1 (stating that the Orland Park, Illinois ordinance was not enforceable against development projects that predate its enactment); David Karp, *Tree Rules May Be Pruned for Builders*, Sr. PETERSBURG TIMES (Tampa, Fla.), June 7, 1998, at 1 (reporting that Tampa, Florida will not enforce existing ordinance to encourage development).

146. See Stevens, *supra* note 145. The 1998 village ordinance imposes a fine on developers of \$200 per diameter inch of illegally chopped trees. The developer in question did not have to pay what amounted to a \$50,000 penalty because the "trees he cut were in the way of development and that some were on slopes that needed to be graded." *Id.*

147. See *id.*

148. See *id.* Despite this concession to the village, at least one resident was appalled at the removal. Resident Bob Loeb stated, "I'll be dead by the time those trees grow to be the same size as the ones we lost." *Id.*

149. Melcer, *supra* note 137 (noting that some residents indicated that they would rather see the money used for "police, roads, schools or other, more concrete services").

150. See O'Mara, *supra* note 113 (stating that residents who claimed a dislike for trees found them "messy, with their leaves and all" and resented their attraction of birds because "everybody knows what birds do").

151. See Rex Springston, *If a Tree Falls . . . We'll All Feel It, and It Won't Be Cool*, RICHMOND TIMES DISPATCH, Aug. 27, 1998, at E-1.

3. *Legal and Constitutional Challenges*

In communities where tree ordinances do dictate the manner in which a landowner must alienate her property, the law may face either invalidation or a constitutional challenge.¹⁵² For example, the South Carolina Supreme Court invalidated the city of Spartanburg's tree protection ordinance, reasoning that the city lacked authority to enforce it.¹⁵³ As enacted in 1962, South Carolina's local planning and zoning ordinance did not stipulate protection for its urban forest.¹⁵⁴ As a result, the city could not enjoin a developer from cutting trees and shrubbery.¹⁵⁵ In 1988, however, the General Assembly amended the ordinance to provide specifically for the "landscaping and protection and regulation of trees."¹⁵⁶ Consequently, municipalities can promulgate regulations pursuant to this amendment enabling them to enforce tree protection ordinances without fear of invalidation.¹⁵⁷

When it affects private property, a tree ordinance may be considered an uncompensated taking of property in violation of the Fifth Amendment.¹⁵⁸ An actual physical taking need not occur to create an unconstitutional exercise of eminent domain.¹⁵⁹ If an ordinance denies an owner all economically viable uses of her property and the government cannot demonstrate a rational relationship between the regulation and the goal thereof, then an unconstitutional taking has occurred.¹⁶⁰ Accordingly, a property owner must be compensated for the taking.¹⁶¹

152. See *infra* text accompanying notes 153-165.

153. See *Dunbar v. City of Spartanburg*, 221 S.E.2d 848 (1976).

154. See S.C. CODE ANN. § 6-7-710 (Law Co-op. 1998).

155. See *Dunbar*, 221 S.E.2d at 850.

156. 1988 S.C. Acts 590.

157. See Code 1976 § 6-7-710.

158. See U.S. CONST. amend. V (stating that "private property [shall not] be taken for public use, without just compensation").

159. See, e.g., *Sheerr v. Township of Evesham*, 445 A.2d 46, 57 (N.J. 1982) (finding that a taking occurs when an ordinance restricts property use so that the land cannot "practically be utilized for any reasonable purpose") (quoting *Morris County Land Improvement Co. v. Parsippany-Troy Hills*, 193 A.2d 232, 242 (N.J. 1963)).

160. See *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200, 202 (Ga. 1994) (4-3 decision), *cert. denied*, 515 U.S. 1116, *reh'g denied*, 515 U.S. 1178 (1995); see also Stacy Plotkin Silber, *Afforestation Under Maryland's Forest Conservation Act and Selected County Codes: Viability of this Land Use Regulation Pre- and Post-Dolan v. City of Tigard*, 4 U. BALT. J. ENVTL. L. 53, 61 (noting that "government action becomes a regulatory taking where the ordinance does not substantially advance legitimate state interest . . . or denies an owner an economically viable use of his land").

161. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that landowner who purchased two residential lots and was subsequently banned from

Even where a municipality demonstrates a legitimate purpose for an ordinance, it still may violate the Fourteenth Amendment's Equal Protection and Due Process Clauses.¹⁶² A court may determine that an ordinance applicable only to a select group or person abridges that group's or person's equal protection and due process rights, and is, therefore, unconstitutional.¹⁶³ However, an ordinance may single out a group without violating the equal protection or due process clauses if it has "some fair and substantial relation to the object of the legislation and furnishes a legitimate ground of differentiation."¹⁶⁴ Absent a showing that the ordinance presents a significant detriment to the landowner and that it is not substantially related to public health goals, the landowner cannot overcome the presumption that the ordinance is constitutionally valid.¹⁶⁵

4. *Ordinances in Decline*

Communities with constitutionally valid and strictly enforceable ordinances may find that they nevertheless conflict with the city's future development goals. For instance, Tampa, Florida has considered amendments that will retract many aspects of its existing tree ordinance to encourage continued urban development.¹⁶⁶ The revised ordinance will make it easier for developers to cut down trees without any requirement to replace those below a certain

building homes thereon per the state beachfront preservation laws was entitled to compensation for the loss in value of the lots).

162. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

163. See *Sheerr*, 445 A.2d at 70-71. By making the ordinance applicable to only one developer, the ordinance in *Sheerr* failed to treat similarly situated landowners equally under the law. As enforced, the law would extract a public benefit from one landowner which had not previously existed. The landowner had no notice of the township's decision to impose a unique conservation burden on him. This results in a deprivation of his right to due process under the law. See *id.* at 60-65.

164. *Parking Ass'n of Ga.*, 450 S.E.2d at 203 (quoting *Bailey Investment Co. v. Augusta-Richmond County Bd. of Zoning Appeals*, 345 S.E.2d 596 (Ga. 1986)).

165. See *id.* at 202. But see *Steel v. Cape Corp.*, 677 A.2d 634 (Md.App. 1996) (holding that the denial of a rezoning application resulted in an unconstitutional regulatory taking through application of the "rough proportionality test" set forth in *Dolan v. City of Tigard*, 512 U.S. 374 (1995)); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 470 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (holding that a statute requiring owners to provide renewal leases to nonprivate hospitals constituted a regulatory taking through application of the *Dolan* test).

166. See Karp, *Tree Rules*, *supra* note 145; see also Ivan J. Hathaway, *Council Talks About Trees*, HCC, TAMPA TRIB., Jan. 10, 1997, at 1.

size.¹⁶⁷ Tampa officials believe that the revised tree ordinance will "encourage development in poor areas."¹⁶⁸ The Tampa Federation of Garden Clubs, however, has urged that the Tampa City Council actually *increase* the replacement requirement for trees of all sizes.¹⁶⁹ Even club members who agree that there exists a need to encourage urban development do not approve of protection for the City's "grand trees" only.¹⁷⁰

Most recently, Tampa's City Council voted unanimously to "give a developer a break" with respect to its existing tree replacement rules despite the protests of local environmental groups.¹⁷¹ While counsel for the developer of a large shopping center claimed that conforming to the existing ordinance created an economic hardship for her client, the Director of Florida Consumer Action Network saw no financial detriment.¹⁷² The director felt that the city could ill afford to replace its own trees and that developers should bear the cost if they want to "take valuable habitat and turn it into a parking lot."¹⁷³ Instead of the required replacement of 1400 trees, the developer only would need to replace 1000, saving him several thousand dollars.¹⁷⁴ Under the existing ordinance, each uprooted tree must be reimbursed with \$125. The revised ordinance will require a developer to pay only sixty-three dollars to the replacement fund if she or he is unable to replace uprooted trees.¹⁷⁵

167. See Richard Danielson, *Critics Say Tree Rules Cut Too Deep*, ST. PETERSBURG TIMES (Tampa, Fla.), Nov. 13, 1996, at 1B (reporting that the Mayor proposed elimination of requirement to replace trees of less than 12 inches in diameter); Michele Drayton, *Some Say City Tree Code Needs Pruning*, TAMPA TRIB., Oct. 31, 1996, at 1 (stating that the city will exempt developers from the ordinance with respect to landscaping parking lots).

168. Drayton, *supra* note 167.

169. See Richard Danielson, *Council Resists Tree Proposal*, ST. PETERSBURG TIMES (Tampa, Fla.), Nov. 15, 1996, at 3B.

170. The "grand trees" are those oak trees in the Tampa area with a diameter wider than 11 inches. One member of the Tampa Federation of Garden Clubs quipped that a failure to replace smaller trees will result in no "grand trees" for the future. She would modify the ordinance to require a proportional replacement of trees between five and eleven inches, as well as the grand oaks. See Ivan J. Hathaway, *City Tree Defenders Oppose Easing Replacement Rules*, TAMPA TRIB., Nov. 17, 1996, at 1.

171. David Karp, *Developer Gets a Break on Tree Replacement*, ST. PETERSBURG TIMES, Apr. 19, 1998, at 8.

172. See Karp, *Tree Rules*, *supra* note 145. Staff director Bill Newton exclaimed, "These developers' saying they can't afford to replace trees is outrageous. . . . We can't afford to not replace our trees." *Id.*

173. *Id.*

174. See *id.*

175. See *id.*

Ironically, Tampa's Mayor Greco stressed his commitment to environmental protection despite his administration's endorsement of the changes in the tree ordinance.¹⁷⁶ He claimed that during his tenure in office his administration has "worked to buy and preserve green space throughout the city" and that environmental conservation efforts will continue after his reelection.¹⁷⁷ Despite a recent meeting between Greco and environmental groups to discuss the city's future conservation policies, environmentalists remain skeptical of his commitment to their preservation concerns.¹⁷⁸ The environmentalists' concern appears to be justified by Mayor Greco's assertions that the projects he set in motion while working as developer, prior to taking office, would not be affected by the city's current protective ordinances.¹⁷⁹

In another Florida community, the city commission passed an ordinance that would allow apartment dwellers and single-family home owners to remove trees without a permit.¹⁸⁰ The city commissioner felt that the new law would benefit areas where tree roots have caused problems with utility lines.¹⁸¹ The director of the county's Department of Natural Resource Protection, however, urged the city of Deerfield Beach to repeal this new policy and maintain its prior strict ordinance.¹⁸² Despite the county's strong suggestion that the city follow a more conservative tree preservation policy, the city emphatically stated that it did not "cut down trees indiscriminately" and did not need county authorities to stick "their noses into the city of Deerfield Beach."¹⁸³

Without any interference from outside authorities, the city of Springfield, Illinois enacted a new tree ordinance that permitted

176. See Editorial, *Greco Moves on Environment*, TAMPA TRIB., Jan. 4, 1999, at 12.

177. *Id.*

178. Mayor Greco worked as a developer in the region for several years before taking office. He has negotiated several development projects which would be affected by the city's protective ordinances. Although he claimed that he was powerless regarding development projects approved before he became mayor, he still did not promise the environmentalists he would take action with respect to their on-going concerns. The Mayor did, however, agree to meet with the group in the future for further discussions. *See id.*

179. *See id.*

180. See Lisa J. Huriash, *City, County Clash: Tree Laws Have Them Seeing Red Over Green*, SUN-SENTINEL (Fort Lauderdale, Fla.), June 14, 1998, at 3.

181. *See id.*

182. Under the old policy, owners of multi-family homes could not remove trees without a city permit. Single-family homeowners could remove trees so long as they kept at least three trees and fifteen shrubs on their property. *See id.*

183. *Id.*

removal instead of preservation.¹⁸⁴ For example, if a resident deemed a tree a "nuisance," she could remove it at her own expense.¹⁸⁵ A local horticulturist resigned from the tree commission in protest of the proposed ordinance, noting that residents could remove trees even on their neighbors' land and replace them with mere "seedlings."¹⁸⁶ This ordinance surely jeopardizes Springfield's status as a "Tree City."¹⁸⁷

Although Los Angeles does not permit residents to uproot "nuisance" trees, the city has engaged in an unofficial policy which may have the same deleterious effects.¹⁸⁸ According to one report, the Street Tree Division has lopped off tree tops in its urban forest as a grotesque form of "tree-trimming."¹⁸⁹ Once trees are "topped," they often no longer grow and may become breeding grounds for harmful insects.¹⁹⁰ One commentator noted that while the City officially did not condone the practice of "topping," its Environmental Quality and Waste Management Committee had done very little to prevent this activity.¹⁹¹

C. Other Proposed Environmental Strategies

At least two commentators have proposed a revision to SEQRA to serve the objectives of environmental protection.¹⁹² According to the proposal, New York would create a new bureaucratic entity called the "New York State Environmental Review Board."¹⁹³ This Environmental Review Board ("ERB") would review only those actions where its participation was specifically requested and only with respect to positive or negative declarations of environ-

184. See Lisa Kernek, *Tree Expert Quits City Panel Over 'Insane' Ordinance*, STATE J.-REG. (Springfield, Ill.), May 31, 1997, at 1.

185. See *id.*

186. *Id.*

187. See *id.* There are reports that the proposed ordinance may be shelved. Instead of the controversial ordinance, the city proposed allowing homeowners to remove only those "nuisance" trees from a designated list of "undesirable" tree varieties. See Lisa Kernek, *Tree Ordinance Cut Short*, STATE J.-REG. (Springfield, Ill.), June 17, 1997, at 1. Furthermore, removal would be permitted for only those trees contiguous to the homeowner's property. See *id.*

188. See Editorial, *Branchless Policy: L.A. Can't See the Urban Forest for the Trees*, DAILY NEWS L.A., Feb. 10, 1999, at N16 (stating that "[t]he city of Los Angeles has the same policy for maintaining the trees it owns as King Louis XIV had for dealing with dissidents: Off with their heads").

189. *Id.*

190. For more information on the harmful effects of "topping," see GENE W. GREY, *THE URBAN FOREST* 113-17 (1996).

191. See Editorial, *Branchless Policy*, *supra* note 188.

192. See Gerrard & Bose, *supra* note 55, at 3.

193. *Id.* at 31.

mental impact or final EISs.¹⁹⁴ An applicant, lead agency or concerned environmental group seeking ERB review would file a statement detailing the basis for challenging or upholding the lead agency's determination.¹⁹⁵ Instead of the arbitrary and capricious standard of review under an Article 78 proceeding,¹⁹⁶ the ERB would use a "reasonableness" standard.¹⁹⁷ Its final determination would not be subject to judicial review except in circumstances involving allegations of corruption, fraud or misconduct.¹⁹⁸

Although these commentators claim that an intermediate review process would "save significant litigation costs," the addition of an ERB would not alleviate any of the time and expense developers incur prior to receiving a negative or positive declaration under SEQRA.¹⁹⁹ The developer still must pay the lead agency's fee, as well as charges for any reports or studies required before the applicant could begin to invoke ERB review.²⁰⁰ The commentators also recognized that concerns about the ERB's independence and professionalism might arise.²⁰¹ In response to this possibility, they have proposed that the ERB be comprised of individuals nominated by various organizations rather than employees of the state.²⁰²

Some U.S. lawmakers favor an extremely contentious environmental policy over expanded conservation laws.²⁰³ These legisla-

194. *See id.*

195. *See id.*

196. Article 78 proceedings involve challenges to a municipality's final determination on issues authorized by state or local statutes. *See* N.Y. C.P.L.R. § 7801.

197. *Compare* New York City Coalition for the Preservation of Gardens v. Giuliani, 670 N.Y.S.2d 654, 654-60 (1997) (finding judicial review limited to whether the determination was made in accordance with lawful procedure and whether it was "arbitrary and capricious"), *with* Gerrard & Bose, *supra* note 55, at 31 (stating ERB review would be "less deferential than the arbitrary and capricious standard used in Article 78 proceedings").

198. *See* Gerrard & Bose, *supra* note 55, at 31.

199. *Id.* Furthermore, the applicant would be required to pay the review board's review costs in addition to the lead agency's review fees. The proposal also creates a 30 day period for anyone to challenge the board's decision with an additional 60 days for the board to respond. This 90 day period comes in addition to the time spent in preparing the EIS and conducting the required studies. Although the review board's decision is purportedly not subject to "judicial challenge," there are circumstances where an action can be brought to court, which will not save any litigation costs. *See id.*

200. *See* N.Y. ENVTL. CONSERV. LAW § 8-0109(7) (stating that developers must pay a fee for a lead agent's review).

201. *See* Gerrard & Bose, *supra* note 55, at 31.

202. *See id.*

203. One lawmaker advocates logging in the national forests, stating that, "My environmental friends may not agree with me on that issue, but I believe it is sustaina-

tors assert that expanded logging makes the most "environmental sense."²⁰⁴ By harvesting mature forests that have sequestered a large volume of carbon, loggers clear areas for saplings, which will grow more rapidly. Carbon trapped in the mature trees is then converted into "homes, telephone poles [and] books."²⁰⁵

The debate over logging as a means of environmental conservation has raged for several years in Congress and has surfaced most recently with the introduction of a bill aimed at the management and protection of national parks and public lands.²⁰⁶ The tension between logging as a benefit to the economy and a detriment to the environment has caused a large rift among environmentally conscious U.S. lawmakers.²⁰⁷ On a national scale, the government certainly owns enough land to consider the possibility of some logging as a practical environmental management tool, at least with respect to a few designated forests.

On a local level, however, logging issues can position a community in an environmental quandary.²⁰⁸ Residents in Missouri log and clear-cut their land for its local chip mill business.²⁰⁹ Because nearly eighty-five percent of the forest is privately owned, the Missouri Department of Conservation cannot dictate how a landowner should exploit her property.²¹⁰ As a result, stormwater washes soil in clear-cut regions into local tributaries, contaminating the water supply.²¹¹

ble, logging in the national forests." 143 CONG. REC. H5049-01, at H5103 (daily ed. July 10, 1997) (statement of Rep. Miller).

204. Cushman, *supra* note 25. The "most environmental sense" argument advocates the cutting of mature forests, "which are no longer growing quickly" and replacing them with saplings. *Id.*

205. *Id.*

206. See 144 CONG. REC. H9741-05, at H9756 (daily ed. Oct. 7, 1998) (statement of Rep. Vento) (passage of H.R. 4570 would be a "return to the thrilling days of the 104th Congress and the antienvironmental message that came from it" because it would accelerate the logging of the national forests); see also 138 CONG. REC. 22,027 (1992) (statement of Sen. Lieberman) (a proposed amendment to a bill would authorize "salvage logging" of dead and dying trees that would still have the same environmental effects "like any other logging . . . includ[ing] destruction of wildlife habitat, reduced water quality, and erosion"). But see 140 CONG. REC. S14,698-02, at S14,699 (daily ed. Oct. 7, 1994) (report commenting that "logging fire-killed timber provides the opportunity to explore new, efficient, economically and environmentally sound ways to manage the national forests").

207. See discussion *supra* note 206.

208. See Tom Uhlenbrock, *Which Forest Do You Prefer? (This is a Test)*, ST. LOUIS POST-DISPATCH, May 31, 1998, at B1 (debate over jobs versus the environment, and property rights versus government intervention, rages in the Ozarks).

209. See *id.*

210. See *id.*

211. See *id.*

Still, the Missouri Department of Conservation believes that logging for chip mills plays an important role in forest management because it removes trees otherwise not fit for timber sale.²¹² Residents of Missouri, however, are concerned that excessive clear-cutting has taken a toll on the community's environment.²¹³ Although landowners do not want politicians to legislate their land use, the local forest manager fears that without some governmental intervention the region will bear the consequences of massive logging which lead to extensive soil erosion and water pollution.²¹⁴ While the community is not currently facing a drastic reduction in its tree canopy coverage, it may soon experience the adverse effects of unimpeded logging.²¹⁵

III. Comprehensive Urban Forestry Program: Solutions to Green Space Issues

As discussed in Part II, cities and communities have responded differently to the issue of urban green space. While one city has relied heavily on its state environmental protection laws, others have employed the use of modern ecological analysis or tree and landscaping protective ordinances.²¹⁶ Individually, these responses have had varying degrees of success, but no particular plan has independently succeeded in protecting urban green space.²¹⁷

212. *See id.*

213. *See id.* Research has shown that massive clear-cuts alter wildlife makeup of the forest, eliminating some inhabitants permanently. Rain that was once trapped by the forest erodes the ground, carrying sediment into the waterways. *See id.*

214. *See id.*

215. *See id.*

216. *See, e.g.,* Gerrard & Bose, *supra* note 55, at 3 (New York City relies on CEQR which is based on SEQRA); Moll & Berish, *supra* note 5 (Atlanta utilized CITYgreen as well as a UEA of the city); Radcliffe, *supra* note 88 (Keller, Texas enacted strict tree preservation ordinances).

217. New York City's reliance on its version of SEQRA has resulted in "enormous fragmentation and inconsistency." Gerrard & Bose, *supra* note 55, at 3. Atlanta, which opted to conduct an ecological analysis of its city, could not act upon the analytical findings without the support of its local government and grass-roots citizens groups. *See* Dawe, *Atlanta: Positive Energy*, *supra* note 95; Moll & Berish, *supra* note 5. Tree and landscaping preservation ordinances may exist on a city's books, but they rarely find strict enforcement and may face constitutional challenges. *See* Editorial, *Things Looking Up*, *supra* note 108 (Atlanta's tree ordinance has never been enforced); *see also* *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994) (upholding the constitutionality of a city's tree and landscaping ordinance). *But see* *Sheerr v. Township of Evesham*, 445 A.2d 46, 66 (N.J. 1982) (holding that the tree legislation was deemed "presumptively valid," but its application to the plaintiff was unconstitutional).

A successful urban environmental strategy should combine each of these responses as part of a comprehensive urban forestry program ("UFP"). Under a UFP, a city may rely on its state sanctioned environmental protection laws, but should adopt measures that address the particular needs of its municipality. For instance, a city should employ the available ecological analysis tools to structure a sustainable urban community.

In conjunction with the laws and ecological analyses, a city also should enact tree and landscaping ordinances tailored to its urban environment. Tree ordinances should not only serve to protect existing trees, but also should contain aggressive planting programs. Moreover, in drafting the ordinances, the community should consider its local needs and enact rules that are flexible enough to allow for further development. Without such flexibility, the community may find enforcement difficult and the purposes of the ordinances frustrated.²¹⁸

In addition, the ordinances should protect a property owner's constitutional use of land by providing uniform treatment to those similarly situated while assuring enforcement that is rationally related to the ordinances' goals.²¹⁹ Proposed development projects which meet the standards set forth in the city's UFP will ensure that continued community growth takes into account vital environmental concerns.

Under a UFP for New York City, actions that qualify as "Type II" or "Exempt Actions"²²⁰ pursuant to SEQRA or CEQR should not escape environmental consideration. Although the state legislature has determined that these types of activities will not significantly impact the environment, it made such a determination without the ecological research tools currently available.²²¹ The New York State legislature should consider amending SEQRA to mandate use of an environmental analytical tool for development projects, such as CITYgreen. Through the use of CITYgreen, the

218. See, e.g., *supra* notes 166-175 and accompanying text.

219. For a discussion of constitutional issues arising from tree ordinances, see *supra* notes 153-165 and accompanying text.

220. "Type II" and "Exempt Actions" have been determined not to have a "significant impact on the environment or are otherwise precluded from environmental review under Environmental Conservation Law, article 8." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.5(a); cf. 43 R.C.N.Y. § 6-04.

221. The legislature made its determination based on its social policy. Legislators found that there was "a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state." N.Y. ENVTL. CONSERV. LAW § 8-0103(3).

City can conduct a UEA for certain proposed "Type II" activities to decide if some natural resource measure will produce an environmental benefit from the activity, such as the addition of trees where none previously existed or the replacement of trees uprooted for development on a "Type II" site.

Similarly, the City can employ CITYgreen for certain "Type I" activities in lieu of preparing an EIS or in conjunction with the EIS's studies.²²² A UEA produced through CITYgreen could reveal alternate methods of energy conservation and stormwater management through the expansion or preservation of trees on property. It could also show whether natural resources can mitigate the otherwise adverse impact of certain "Type I" development actions. Because CITYgreen and the UEA are not as involved as the preparation of an EIS, they will not incur the same expense as an EIS.²²³

While some have criticized results from satellite imaging used in CITYgreen,²²⁴ the message behind the aerial portraits has not been lost on communities.²²⁵ Despite noting that "problems arise with differences in detail in the pictures taken by older, lower-resolution satellites and those taken by more modern equipment," officials

222. Currently, the designation of an activity as "Type I" presumes that the activity will likely have a significant adverse effect on the environment and "may require an EIS." N.Y. COMP. CODES R. & REGS. tit. 6, § 617.4(a)(1); cf. 43 R.C.N.Y. § 6-15. Preparation of an EIS involves considerable expense and time and does not guarantee that the project can proceed without additional delays or challenges thereto. On the other hand, a UEA through CITYgreen costs approximately \$5000 to \$80,000, depending on the size of the project, and can be conducted quickly. Compare N.Y. ENVTL. CONSERV. LAW § 8-0109 (requiring a number of studies as well as fees to the reviewing agency), and Gerrard & Bose, *supra* note 55, at 3 (noting that some EISs are approved within days of submission while others are delayed for months and those approved may be challenged in court), with Moll & Berish, *supra* note 5 (stating that the "cost of conducting an analysis can range from \$5000 to \$80,000, depending on the size of the city, the information local agencies have on hand, and the amount of time local officials can contribute to conducting the analysis"), and Moll, *supra* note 37 (stating that "[t]he analysis can be done quickly").

223. According to Alice Ewen, director of the CITYgreen program at American Forests, the cost of purchasing the software program is only \$800.

224. Critics in Seattle disparage CITYgreen's use of black coloring on satellite images for areas with less than twenty percent tree cover. Although twenty percent canopy coverage is not optimal for some areas, there still are *some* trees in the area, which the choice of shading does not reveal. The shading projects the image of barren land, which is not accurate on ground level. See J. Martin McOmber, *Treeless in Seattle?: Images Miss Mark*, SEATTLE TIMES, July 17, 1998, at A1.

225. Skeptics in the Seattle area have questioned the results of a UEA conducted on its city from 1972-1996. According to American Forests, Seattle appears to have lost 37 percent of its heavily forested areas over the research period. Residents claimed, however, that some of the images that showed barren sites were actually wooded. See *id.*

have had to acknowledge that they needed greater focus on their local reforestation program.²²⁶ CITYgreen has encouraged increased monitoring of the city's natural landscape.²²⁷

Even where a proposed activity would qualify for exempt or "Type II" treatment under CEQR or SEQRA, under the city's UFP, the developer may be required to conduct the geographic information system ("GIS") survey described in CITYgreen. The GIS will present the developer with various hypothetical scenarios involving the removal or addition of trees around the project.²²⁸ The UFP also could provide a forum for concerned environmentalists and city residents to protest the urban forester's decision to allow tree removal.²²⁹ Public notice could be provided with respect to trees selected for removal. The notice would contain the environmental analyses undertaken in making the decision. Protesters would have no more than thirty days to counter the decision by submitting their own environmental analyses of the project. The urban forester or environmental committee would make the ultimate decision on which plan makes the most environmental sense.

In addition to implementing CEQR and CITYgreen, New York City's UFP must contain a detailed, strictly enforceable tree and landscaping ordinance.²³⁰ The ordinance should commission an Urban Forester²³¹ or city management committee to oversee its enforcement.²³² The type of project to be completed will determine

226. *Id.*

227. *See id.*

228. *See* Benyus, *Click Here For Cleaner Air*, *supra* note 3.

229. *See, e.g.,* Rachel Gordon, *City Fells Final 4 Hallidie Plaza Trees: Neighborhoods Come Together to Save Street Greenery*, S.F. EXAMINER, Mar. 19, 1998, at A-11 (reporting that the public has ten days to protest urban tree removal after notice posted on targeted tree).

230. Guidelines for developing a community tree preservation ordinance have been promulgated by the Community Tree Preservation Task Force of the Minnesota Shade Tree Advisory Committee. The first step in developing an ordinance is an assessment of the tree resources in the urban forest. The publication also acknowledges that enforcement issues cloud the drafting process and makes recommendations on how to overcome these challenges. *See A Guide to Developing a Community Tree Preservation Ordinance* (visited July 5, 1999) <<http://willow.ncfes.umn.edu/mnstac/treepres.htm>>.

231. An "Urban Forester" would be commissioned to oversee the city's UFP. The position would entail the supervision of the tree conservation ordinances, as well as the recommendation of appropriate tree plantings. *See, e.g.,* Brandon Loomis, *A New Tree Preservation and Planting Ordinance in Farmington Would Make It a City True to Its Roots*, SALT LAKE TRIB., Sept. 7, 1998, at D1; Wireback, *supra* note 9.

232. Currently, the City Planning Commission oversees the implementation of laws that require environmental reviews of actions taken by the city. *See* 62 R.C.N.Y. § 5-01 (1997). This commission could be placed in charge of tree ordinance enforcement.

whether the city ordinance requires the replacement in kind of those trees removed during development²³³ or requires developers to reimburse a tree fund if replacement of the trees is not possible.²³⁴ Alternatively, the ordinance can credit developers who conserve trees by relaxing other, less pressing zoning requirements.²³⁵ If the ordinance places restrictions on private landowners' treatment of trees, it should be carefully drafted to avoid constitutional issues such as governmental takings, equal protection and due process.²³⁶ Indeed, although the Supreme Court recently upheld a tree preservation law, two Justices believed that such laws may constitute a regulatory taking.²³⁷

Although the use of trees is not the only answer to the urban green space problem, it provides the most cost-effective solution.²³⁸ The UFP need not involve the creation of another legislative board, such as the ERB.²³⁹ Creating another bureaucratic group

233. Under the existing administrative code, trees removed need only be replaced by "2½ to 6 inch caliper trees." N.Y.C. ADMIN. CODE § 18-107. However, caliper trees are not necessarily the best trees for the urban environment. Recommended urban trees include dogwoods, crab apples or magnolias for small areas or plantings close to power lines. In larger spaces, the city can choose "ginkgo, oaks, sweet gum, linden and basswood" as well as sugar and red maples. Sue Lowe, *You Can Turn Over a New Leaf By Planting Trees*, S. BEND TRIB., Jan. 4, 1999, at B3.

234. See Editorial, *Things Looking Up*, *supra* note 108 (Atlanta's tree ordinance demands inch-for-inch replacement of trees destroyed by developers or contributions to a tree bank for plantings in other areas).

235. See Liz Szabo, *Chesapeake Panel to Consider Tree-Saving Ordinance*, VIRGINIAN-PILOT (Norfolk, Va.), Oct. 8, 1997, at B5 (stating developers who save trees may build closer to the road or construct fewer parking spaces under proposed ordinance); Jake Sandlin, *Council Chief Urges Builders to Save Trees*, ARK. DEMOCRAT-GAZETTE, Oct. 10, 1998, at B2 (noting that ordinance rewards developers with a point system based on tree preservation).

236. Keller's city tree ordinance requires developers, as well as residents who own more than five acres to obtain city permission to cut down trees. One resident complained that this restriction may be unconstitutional. See Radcliffe, *supra* note 88; see also Loomis, *A New Tree Preservation*, *supra* note 231 (stating ordinance requires homeowners to seek a permit from the city's urban forester before planting a tree).

237. See *Parking Ass'n of Ga. v. City of Atlanta*, 515 U.S. 1116, 1118 (Thomas, J., dissenting) ("The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.").

238. See, e.g., William Stevens, *Urban Trees: Forest Service Quantifies Benefits*, GREENWIRE, Apr. 19, 1994 (researchers calculated that planting and maintaining trees in Cook and DuPage counties in Illinois would cost \$21 million, but yield a \$59 million benefit). See also, e.g., Gene Duvernoy, *Keeping It Green: Political and Administrative Issues in the Preservation of the Urban Forest*, in URBAN FOREST LANDSCAPES: INTEGRATING MULTIDISCIPLINARY PERSPECTIVES 78, 78-79 (Gordon A. Bradley ed., 1995) (noting that the benefits of urban land preservation programs are permanent and the payoffs are "extraordinary").

239. See Gerrard & Bose, *supra* note 55, at 31.

may exacerbate existing problems with environmental assessment review instead of realizing the purpose for which the state enacted SEQRA.²⁴⁰ Input from an additional board would only compound the time delays already inherent in the environmental review process. Existing problems include a failure of SEQRA to incorporate tree planting programs as an integral part of development and a lack of environmental focus in certain "Type II" activities.

As an environmental management tool, logging would not affect a community such as New York City which does not maintain land for this purpose. As discussed earlier, logging creates its own environmental hazards for those urban areas which rely on their forests for the local economy. Similar to logging communities, however, New York City must consider the effect of failing to sustain adequate tree coverage. Without trees as natural allies in preventing excessive stormwater runoff and water contamination, the City and logging towns both subject their residents to substantial environmental risks associated with these phenomena.²⁴¹

Under a UFP, use of CITYgreen software and a UEA can resolve these environmental risk factors. These ecological tools will be more consistent and predictable if required for both "Type I" and "Type II" actions. They can set a standard for judging the environmental effectiveness of urban planning. The lead agency will determine the effect of the UEA and can make an educated and economic judgment about urban development projects. Such analyses should also be made available to the public for review.

Those wishing to challenge the lead agency's decision should be allowed to contest the data only if the analysis was fraudulently conducted or the alternative chosen was clearly unreasonable given the other options available. Also, standing should be granted to any person wishing to challenge the city's environmental determinations by showing that the city has not fulfilled the objectives set forth in the UFP.²⁴² A court should show extreme deference to the

240. The New York State legislature, in enacting SEQRA, noted that:

Trees and shrubs can improve the quality of urban environments by helping to prevent erosion, by providing shade, modifying extremes of temperature and humidity, helping to reduce noise and air pollution, and enhancing the aesthetic quality of life. . . . [V]egetation in urban green space can contribute to urban water shed management and provide habitats for desirable urban wildlife.

N.Y. ENVTL. CONSERV. LAW § 53-0301(3) (1997).

241. See *supra* notes 44-47.

242. See, e.g., *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998) (holding that an organization had standing to pursue action against the USDA under the Endangered

lead agency's review and dismiss any case which does not meet the burden of proof set forth above.

Conclusion

In order to inject more environmental focus into future development, New York City should adopt a comprehensive UFP. As part of the UFP, the City would utilize recently developed environmental software, such as CITYgreen, as well as a UEA to assess the current status of its urban forest and evaluate the environmental impact of all development projects. A successful UFP will also incorporate tree and landscaping protection ordinances. These ordinances can mandate replacement of removed trees or payments to a tree planting fund in the event that replanting is not possible. They also can credit developers who endeavor to save existing trees.²⁴³ Caution should be taken when drafting restrictive provisions for private landowners to avoid constitutional issues relating to governmental takings, equal protection and due process.²⁴⁴

Trees are not a "soft benefit"²⁴⁵ as once characterized by developers.²⁴⁶ Their concrete economic value can be ascertained through the use of CITYgreen and a UEA for many construction projects in New York City. Because all types of development projects would be reviewable under the City's UFP, it will generate greater predictability in the environmental review process than currently obtainable under SEQRA.²⁴⁷ A comprehensive UFP also can actualize the potential benefits of urban green space by protecting existing trees and, hopefully, planting more trees . . . please.

Species Act for failure to carry out its conservation program for endangered darter, salamanders and wild rice without showing that it had suffered an injury in fact).

243. See, e.g., Ed Cullen, *The Green Team: Baton Rouge Working Hard to Maintain City's Urban Forest*, ADVOCATE (Baton Rouge, L.A.), Apr. 20, 1997, at 1H.

244. See *supra* notes 153-165 and accompanying text.

245. The "soft benefit" argument stems from those developers, engineers and urban leaders who do not want to incur the expense of replacing trees after removing them for development. Often a city's requirements for drainage, roads and other infrastructure win out over tree conservation. If a city values these man-made improvements more than its natural resources, trees certainly appear less "beneficial."

246. See MacDonald, *supra* note 4; see also Tom Bailey, Jr., *Nothing So Unloved as a Tree Law in a Growth Town*, COMMERCIAL APPEAL (Memphis, Tenn.), Sept. 15, 1998, at B3 (trees viewed as a "hindrance" according to one developer).

247. See discussion *supra* Part I.B.

FRIENDS OF THE COURT? THE ETHICS OF AMICUS BRIEF WRITING IN FIRST AMENDMENT LITIGATION

Allison Lucas*

The bane of lawyers is prolixity and duplication. . . . In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.¹

Introduction

In March 1993, James Perry, armed with an AR-7 rifle, strangled a quadriplegic, eight-year-old boy, and shot to death the boy's mother and his nurse in Rockville, Maryland.² Perry was a contract killer hired by the boy's father, who was interested in the almost \$2 million award that the boy had won in a settlement for injuries that had left him paralyzed for life.³ In preparing for and committing these murders, Perry followed – almost to the letter – a book entitled *Hit Man: A Technical Manual for Independent Contractors* (“*Hit Man*”), a 130-page “how-to” on murdering and becoming a professional killer.⁴ Perry was convicted in 1996 of capital murder, and subsequently the victims' families filed a civil lawsuit against Paladin Press, the publishers of *Hit Man*, for aiding and abetting the murders.⁵

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1. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997) (Posner, C.J.).

2. *See Perry v. Maryland*, 686 A.2d 274, 276 (Md. 1996).

3. *See Rice v. Paladin*, 128 F.3d 233, 239 (4th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3558 (U.S. Apr. 20, 1998) (No. 97-1325). Paladin settled the case in May, 1999. *See infra* note 5.

4. *See Perry*, 686 A.2d at 279.

5. *See Paladin*, 128 F.3d at 241. The case settled May 21, 1999, when Paladin Press agreed to a “multimillion-dollar settlement” with relatives of the three people murdered. *See Ruben Castaneda & Scott Wilson, “Hit Man” Publisher Settles Suit; Littleton Made First Amendment Defense Dicey*, WASH. POST, May 22, 1999, at A1. In addition to that part of the settlement, Paladin agreed to make contributions to two

The district court granted Paladin summary judgment, and in the appeal that followed, a host of media lawyers submitted an amicus curiae brief urging affirmation of the lower court decision.⁶ What followed was not only a reversal of summary judgment, but also a stunningly harsh critique of Paladin Press by Judge Luttig in the Fourth Circuit for its potentially critical role in the murders.⁷ Luttig also scolded the media organizations and their lawyers who zealously advocated on behalf of Paladin Press.⁸

The example above is only one among many cases in which the legal community and the community-at-large have become wary of enthusiastic support thrown behind a defendant, especially in situations where the defendant's conduct is egregious and the outcome is legally significant. This Note seeks to explore the ethics of writing amicus briefs, specifically in defamation and privacy cases where the conduct of defendants may seem indefensible to many mainstream journalists and their attorneys. By using two recent First Amendment cases, *Rice v. Paladin* and *Khawar v. Globe, International*,⁹ it will illustrate the potential conflicts and usefulness of writing such briefs. Part I will discuss the history of amicus curiae briefs, their purposes and cases where amicus briefs have been particularly helpful or persuasive for judges. It will also discuss Chief Judge Richard Posner's recent move to limit their use in the Seventh Circuit. Part II will discuss *Paladin* and *Khawar* and also review cases in which there was a strong public sentiment against the application of First Amendment protections to particular speech. Part III will analyze the debate on each side, arguing that despite the outrageous conduct of a media defendant, it is proper for other media lawyers to continue the practice of amici submissions. However, even though there is a moral obligation to continue representing a client in such cases, the scores of people in the media and general public may be justified in feeling that media organizations should not rush to defend any and all media conduct for which a publisher might be liable. This Note will conclude that

charities chosen by the plaintiff, and to give the plaintiffs the remaining 700 copies of the book. *See id.*

6. *See* Brief of ABC, Inc., et. al. as Amici Curiae, *Rice v. Paladin* 128 F.3d 233 (4th Cir. 1997) (No. 96-2412) [hereinafter ABC Paladin Amicus Brief] (on file with the *Fordham Urban Law Journal*). For further discussion of the amicus briefs, see part II, *infra*.

7. *See Paladin*, 128 F.3d 233 *passim*.

8. *See id.* at 265.

9. 965 P.2d 696 (Cal. 1998).

despite these justifications, it would be a bad precedent to start dismissing amicus concerns.

I: The History and Policies of Amicus Brief Writing

A. History of the Amici

Some scholars suggest that the use of amicus curiae is rooted in ancient Roman law,¹⁰ where the amicus was usually court-appointed and offered non-binding opinions on law unfamiliar to the court.¹¹ However, the role for which amicus briefs are known today became a common practice in England by the 17th Century.¹² The function of the amicus curiae at common law was a form of oral "shepardizing," the bringing up of cases not known to the judge.¹³ In this role, the amicus submission originally was intended to provide a court with impartial legal information that was beyond its notice or expertise, which is where the name amicus curiae, or "friend of the court" is derived.¹⁴ In many cases, the amicus was a bystander who acted on behalf of infants, and also called attention to manifest error, to the death of a party to the proceeding, and to existing applicable statutes.¹⁵ The amicus did not need to be an attorney, and the general attitude of the courts was to welcome such aid, since "it is for the honor of a court of justice to avoid error."¹⁶

The courts expanded amicus participation in the eighteenth and nineteenth centuries. Judges and attorneys alike appointed themselves amici and advised each other in client representation,¹⁷ overcoming the problem of representation of third parties in common lawsuits.¹⁸ In England, this expanded participation also included

10. 1 BOUVIER'S LAW DICTIONARY 188 (Rawle's 3d ed. 1914), cited in Judith S. Kaye, *One Judge's View of "Friends of the Court"*, N.Y. ST. BAR J., Apr. 1989, at 8, 9.

11. Comment, *The Amicus Curiae*, 55 N.W. U. L. REV. 469, 469 n.3 (1960).

12. See Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 695 (1964).

13. See *id.*

14. See Alexander Wohl, *Friends with Agendas*, A.B.A. J., Nov. 1996, at 46.

15. See Krislov, *supra* note 12, at 695.

16. *Id.* (citing *The Protector v. Geering*, 145 Eng. Rep. 394 (Ex. 1656)).

17. See Krislov, *supra* note 12, at 696.

18. See *id.* Problems of representation of third party interests under the common law system were plentiful. The complex federal system meant not only that state and national interests were conflicted, but also that an even greater number of conflicted public interests were potentially unrepresented in the courts of private suits. *Id.* at 697-99. Courts, "where obvious injustice would be caused by lack of representation, allowed outsiders to intervene generally by exercise of what was called 'the inherent power of a court of law to control its processes.' . . . [O]ften the court merely extended

taking sides. For example, in *Coxe v. Phillips*,¹⁹ an amicus represented a spouse's interests in an action on a promissory note, despite the fact that he was not party to the suit.²⁰

This pattern followed in the United States as well, where the amicus moved from being a friend of the court to a friend of a specific party. The practice started in the United States in the nineteenth century to address concerns of collusion between two adversaries.²¹ "The amicus is treated as a potential litigant in future cases, as an ally of one of the parties, or as the representative of an interest not otherwise represented. . . . [T]he institution of the amicus curiae brief has moved from neutrality to partisanship, from friendship to advocacy."²²

Over the last century and a half, some courts have insisted on neutrality from an amicus,²³ and others have accepted only limited advocacy.²⁴ However, the majority of courts recognize that amici need not be completely disinterested, and an amicus "who takes a legal position and presents legal arguments in support of it [fulfills] a perfectly permissible role."²⁵

B. The Current Amici Curiae

There is little doubt that amicus briefs have shaped the law. The most visible court to be influenced by amici has been the Supreme Court, and one of the most influential amicus curiae has been the American Civil Liberties Union ("ACLU").²⁶ For example, in 1961 the ACLU convinced the Supreme Court to apply the exclu-

the privilege of filing a brief 'by leave of the court.'" *Id.* at 699 (quoting *Krippendorf v. Hyde*, 110 U.S. 276, 283 (1884)).

19. 95 Eng. Rep. 152 (K.B. 1736).

20. *Id.* The amicus in this case not only had the action vacated, but also was able to convince the court that the two parties involved were collusive, and had them found in contempt of court. See *Krislov, supra* note 12, at 696-97.

21. See *Green v. Biddle*, 21 U.S. 1 (1823) (granting amicus request for rehearing, due to nonrepresentation of state interests).

22. *Krislov, supra* note 12, at 704.

23. See *Central Hanover Bank & Trust Co. v. Saranac River Power Corp.*, 278 N.Y.S. 203 (1935) (refusing to consider an amicus brief because it was partisan).

24. See *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991).

25. Gary F. Smith & Beth E. Terrell, *The Amicus Curiae: A Powerful Friend for Poverty Law Advocates*, CLEARINGHOUSE REV. 772, 776 (Nov.-Dec. 1995) (quoting *Funbus Sys. Inc. v. California Pub. Util. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986)). A more detailed discussion of the history of amicus briefs is beyond the scope of this discussion. For a comprehensive discussion of this topic, see generally *Krislov, supra* note 12.

26. See Gregg Ivers & Karen O'Connor, *Friends as Foes: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union and Americans for Effective Law Enforcement in Criminal Cases, 1969-1982*, 9 L. & POL'Y 161 (1987).

sionary rule, previously applied only in federal actions, to the states.²⁷ From 1961 to 1966, the ACLU participated as amicus curiae in such groundbreaking decisions as *Gideon v. Wainwright*,²⁸ *Escobedo v. Illinois*²⁹ and *Miranda v. Arizona*.³⁰ During a twelve-year period from 1969-1981, the ACLU participated in forty-four percent of all criminal cases in which an amicus brief was filed.³¹

There are many other circumstances in which the Court has used amicus briefs to shape its opinions. In *Romer v. Evans*,³² Justice Kennedy's opinion seemed to accept the argument offered by Professor Laurence Tribe of Harvard and several other constitutional scholars, that a Colorado amendment constituted a *per se* violation of the equal protection guarantee under the Fourteenth Amendment.³³ In three separate antitrust cases in the Supreme Court's 1991-92 term, amici seem to have influenced the court.³⁴ And, from 1981 to 1989, the Securities and Exchange Commission ("SEC") filed briefs on the merits as amicus in nine Supreme Court cases - the SEC's views were adopted by the Court in eight of those cases.³⁵

27. See *Mapp v. Ohio*, 367 U.S. 643 (1961).

[N]either of the principal litigants raised the issue of the exclusionary rule in their briefs or at oral argument, [but] the ACLU [in its amicus curiae brief] had asked the Court to find that evidence which is unlawfully and illegally obtained . . . not be permitted into a state proceeding and that its production is a violation of the Federal Constitution, the Fourth Amendment and Fourteenth Amendment. We have no hesitancy about it, because we think it is a necessary part of due process.

Ivers & O'Connor, *supra* note 26, at 163.

28. 372 U.S. 335 (1963) (holding that the Sixth Amendment right to trial includes the right to effective assistance of counsel).

29. 378 U.S. 478 (1964) (excluding evidence on a finding that denying an accused person's request for assistance constitutes a denial of the right to assistance of counsel).

30. 384 U.S. 436 (1966) (excluding statements of a defendant when procedural safeguards effective to secure the Fifth Amendment privilege against self-incrimination were not used).

31. See Ivers & O'Connor, *supra* note 26, at 168. In the 1998-99 term, the ACLU submitted 16 amicus curiae briefs to the Supreme Court. See ACLU Web Site (visited June 25, 1999) <<http://www.aclu.org/court/summ-95.html>>.

32. 517 U.S. 620 (1996) (striking down a Colorado voters' initiative that barred enactment of the state and local laws or regulations protecting homosexuals from discrimination).

33. See Wohl, *supra* note 14, at 48.

34. See Stephen Calkins, 61 ANTITRUST L.J. 269, 269 (1993) (discussing the role that amici played in *FTC v. Ticor Title Ins.*, 504 U.S. 621 (1992), *Morales v. TWA*, 504 U.S. 374 (1992), and *Eastman Kodak v. Image Technical Services*, 504 U.S. 451 (1992)).

35. *Id.* The court accepted the SEC's views in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), *Pinter v. Dahl*, 486 U.S. 622 (1988), *Herman & MacLean v. Huddleston*, 459 U.S. 375, 377 (1983), *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 682-83 (1985),

The use of amicus briefs has flourished in local courts as well. In *Polaroid v. Travelers Indemnity Co.*,³⁶ even though the Massachusetts court ultimately rejected the amicus corporation's position, the court remarked that it found the brief to contain "the most comprehensive and instructive argument" on appellant's behalf.³⁷ The *Polaroid* court also indicated that the presence of amicus briefs prompted them to address issues they might not otherwise have addressed.³⁸ In several cases, courts have indicated that the views of amici influenced their opinions.³⁹

Currently, courts have found briefs so effective in a variety of types of litigation that some judges have even requested that certain advocates submit briefs.⁴⁰ For example, in Massachusetts, the Supreme Judicial Court has requested amicus briefs in connection with its advisory opinions to the legislature.⁴¹ In recent years, the Appeals Court in Massachusetts requested an amicus brief in at least two cases (both raising landlord-tenant issues).⁴² During a five and one half year period, about 200 cases in the Supreme Judicial Court of Massachusetts involved amicus briefs.⁴³

1. *Reasons for amicus submission*

There are several reasons why amicus briefs are requested. First, an amicus curiae can furnish a statewide or national perspective to show the legal or social consequences that a decision could have.⁴⁴ Second, it can be used to explain how a regulation or statute at

Gould v. Ruenfenacht, 471 U.S. 701, 702 (1985), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), *Bateman Eichler, Hill Richards Inc. v. Berner*, 472 U.S. 299, 300 (1985) and *Randall v. Loftsgaarden*, 478 U.S. 647, 649 (1986). The court declined to adopt the SEC's position in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987). See *id.*

36. 610 N.E.2d 912 (Mass. 1993) (upholding insurers' refusal to settle pollution claims of insured).

37. *Id.* at 920 n.15.

38. See *id.*

39. See, e.g., *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 231 n.1 (1st Cir. 1992) (adopting recommendation of amici); *Harris v. Capitol Growth Investors XIV*, 805 P.2d 873 (Cal. 1991) (adopting an amici's point that plaintiff's interpretation of a statute would generate massive expenses within the states's business communities).

40. See E. Susan Garsh & Joanne D'Alcomo, *Role of the Amicus Brief*, MASSACHUSETTS CONTINUING LEGAL EDUCATION, APPELLATE PRACTICE IN MASSACHUSETTS §§ 17, 17.3 (1996).

41. See *id.*

42. See *Poncz v. Loftin*, 607 N.E.2d 765, 766 (Mass. 1993); *Jinwala v. Bizzaro*, 505 N.E.2d 904, 904 n.1 (1987).

43. Garsh & D'Alcomo, *supra* note 40, at § 17.3.

44. See *id.*

issue fits within a larger regulatory or statutory framework.⁴⁵ Third, the amicus can furnish additional information to describe how a particular industry operates.⁴⁶ Often, an amicus may have more familiarity with an issue on appeal than the parties themselves.⁴⁷ Finally, it can apprise the court of the details of another case pending in the system posing related issues.⁴⁸

For these reasons, the use of amicus briefs in appellate and Supreme Court litigation has exploded since the nineteenth and early twentieth centuries. In the 1995-96 term, amicus briefs were filed in nearly ninety percent of the cases the Supreme Court decided;⁴⁹ by contrast, during the 1980-81 term, seventy-one percent of the Court's cases decided by opinion had amicus filings, and only thirty-five percent of the cases decided in the 1965-66 term included such briefs.⁵⁰ In the 1998-99 term, ninety-five percent of cases argued before the Supreme Court had at least one amicus filing.⁵¹ The numbers are even more dramatic than they appear, since it is common for several amicus organizations to file briefs in a given case.⁵²

2. *Amicus Procedures*

Both federal and state courts usually are lenient about granting motions for leave to file an amicus brief. The showing that a proposed amicus must make is minimal; it is much lower than the threshold that must be met for intervention by a third party.⁵³ An intervenor must serve a motion that states the grounds for intervention and accompany a pleading setting forth the claim or defense for which intervention is sought.⁵⁴

In the Supreme Court, the rules for submitting amicus briefs are simple. An amicus brief submitted before the Court's consideration of a writ of *certiori* may be filed if accompanied by the written

45. *See id.*

46. *See id.*

47. David G. Knibb, *FEDERAL COURT OF APPEALS MANUAL: A MANUAL ON PRACTICE IN THE US COURT OF APPEALS* § 29, 29.14 (3d. ed. 1997).

48. *See* Garsh & D'Alcomo, *supra* note 40, at § 17.3.

49. *See* Wohl, *supra* note 14, at 46.

50. *See* Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 603 (1984).

51. This statistic is based on a review of 90 cases argued before the Supreme Court this term.

52. *See* Ennis, *supra* note 50, at 603.

53. A party may intervene as a matter of right, or by permission. FED. R. CIV. P. 24(a)-(b).

54. *See* FED. R. CIV. P. 24(c).

consent of all parties, or if the court grants leave to file.⁵⁵ An amicus brief may also be filed in a case before the Court for oral argument if accompanied by the written consent of all parties, or if the Court grants leave.⁵⁶ The briefs must indicate whether counsel for a party authored the brief in whole or in part, and must identify every person or entity, other than the amicus curiae, who made a monetary contribution to the preparation or submission of the brief.⁵⁷ The rules are the same in the Federal Courts of Appeals.⁵⁸ One of the key limitations that courts have enunciated through opinions, is that an amicus may not raise issues that the parties could have but did not.⁵⁹

The rules of submitting amicus briefs in state courts vary with each state. For example, in New York State, an amicus party must satisfy the court that at least one of the following criteria has been met: (1) the parties are not capable of a full and adequate presentation, and the movant could remedy that situation; (2) the movant would invite the court's attention to law or arguments that might otherwise escape its consideration; or (3) an amicus brief would otherwise be of special assistance to the court. In addition, an amicus brief may not introduce new issues, but may only relate to the issues raised by the parties.⁶⁰

C. Limiting The Use Of Amicus Briefs

In 1989, Judge Judith Kaye (then Associate Judge of New York State's Court of Appeals – now Chief Justice) wrote her views on the worth of amicus briefs.⁶¹ She praised the Court of Appeals' expressed interest in receiving amicus curiae submissions,⁶² and said that despite the transformation from "selfless servant[s] of his-

55. See S. CT. R. 37.2(a).

56. See S. CT. R. 37.3(a).

57. See S. CT. R. 37.6. An exception is made for a brief written on behalf of the United States. See S. CT. R. 37.4.

58. See FED. R. APP. P. 29.

59. See *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n.2 (1979) (refusing to consider arguments not raised by the parties); *Preservation Coalition Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982) (refusing to consider, on appeal, issues raised by parties below, but not amicus).

60. See N.Y. COMP. CODES R. & REGS. tit. 22 § 500.11(e) (1998).

61. See Kaye, *supra* note 10, at 9.

62. See *id.* The Court of Appeals amended its rules in 1988 so that when the court each week informed the public about its new filings, it also issued the following invitation to interested persons: "The subject matter of the newly filed cases may suggest appropriate motions and participation which the Court welcomes." *Id.*

tory" to their advocacy role today, "the amicus curiae . . . retain[s] the mark [of] a friend."⁶³

Eight years later, Judge Kaye's words were challenged. In *Ryan v. Commodity Futures Trading Commission*,⁶⁴ Judge Posner denied a motion for leave to file an amicus brief because the brief would repeat arguments made by a party.⁶⁵ In a short opinion, Posner argued that closer scrutiny of such briefs was necessary because the vast majority of amicus briefs did not materially assist the judges in deciding the case at hand.⁶⁶ He noted several situations where an amicus brief should normally be allowed.⁶⁷ The first situation is when a party is not represented at all. The second is when the amicus has an interest in some other case that may be affected through the decision in the present case (though not affected enough to entitle the amicus to intervene and become a party in the present case). The third is when the amicus has unique information or perspective that can help the court more than the litigants' lawyers can.⁶⁸ "Otherwise, leave to file an amicus curiae brief should be denied."⁶⁹

Other scholars argued Judge Posner's point long before the *Ryan* decision. Two law professors assert that in certain areas, such as social science, amicus briefs are too often designed to persuade rather than inform the court, and thus, the attorneys are not guided by scientific norms of neutrality and objectivity, but by the ideology of advocacy.⁷⁰ "The desire to win the case encourages the amici to distort or ignore any damaging social science findings."⁷¹

However, it is reliance on Judge Posner's criticism of the amicus brief in *Ryan* that has led other circuit courts to preclude amici

63. *See id.* at 13.

64. 125 F.3d 1062 (7th Cir. 1997).

65. *See id.* The Chicago Board of Trade moved under FED. R. APP. P. 29 for leave to file an amicus brief in support of the petitioner, who was challenging a disciplinary order of the Commodity Futures Trading Commission. Judge Posner originally denied the motion without a statement of reasons. This opinion stems from a further motion by the Board of Trade, asking Posner to explain his decision on the motion. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *Id.* These sentiments are echoed in *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903), *American College of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644 (3d Cir. 1983), *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) and *United States v. Gotti*, 755 F. Supp. 1157 (E.D.N.Y. 1991).

70. Michael Rustad and Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 100 (1993).

71. *Id.*

from offering their opinions in cases.⁷² In addition, some state courts have taken the same position. In *Ferguson v. Brick*,⁷³ the Arkansas Supreme Court's attitude toward amici was almost hostile.⁷⁴ The court traced the descent of amicus briefs, from helpful friendships, to unabashed advocacy, and on to mere lobbying.⁷⁵ "Henceforth, we will deny permission to file a brief when the purpose is nothing more than to make a political endorsement of the basic brief."⁷⁶ The legal press has also used Judge Posner's opinion to reiterate that a "friend of the court" is quite different from a "friend of a party."⁷⁷

Although some courts have followed Judge Posner's lead, some lawyers have instead cited the dangers of his restrictions. Luther Munford, a prominent appellate attorney, argues that for decades partisan interests may befriend a court by providing useful information, even if it benefits only one side.⁷⁸ To illustrate his position, Munford points to the 1908 Brandeis brief in favor of child labor regulation,⁷⁹ written on behalf of the National Consumers League, as well as the important briefs written by the ACLU⁸⁰ and the Criminal Justice Legal Foundation.⁸¹

72. See e.g., *United States v. Hunter*, 1998 U.S. Dist. LEXIS 9869 (D. Vt. 1998) (denying the American Civil Liberties Foundation of Vermont its motion to file brief due to lack of convincing reason as to why an amicus brief was desirable); *United Stationers, Inc. v. United States*, 982 F. Supp. 1279, 1288 n.7 (N.D. Ill. 1997) (denying several parties motions because it determined that the government and stationers "adequately and thoroughly addressed the issue at bar").

73. 649 S.W.2d 397 (Ark. 1983).

74. See *id.* at 398.

75. See *id.* at 397-98.

76. *Id.* at 173.

77. See *Amicus Briefs Must Add Something*, 13 No. 1 FED. LITIGATOR 30 (Jan. 1998).

78. See Luther Munford, *Listening to Friends of the Court*, 84 A.B.A. J. 128 (Aug. 1998). Munford is the former president of the American Academy of Appellate Lawyers.

79. Louis D. Brandeis' brief for the defendant figured prominently in the opinion of *Muller v. Oregon*, 208 U.S. 412 (1908) (restricting women's working hours on the premise that a woman's primary function was to bear children). The brief contained two pages of legal arguments, but more than 100 pages referring to factual reports and existing laws affecting the parties. Briefs with this type of jurisprudence and constitutional advocacy have come to be known as "Brandeis briefs."

80. See discussion, *supra* notes 26-31, and accompanying text.

81. The Criminal Justice Legal Foundation in 1989 persuaded the Supreme Court to limit the retroactivity of a new constitutional ruling. See *Munford*, *supra* note 78, at 128.

3. *Ethical guidelines for submission*

Although there are no ethical code provisions governing the submission of amicus briefs, some portions of the *ABA Model Rules* and the *Model Code* indicate that it is ethical for an attorney to submit a brief if it would amount to helpful representation of his or her client.⁸² In addition, discipline may be imposed on a lawyer if he or she neglects a client matter;⁸³ however, since the topic of this Note deals with clients who are not parties to a litigation, it is unlikely these provisions would apply.

II. First Amendment Defendants And Their "Friends"

A. *Rice v. Paladin*

1. *The facts and lower court decision*

In early 1992, James Perry responded to a catalogue solicitation by Paladin Press,⁸⁴ and ordered two of the publisher's books: *Hit Man*, a how-to hit manual, and *How to Make Disposable Silencers*. A little more than a year later, Perry murdered Mildred Horn, her quadriplegic son Trevor, and Trevor's nurse.⁸⁵ Perry was found guilty of murder on three counts,⁸⁶ and subsequently, the victims' representatives filed a civil action against Paladin Press for aiding and abetting Perry in the commission of his murders through the publication of *Hit Man's* killing instructions.⁸⁷ The U.S. District Court for Maryland granted summary judgment to the publishers because Paladin's speech was not excepted by the "imminent lawless action" exception cited in the landmark First Amendment case *Brandenburg v. Ohio*.⁸⁸

82. See *infra* Part III.C for a fuller discussion of the Model Rules and Model Codes.

83. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1994) [hereinafter *Model Code*].

84. *Rice v. Paladin*, 128 F.3d 233, 241 n.2 (4th Cir. 1997).

85. See *id.* at 239.

86. See *Perry v. State*, 686 A.2d 274 (Md. 1996).

87. *Rice v. Paladin*, 940 F. Supp. 836 (D. Md. 1996). It is interesting, although not germane to the discussion, to note that the author of *Hit Man*, Rex Feral, was actually a divorced mother of two when she wrote the book in 1983. Originally, she submitted a novel, but Paladin's editors wanted a how-to. She got her ideas from books, television, movies, newspapers, police officers, her karate instructor and a lawyer friend. See David Montgomery, *If Books Could Kill; This Publisher Offers Lessons in Murder. Now He's a Target Himself*, WASH. POST, July 26, 1998, at F1.

88. *Paladin*, 940 F. Supp. at 845-46. *Brandenburg v. Ohio*, 395 U.S. 444 (1969), was the landmark Supreme Court case stating that a statute that purported to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the describe type of action, was a violation of the First and Four-

The plaintiffs appealed to the Fourth Circuit. A host of prominent media entities, including the American Broadcasting Company, America Online, the New York Times Company, Society of Professional Journalists, and the Washington Post Company (hereinafter "Paladin amici"), submitted an amicus curiae brief to the Court of Appeals urging affirmation of the district court decision.⁸⁹ The amici argued that under *Brandenburg*, Paladin's books contain protected speech, because the books do not incite *imminent* lawless action. They also argued that the First Amendment does not yield to the law of aiding and abetting⁹⁰ and concluded that the lawsuit threatened entire genres of expression.⁹¹

2. The appellate decision

In April 1997, the Court of Appeals overturned the District Court decision, and found that the book was not entitled to protection under the First Amendment's free speech clause because it was not merely "abstract advocacy."⁹² Judge Luttig first quoted extensive passages from *Hit Man*, noting that "the court has even felt it necessary to omit portions of these few illustrative passages in order to minimize the danger to the public from their repetition herein."⁹³ He then illustrated the striking similarity between quoted passages from the *Hit Man* and James Perry's actions in 1993, and stated that a reasonable jury clearly could conclude that Paladin aided and abetted in Perry's triple murder⁹⁴ based on the stipulations of the parties⁹⁵

teenth Amendments. See *Brandenburg*, 395 U.S. at 449. The courts have used *Brandenburg* to exonerate defendants, absent a showing of "imminent lawless action."

89. See ABC Paladin Amicus Brief, *supra* note 6, at 2-3.

90. See *id.* at 17.

91. See *id.* at 22-27. The amici cite various publications, such as Abbie Hoffman, *Steal This Book* (1971), Malcolm X, *By Any Means Necessary* (2d ed. 1992), Jonathan Swift, *A Modest Proposal for Preventing the Children of Poor People in Ireland From Being a Burden to Their Parents or Country* (1729), as examples of threatened publications. See *id.* at 4-5.

92. *Rice v. Paladin*, 128 F.3d 233, 233 (4th Cir. 1997). The judge, in a 32-page decision, spent a good part of the opinion quoting graphic portions of the *Hit Man* text and comparing it to Perry's strikingly similar actions. For example, "Hit Man specifically instructs its audience of killers to shoot the victim through the eyes if possible: 'At least three shots should be fired to insure quick and sure death . . . [A]im for the head - preferably the eye sockets if you are a sharpshooter.' James Perry shot Mildred Horn and Janice Saunders two or three times through the eyes." *Id.* at 240.

93. *Paladin*, 128 F.3d at 239 n.1.

94. See *id.* at 242-43.

95. Those stipulations include an acknowledgement by Paladin that:

Paladin Press assisted Perry, according to Luttig, by providing detailed instructions on the techniques of murder and murder for hire with the *specific intent* of aiding and abetting the commission of these violent crimes.⁹⁶ He argued that this case bore no resemblance to a host of First Amendment cases in which the defendant promoted "theoretical advocacy."⁹⁷

3. *Legal community response*

The reaction from the legal community was similar. Rodney Smolla, a leading First Amendment lawyer, shifted away from his usual role to become one plaintiff's attorney. Writer and attorney Stuart Taylor agrees with Smolla's decision. "A murder manual intentionally marketed to would-be contract killers (along with fantasists and others) doesn't strike me as the kind of 'freedom of speech' that the framers sought to protect."⁹⁸

Smolla and Taylor are not alone. One critic champions government regulation of speech such as Paladin's, that provides detailed, step-by-step instructions about how to commit violent felonies.⁹⁹ Another detractor compares Paladin's liability to that of a gun dealer or a bar owner, saddling publishers with a duty to desist from publication of such books.¹⁰⁰ Some scholars echo Judge Luttig's view, dismissing concerns that a decision unfavorable to Paladin would implicate a host of authors, moviemakers and other

[I]n marketing *Hit Man*, Paladin 'intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes' but also that it 'intended and had knowledge' that *Hit Man* actually 'would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire.

Id. at 241.

96. *See id.* at 255. Judge Luttig's opinion notes that in cases where aiding and abetting liability was to be imposed on publishers, there is an intent requirement. He states that Paladin Press:

[S]tipulated to a set of facts which establish as a matter of law that the publisher is civilly liable for aiding and abetting James Perry in his triple murder, unless the First Amendment absolutely bars the imposition of liability upon a publisher for assisting in the commission of criminal acts.

Id. at 241.

97. *Id.* at 249 (citing *Scales v. United States*, 367 U.S. 203, 235 (1961)).

98. Stuart Taylor Jr., *A Constitutional Suicide Pact?*, *LEGAL TIMES*, Aug. 5, 1996, at 23.

99. *See* Avital T. Zer-Ilan, Note, *The First Amendment and Murder Manuals*, 106 *YALE L.J.* 2697, 2697 (1997) ("Instructional speech like the kind found in *Rice* is easily distinguishable from general advocacy, description, opinion or political speech. For example, speech that provides instructions on how to blow up buildings or commit murder, torture, or rape falls well within this exception.").

100. Bruce Fein, *Crime, Responsibility and Free Speech*, *WASH. TIMES*, Feb. 27, 1996, at A17.

artists. They question whether holding *Hit Man*'s publisher liable would really endanger the First Amendment rights of these media entities in light of the historic purposes of the Amendment.¹⁰¹

4. *Amici concerns*

After his assessment of the case and the district court's opinion, Judge Luttig sternly addressed the media amici's brief. His condemnation focused on the fact that the *Paladin* amici stood behind a defendant that *knowingly and intentionally* gave a dangerous weapon to a murderer.

That the national media organizations would feel obliged to vigorously defend *Paladin*'s assertion of a constitutional right to intentionally and knowingly assist murderers with technical information which *Paladin* admits it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking.¹⁰²

Judge Luttig further stated that it should be apparent to all parties involved that the First Amendment values that *Paladin* and amici sought to protect would not be adversely affected by allowing plaintiff's action against *Paladin* to proceed. "[N]either the extensive briefing by the parties and the numerous amici in this case, nor the exhaustive research which the court itself has undertaken, has revealed even a single case that we regard as factually analogous to this case."¹⁰³

Richard Smolla agrees with Judge Luttig about *Paladin*'s media amici. He compares *Paladin*'s amici with those who advocate similar protection for the publisher of a terrorist manual that provides detailed instructions on how to smuggle bombs onto airplanes. Similarly, Smolla indicates that the amici advocate for publication of manuals on how to steal nuclear materials from Russia, build a nuclear device and blow up a few million people.¹⁰⁴ "How imminent would the intended explosion have to be to satisfy [the 'imminent danger' exception to First Amendment protections cited in]

101. Amy Dilworth, Note, *Murder in the Abstract: The First Amendment and the Misappropriation of Brandenburg*, 6 WM. & MARY BILL RTS. J. 565, 587. See also Bennett L. Gershman, *Perverting the First Amendment*, N.Y. L.J., Jan. 8, 1998, at 2.

102. *Paladin*, 128 F.3d at 265.

103. *Id.* Amici also argues that recognizing this type of cause of action against *Paladin* predicated on aiding and abetting will subject broadcasters and publishers to liability whenever someone imitates or "copies" conduct that is either described or depicted in their broadcasts, publications or moves. The judge dismissed this contention as "simply not true." *Id.*

104. See Taylor, *supra* note 98, at 23.

Brandenburg? Is the Constitution a suicide pact?"¹⁰⁵ Law professor Bennett Gershman argues that when the free speech proponents champion subterfuge, the First Amendment is perverted and its friends are discredited.¹⁰⁶ He further argues that the media's complicity in *Paladin*'s "audacious misuse of the First Amendment should be underscored,"¹⁰⁷ and that the inability or unwillingness of presumably responsible members of the media to make elementary, common sense distinctions raises serious questions about their judgment.¹⁰⁸ He states that if defenders of the First Amendment fail to grasp that "simple but overarching truth, and fail to brand *Paladin*'s corruption for what it is, then they . . . delegitimize themselves."¹⁰⁹

B. *Khawar v. Globe, International*

1. *The Facts*

A similar sentiment to that stated in *Paladin* was enunciated in the recently decided case of *Khawar v. Globe International*¹¹⁰ In November 1988, Roundtable Publishing published a book entitled *The Senator Must Die: The Murder of Robert Kennedy*, alleging that the Iranian Shah's secret police, working together with the Mafia, carried out the 1968 assassination of Robert Kennedy. The book contained four photographs of a young man standing in a group of people around Senator Kennedy at the Ambassador Hotel in Los Angeles shortly before he was assassinated.¹¹¹ It identified the man in pictures as Ali Ahmand, and alleged that he was the real Kennedy murderer.

Five months after the book was published, the *Globe*, a weekly tabloid newspaper, ran an article containing an uncritical summary of the book's allegations. The *Globe* enlarged one of the photographs in the book, and added an arrow pointing to the accused man, and again identified him as the assassin.¹¹² The man in the photograph was actually named Khalid Khawar, not Ahmand; he was a photographer who had been hired by an Indian newspaper to write about the Los Angeles convention. In August 1989, Khawar,

105. *Id.*

106. *See* Gershman, *supra* note 101, at 2.

107. *Id.*

108. *See id.*

109. *Id.*

110. 965 P.2d 696 (Cal. 1998), *cert. denied*, 67 U.S.L.W. 3705 (U.S. May 17, 1999) (No. 98-1491).

111. *See id.* at 698-99.

112. *See id.*

who received death threats following the Globe article's release, sued the Globe, Roundtable and the book's author, Robert Morrow, for libel.¹¹³

The jury in the case granted judgment to Khawar in the amount of \$1.75 million, and held that: "(1) the Globe article contained statements about Khawar that were false and defamatory; (2) Globe published the article negligently and with malice or oppression; (3) with respect to Kennedy's assassination, Khawar was a private rather than public figure; and (4) the Globe article was a neutral and accurate report of the Morrow book."¹¹⁴ Since the last two determinations were advisory only, the trial court ruled as a matter of law that the article was not an accurate and neutral report.¹¹⁵ In affirming the trial court ruling, the California Court of Appeals held that California had not adopted a neutral reportage privilege for private figures, and therefore it was not necessary to decide whether the Globe article was a neutral report.¹¹⁶

2. *Neutral Reportage Defense*

In this case, the media's concern was the issue of applying *neutral reportage* to private figures. Neutral reportage is a privilege available in some states that gives a First Amendment defense to publishers who republish defamatory statements.¹¹⁷ The Second Circuit defined neutral reportage in 1977 in *Edwards v. National Audubon Society*, noting that "[W]hen a responsible, prominent organization . . . makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regard-

113. *See id.* at 699. Although Morrow defaulted, and Roundtable settled with Khawar before trial, the trial court vacated Morrow's default and ultimately entered judgment in his favor, based on findings that Khawar could not be named in and could not be identified from the photographs in Morrow's book. *See id.*

114. *Id.* at 699.

115. *See id.* at 700. The trial court's decision that the Globe article was not a neutral report was based on its finding that although Khawar could be identified from the Globe photo, which included an arrow pointing directly at Khawar, it was impossible to identify Khawar from the smaller, darker and less distinct image of him that appeared in the Morrow book. *See id.*

116. *See Khawar v. Globe*, 54 Cal. Rptr.2d 92, 102-04 (1996).

117. *See Khawar*, 965 P.2d 696, 704 (Cal. 1998). The privilege is similar to the common law privilege of "fair report," which California codified in CAL. CIVIL CODE §§ 47(d) and 47(e). *See id.*

ing their validity.”¹¹⁸ The Supreme Court has never ruled on the neutral reportage privilege.¹¹⁹

Media conglomerates like ABC and CBS, publishers such as Knight-Ridder, and associations like the California First Amendment Coalition and the Radio-Television News Directors Association submitted a total of three amicus briefs¹²⁰ (“Globe amici”) urged the court to reverse the Court of Appeals, decision. The briefs asserted that the neutral reportage privilege extends protection to the media where they accurately and neutrally report that claims have been made about private individuals involved in public controversy.¹²¹

The briefs offered several other reasons for reversal. The first was that the court analysis did not focus on the republication aspect of the Globe’s defense.¹²² A duty to reinvestigate those claims would bar the media from informing the public about many newsworthy matters, in violation of the First Amendment. In addition, the ABC brief cited *Time v. Pape*,¹²³ which states that in the republication context, truth or falsity and actual malice are judged by examining whether the media accurately republished the underlying claims.¹²⁴

3. California’s Ruling

The California Supreme Court affirmed the appellate decision. Justice Kennard declined to address the amici’s concerns about neutral reportage for private figures, and instead affirmed the lower court opinion on this individual’s status as a private person for the purpose of defamation law.¹²⁵

Justice Kennard concluded that Khawar was not a public figure in relation to the article,¹²⁶ and stated that California does not rec-

118. *Edwards v. National Audubon Soc’y*, 556 F.2d 113, 120 (2d Cir. 1977) (citing *Time, Inc. v. Pape*, 401 U.S. 279 (1971)).

119. *Khawar*, 965 P.2d 696, 705 (1998) (citing *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989) (declining to decide the issue)).

120. See Brief of ABC, Inc. et al. [hereinafter ABC Khawar Amicus Brief]; Brief of Los Angeles Times et al. [hereinafter L.A. Times Amicus Brief]; and Letter Brief of San Jose Mercury News, Inc. and Knight-Ridder Pub., Inc., as Amici Curiae, *Khawar v. Globe*, 965 P.2d 696 (on file with the *Fordham Urban Law Journal*).

121. See L.A. Times Amicus Brief at 20-22; ABC Amicus Brief at 7-13.

122. See L.A. Times Amicus Brief at 15.

123. 1 U.S. 279 (1971).

124. See *id.*, cited in ABC Khawar Amicus Brief, *supra* note 120, at 15-20.

125. *Khawar*, 965 P.2d at 703.

126. See *id.* at 698. Khawar was a young journalist at the time who was photographed near Kennedy, a prominent politician, moments before his death. However,

ognize neutral reportage for private figures. She declined to decide whether California recognized such a privilege for public officials or public figures, stating:¹²⁷

Only rarely will the report of false and defamatory accusations against a person who is neither a public official nor a public figure provide information of value in the resolution of a controversy over a matter of public concern. On the other hand, the report of such accusations can have a devastating effect on the reputation of the accused individual, who has not voluntarily elected to encounter an increased risk of defamation and who may lack sufficient media access to counter the accusations.¹²⁸

While the California courts did not address the amicus as the Fourth Circuit did in *Paladin*, the mainstream press did. Mike Wallace, CBS anchor for the television show "60 Minutes," ran a story criticizing the media (including his own network).¹²⁹ Speaking to a lawyer who worked on the amicus brief in support of the *Globe*, Wallace stated "I know damn well that I would never in a million years have been permitted to put on 60 Minutes what the *Globe* put in their magazine."¹³⁰ Howard Kurtz, press critic for the *Washington Post* added, "[t]he nation's top news organizations have a knee-jerk tendency to rush to the defense of any journalist in trouble. They're afraid [the *Khawar* case] would set some kind of legal precedent. I don't think we should apologize for the worst excesses of our business."¹³¹ Specific to this case, the *Globe* did not do any journalism homework to insure a fair report.¹³² But the argument was the same as in the *Paladin* case, in that the media entities involved in writing the amicus briefs compromised their journalistic ethics by supporting the *Globe*.

C. Other "Friends of the Courts"

Both *Paladin* and *Khawar* are good examples of the public's outraged response to the defense of the media's conduct, but they are not the only cases. For example, in September 1997, the death of

he was never a suspect, was never publicized and never sought to influence public discussion on the topic. *See id.*

127. *See id.* at 707 ("Republication of accusations made against private figures is never protected by the neutral reportage privilege.").

128. *Id.*

129. *60 Minutes* (CBS television broadcast, Sept. 6, 1998) (transcript on file with the *Fordham Urban Law Journal*).

130. *Id.*

131. *Id.*

132. *See Khawar v. Globe*, 965 P.2d 696, 708 (Cal. 1998).

Princess Diana and Dodi Fayed in Paris resulted in a backlash against the paparazzi and their tactics.¹³³

Scrutiny has hit the mainstream media as well. When Richard Jewell, a security guard in Atlanta, became a suspect in the Centennial Olympic Park bombing during the Olympics in July, 1996, the media essentially tried and convicted him in the press.¹³⁴ Federal prosecutors exonerated Jewell almost three months later;¹³⁵ he subsequently filed defamation suits against many major news organizations.¹³⁶

In 1992, a police officer's family sued rap artist Tupac Shakur, Atlantic Records, and Time Warner when the officer was shot by a 19-year-old man who had been listening to Shakur's album, *2pacalypse Now*.¹³⁷ On this case's heels, Ice-T also attracted attention when he released the song "Cop Killer" from his album, *Body Count*. The release of the song, and songs such as those found on *2pacalypse Now* led to an all-out attempt by groups such as the Combined Law Enforcement Association of Texas, and people like Oliver North and former Representative Susan Molinari to censor the music.¹³⁸ The protests seemed to have the desired effect. Due

133. See James C. Goodale & Jeremy Feigelson, *Greater Legal Restrictions on the Paparazzi?*, N.Y. L.J., Sept. 22, 1997, at 4.

134. See, e.g., Kathy Scruggs & Ron Martz, *FBI Suspects "Hero" Guard May Have Planted Bomb*, ATLANTA J. & CONST., July 30, 1996, at 1X (stating that "Richard Jewell . . . fits the profile of the lone bomber. This profile generally includes a frustrated white man who is a former police officer, member of the military or police 'wannabe' who seeks to become a hero."), Andrea Peyser, *Who Checked "Rambo" Crossing Guard's Record?*, N.Y. POST, July 31, 1996, at 3 ("He was a fat, failed former sheriff's deputy[.]"). Jewell, initially identified as a hero for discovering a knapsack containing the bomb, was turned into a suspect within days of the explosion. For weeks following the incident, "a horde of news media members camped outside his mother's apartment . . . where Jewell live[d]." Bill Rankin, *Jewell is Cleared in Bomb Case: No Longer a 'Target,' Feds Say*, ATLANTA J. & CONST., Oct. 27, 1996, at A1.

135. See Rankin, *supra*, at A1.

136. Jewell settled his claims against NBC and CNN for undisclosed amounts. Suits against the *Atlanta Journal-Constitution*, and the *New York Post*, are pending. See Jewell v. NYP Holdings, 23 F. Supp. 2d 348 (S.D.N.Y. 1998). See also Charles L. Babcock & Cami Dawson Boyd, *Can Suspects Sue the Media for Coverage of Investigations?*, 15 COMM. LAW. 3 (Summer 1997); *Judge Lets Jewell Continue Suit*, FLORIDA TODAY, Oct. 3, 1998, at 3A.

137. See Davidson v. Time Warner, 25 Media L. Rep. 1705 (S.D. Tex. 1997). The plaintiffs argued in this suit that *2Pacalypse Now* did not merit First Amendment protection because it was obscene, contained "fighting words," defamed police officers and tended to incite imminent illegal conduct on the part of individuals like the officer's killer. The court, however, granted summary judgment to the defendants.

138. See Jason Talerman, Note, *The Death of Tupac: Will Gangsta Rap Kill the First Amendment?*, 14 B.C. THIRD WORLD L.J. 117, 137 (1994) (noting that both Representative Susan Molinari and Oliver North cited Time Warner's profit motive as contrary to constitutional protection).

to these objections and support of the censorship by public officials, musician Ice-T voluntarily withdrew "Cop Killer" from *Body Count*.¹³⁹ Two weeks after Ice-T pulled the song, he and other rap artists met with Warner Group. The musicians were told to change their lyrics or find another label.¹⁴⁰

III: Analysis of the Debate

"I disapprove of what you say, but I will defend to the death your right to say it."¹⁴¹ These words by Voltaire echo the sentiments of both the media and their lawyers, when it comes to defending the First Amendment. *Paladin* and *Khawar* question whether it is permissible – and proper – for the media to support parties in a litigation who have, by social, moral and journalistic standards, acted inappropriately. They also question whether it is unethical for lawyers to support the media's attempts to defend such conduct.

The answer to the first question, according to Judge Luttig, and other critics like Chief Judge Richard Posner and Mike Wallace, is that it is *not* proper.¹⁴² Anti-media sentiment has grown tremendously in recent years, to the point where a recent Roper-Freedom Forum-Parade poll states that fewer than twenty percent of people polled rated the ethics of journalists as high, and sixty-five percent of respondents said there are times when publication or broadcast should be prevented.¹⁴³ For those who wish to maintain the prestige of journalism, it may be critical to point out defendants who give the profession a bad name.

Ultimately though, it is wrong to criticize the media and their amici for defending their peers. There are compelling explanations that indicate that the scores of media who have sided with such defendants have made the right decision. One of the most important reasons is that a media client may think it has a legitimate interest in the outcome of the case purely from a precedential standpoint – the case law may be unclear or non-existent. If this is the case, then the media are only protecting their First Amendment freedoms, and their actions are proper.

139. *See id.* at 135.

140. *See id.*

141. Talermin, *supra* note 138, at 117 (citing Voltaire).

142. *See supra* notes 64-69, 129-31 and accompanying text.

143. *See* ROPER CENTER FOR PUBLIC OPINION RESEARCH, NEWS JUNKIES, NEWS CRITICS: HOW AMERICANS USE THE NEWS AND WHAT THEY THINK ABOUT IT (Feb. 1997), *cited in* Daniel Schorr, *Forgive Us Our Press Passes*, 20 HASTINGS COMM/ENT. L.J. 269, 271 (Winter 1998).

A. The Goals of an Amicus

The first step in the analysis of Judge Luttig's and Mike Wallace's arguments is defining precisely the goals of an amicus curiae. Judge Posner argues that many amicus briefs are simply redundant, echoing the parties' briefs rather than giving new legal analysis, and are thus detrimental, not legitimate.¹⁴⁴ In *Ryan v. Commodity Futures Trading Commission*,¹⁴⁵ the amicus claimed to have an overriding interest in the case because the defendant was one of its members. Accordingly, it wanted to express its view that the evidence clearly established the lack of any need for the sanction imposed by the Commodity Futures Trading Commission.¹⁴⁶ Judge Posner replied that the court is helped only "by being pointed to considerations germane to our decision of the appeal that the parties for one reason or another have not brought to our attention," not by an amicus' "expression of a 'strongly held view' about the weight of the evidence."¹⁴⁷ Judge Posner's point is well taken. Appellate judges are flooded with briefs on both sides of the argument, and many attorneys understand that the courts should not be compelled to read additional briefs that merely scream "me too."¹⁴⁸

Putting the redundancy argument aside, parties in an amicus curiae brief do not necessarily support a defendant's conduct alleged by the plaintiff. Instead, they may provide the court a legal analysis illustrating why a decision will be bad precedent for other similarly situation parties.¹⁴⁹ In addition, they may focus the court's attention on the broader implications of various possible rulings.¹⁵⁰

There are also times when, because of page limitations on the briefs of parties to the litigation, or because of other considerations, an amicus may be in a better position to make a specific point than a party to the litigation. For example, in *Metromedia v. San Diego*,¹⁵¹ San Francisco sought to exclude most billboards from

144. See *supra* notes 64-68, and accompanying text.

145. 125 F.3d 1062 (7th Cir. 1997).

146. See *id.*

147. *Id.* at 1064.

148. Thomas R. Newman & Steven J. Ahmuty, Jr., *Justifying the Filing of Amicus Briefs*, N.Y. L.J., Feb. 2, 1998, at 3.

149. See, e.g., Brief for the Lawyer's Committee for Civil Rights Under Law, as Amicus Curiae, *Haddle v. Garrison*, 132 F.3d 46 (11th Cir. 1997) (arguing that the lower court decision would deny the protections afforded in section 1985(2) to individuals working under employment contracts of indefinite length).

150. See Ennis, *supra* note 50, at 608.

151. 458 U.S. 1 (1982).

designated sections of the city.¹⁵² The billboards carried primarily commercial messages, but also some political messages as well. Billboard owners were not in a position to argue credibly on behalf of political speech because they did not engage in political speech (they leased billboard space only), and so the billboard owners' lawyer invited the ACLU to file an amicus brief emphasizing the political speech aspects of the case.¹⁵³

Other legitimate reasons for filing amicus briefs include clarifying convoluted litigation, collecting useful historical or factual references that merit judicial notice or urging limitations on rulings.¹⁵⁴ It is imperative to the adversary system that an amicus with legitimate interests be able to assert its arguments. Thus, it can be deemed ethical for an amicus party to submit a brief where that party is motivated by one of the enumerated reasons.

B. Legitimate Interests

It is clear that Judge Luttig, Mike Wallace and their peers, saw few, if any, legitimate interests expressed by the amici who filed in the *Paladin* and *Globe* cases. However, there are strong arguments for amici involvement in both *Paladin* and *Khawar*. In these cases, it is not necessarily *whom* the media stood behind, but the constitutional right each supported that legitimized each interest. Thus, the media amici pass a "legitimate interest" test that refute the critics' notions of the amici's decision to file in the litigation.

1. *Paladin's Critics and the Brandenburg Precedent*

In *Paladin*, the amici articulated a chilling effect argument¹⁵⁵ that the District Court accepted. However, the Fourth Circuit rejected this claim, arguing that:

152. *See id.*

153. *See Ennis, supra* note 50, at 607. The majority of the Court in *Metromedia* agreed to strike down the San Diego ordinance. The four justices in the plurality "thought the ordinance was constitutional insofar as it regulated only commercial speech, but struck down the entire ordinance because it unconstitutionally regulated political speech, and the commercial and political regulations were not severable." *Id.*

154. *See ABC Paladin Amicus Brief, supra* note 6, at 128.

155. *See id.* The Amici concluded:

A word, a lyric, a film clip – these are the living embodiments of our proud heritage of defending the rights of even the most outrageous speaker. They are capable of enriching, entertaining, educating, and – occasionally – shocking and horrifying us. But whatever their power, they are incapable of acting. To hold a word or an image jointly responsible for even the most ghastly criminal act diminishes us all, because it means that some speech surely will be chilled in the process.

Id. at 28.

[F]or almost any broadcast, book, movie or song that one can imagine, an inference of unlawful motive from the description or depiction of particular criminal conduct therein would almost never be reasonable, for not only will there be . . . a legitimate and lawful purpose for these communications, but the contexts in which the descriptions or depictions appear will themselves negate a purpose on the part of the producer or publisher to assist others in their undertaking of the described or depicted conduct.¹⁵⁶

The crux of the majority's criticism was that because *Paladin* admitted that it intended and knew the book would be used "immediately in the commission of murder and other crimes[.]"¹⁵⁷ this case did not affect any First Amendment principles. The court's argument focused on *Paladin*'s actions, and its intent to publish dangerous speech.

Despite the court's assertion, the chilling effect that reversal of the District Court's summary judgment would have on subsequent media conduct was a valid concern for the media amici. The media did not cheer for *Paladin*, nor did they argue that the book was necessary. Furthermore, they did not condone the type of violence advocated in *Paladin* Press' books. Instead, the *Paladin* amici argued there was no distinction between the constitutional protection for the type of information found in *Hit Man*, and protection for similar information found in "a vast array of fiction, nonfiction, music, electronic communication, and video programming."¹⁵⁸

The media's position is reasonable and passes a legitimacy test. It was in the media's best interest in *Paladin* to advocate for First Amendment freedoms. The media generally strive to extend First Amendment protections as much as possible, thereby alleviating concerns about potential lawsuits.¹⁵⁹ In this case, the media entities were worried that the precedent set by a reversal of summary judgment for the defendant would subject information in books to censure review by trial.¹⁶⁰

156. *Paladin*, 128 F.3d at 266.

157. *Id.* at 265.

158. ABC *Paladin* Amicus Brief, *supra* note 6, at 2.

159. For example, the media have previously stood behind defendants like *Hustler Magazine*. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (prohibiting public figures and officials from recovering damages for the tort of intentional infliction of emotional distress without showing a false statement of fact being made with actual malice); *Hustler v. Herceg*, 814 F.2d 1017 (5th Cir. 1987) (holding that a *Hustler* article did not incite an adolescent to perform an act that led to his death).

160. See ABC *Paladin* Amicus Brief, *supra* note 6, at 22. The ABC *Paladin* Amicus Brief states:

Because it is unclear how restrictive the limits set by *Brandenburg v. Ohio*¹⁶¹ are, it is in the media's interests to ensure that such protections continue. Because *Brandenburg* has almost exclusively been applied to political speech,¹⁶² some Paladin supporters wonder whether its First Amendment protections would extend to Paladin if it had written a chapter in its book extolling the virtues of contract killing.¹⁶³ It was this type of arbitrary line-drawing that the amici attempted to defend themselves against.

2. *The Globe and Neutral Reportage*

Mike Wallace and Howard Kurtz presented a similar argument to that of Judge Luttig. Wallace's "60 Minutes" interview with Khalid Khawar occurred before the California Supreme Court ruled on the case.¹⁶⁴ Criticizing the media's defense of Paladin, Wallace noted that "[t]his case is about Khalid Khawar, who was libeled. The jury found that he had been libeled. An appellate court agreed. That's what the case is about. It's about a human being and his family."¹⁶⁵

Nevertheless, the media amici make several compelling arguments that this case was about more than the facts. There was an important legal issue at stake – the application of neutral reportage to public figures. "[T]he neutral reportage privilege protects the media from defamation liability for the non-malicious publication of a serious accusation made by a prominent person where such accusations in and of themselves are newsworthy, while preserving the private figure's right to seek damages from the original publisher."¹⁶⁶ The impact of the *Khawar* litigation would not be limited to tabloids like the *Globe* or the *Enquirer*, but also to the

A decision that allows this claim to survive – even for a brief time – will have a destabilizing effect on First Amendment law, and will inevitably unleash a hailstorm of derivative suits on the communications industry as plaintiffs search for deep pockets to avenge imagined affronts, or real affronts better recompensed by perpetrator than publisher.

Id. See also *supra* notes 26-31 (providing examples of this premise) and accompanying text.

161. 395 U.S. 444 (1969).

162. See Robert J. Coursey III, Note & Comment, *Another Case of Freedom vs. Safety: Stretching the First Amendment to Protect the Publication of Murder Manuals – Brandenburg Need Not Apply?*, 14 GA. ST. U. L. REV. 875, 899 (1998).

163. See *id.* at 899-900.

164. *60 Minutes* (CBS television broadcast, Sept. 6, 1998).

165. *Id.*

166. L.A. Times Amicus Brief, *supra* note 120, at 24.

mainstream press; and there was the possibility that future courts may eliminate neutral reportage altogether.¹⁶⁷

The amici expressed additional concern about the Court of Appeals ruling – that failure to reinvestigate a story constitutes “actual malice” if the court later concludes that the book’s assertions were improbable.¹⁶⁸ The brief filed on behalf of ABC noted that where the media simply informs the public of the “historical fact” that allegations have been made, and do not report the allegations as true or otherwise distort them, then “the media cannot be held liable because the report was ‘materially true’ and thus ‘constitutionally protected.’”¹⁶⁹

In addition, the brief filed by Davis, Wright and Tremaine, attorneys for the amici curiae, including the Los Angeles Times, NBC, and the New York Times, argue that a ruling mandating a duty of independent investigation resurrects strict scrutiny.¹⁷⁰ In this portion of the brief, there are only brief mentions of the *Globe* case; the rest of the argument is a strictly legal analysis.

What the amici stress – and what people like Mike Wallace and Howard Kurtz largely ignore – is that it is not necessarily *Paladin*, or the *Globe*, that the media amici are defending. Instead, the amici’s primary goal is to protect the constitutional rights guaranteed and extended by the First Amendment. In the final paragraph of the *Paladin* amicus curiae brief, amici note that “[r]einstatement of this case will engender a new tort against the written word – a futile exercise in ‘pigeonholing’ [that] endangers the pigeon.”¹⁷¹

C. Legitimate Interests of Lawyers

If there is a compelling and legitimate interest of the media amici, the same conclusion can be reached for the lawyers who write the amicus for their media clients. As noted above, there are

167. See Jane Kirtley, *Defamation Judgment Puts Onus on Media*, AM. JOURNALISM REV., Jan. 1, 1999. Kirtley stated:

Future courts may interpret the ruling as creating a legal obligation to independently investigate defamatory statements made by authoritative sources before repeating them. That may be a desirable journalistic aspiration. But courts are ill equipped to second-guess news judgment or allocation of resources. You can bet they’ll seldom be satisfied that a reporter did all he or she could to determine the truth.

Id.

168. See *Khawar v. Globe*, 54 Cal. Rptr. 2d 92 (Ct. App. 1996).

169. ABC *Khawar* Amicus Brief, *supra* note 120, at 20.

170. L.A. Times Brief, *supra* note 166, at 9.

171. ABC *Paladin* Amicus Brief, *supra* note 6, at 27 (citing LAURENCE TRIBE, AM. CONSTITUTIONAL L. §§ 12–18, at 943 (2d ed. 1988)).

many reasons why the media amici have a vested interest in defending their peers. If that is the case, and an appellate decision may affect future litigation for the lawyer's client, that lawyer has an obligation to serve the amici's interests.

Even if that were not the case – even if the media had been misguided – there still may be the ethical obligation of the amici's lawyers to advocate for their clients. There are no *ABA Model Rule* or *Code* provisions that deal specifically with advocating for a non-client in a case that may have an effect on a current client. However, there are several general comments that provide a good basis for analysis.

The *ABA Model Rules of Professional Conduct* (“*Model Rules*”) require a lawyer to act with reasonable diligence and promptness in representing a client.¹⁷² The *Model Rules* further state that “a lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.”¹⁷³ An amicus brief would likely fall within the ambit of “lawful and ethical measures.”

The *Model Rules* also note that a lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.¹⁷⁴ The *Model Code of Professional Conduct* (“*Model Code*”) similarly notes that a lawyer should represent a client zealously within the bounds of the law.¹⁷⁵ An attorney's ethical obligation to assist the judge or jury in arriving at its distillation of the “truth” is best fulfilled through the zealous advocacy of the client's position under the existing paradigm of civil litigation.¹⁷⁶ The attorney's primary obligation is to pursue – to the fullest extent of the law – his or her client's rights.¹⁷⁷

172. AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

173. *Id.* Rule 1.3 cmt. 1.

174. *See id.* Rule 1.3 cmt. 1.

175. MODEL CODE Canon 7. Some states have moved to eliminate the word “zeal” in their Codes of Professional Responsibility because a lawyer on behalf of a client might interpret zealousness to mean “zealotry,” justifying wrongful conduct. It might also be interpreted to imply a requirement of personal involvement rather than detached commitment. *See* George A. Riemer, *Zealous Lawyers: Saints or Sinners?*, 59 OCT. OR. ST. B. BULL. 31, 32 (1998). An in-depth analysis of this point is beyond the scope of this article.

176. Jamil N. Alibhai et al., *Zealous Advocacy and the Search for Truth*, 61 TEX. B.J. 1009, 1014 (1998).

177. *See id.*

Rule 1.3 of the *Model Rules* tangentially addresses the role of a lawyer when the relationship is ongoing; it states that if a lawyer has served a client over a substantial period in a variety of matters, the client can assume that the lawyer will serve on a continuing basis.¹⁷⁸

Finally, it is up to the client to determine the objective of the litigation.¹⁷⁹ Logically, it seems that if the objectives of a client are to prevent bad precedent for possible future litigation, it is the obligation of the lawyer to represent his or her client in that matter. However, the rules also state that a lawyer has professional discretion in determining the means by which a matter should be pursued.¹⁸⁰ It is, however, within the ethical boundaries that a lawyer pursue any objectives of the client.¹⁸¹

The *Model Rules* provide an escape hatch for an attorney. A lawyer may withdraw from a matter if the client insists on pursuing an objective that the lawyer finds repugnant or imprudent.¹⁸² However, it would be hard in these cases for a lawyer to prove that such objections are repugnant to him or her.

When taken collectively, it becomes clear that there is no ethical problem with a lawyer writing a brief on behalf of an interested third party. Furthermore, if there is a legal avenue for that client to take, there may even be an obligation to pursue such a course of action. If a lawyer is within his or her boundaries to promote an objective of an interested media client, there is no reason why that attorney should be required to withdraw, especially if the lawyer is not particularly disturbed by the behavior the media client wants to uphold.¹⁸³ In tandem with the idea that an attorney should represent a client zealously, it only makes sense that writing amicus briefs falls within the ambit of responsible lawyering.

178. See MODEL RULES Rule 1.3 cmt. 3 (“[A] lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue, to serve on a continuing basis unless the lawyer gives notice of withdrawal.”).

179. MODEL RULES Rule 1.2.

180. See *id.*

181. The exception, of course, is to perpetuate or aid in the commission of a crime. See MODEL RULES Rule 1.16 cmt. 2. See also MODEL CODE at DR 2-110(b).

182. MODEL RULES Rule 1.16.

183. It is useful to note that a lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social, or moral views or activities. MODEL RULES Rule 1.2(b).

If it is not unethical on the part of media entities and their lawyers to advocate as amici on behalf of a media defendants,¹⁸⁴ why, in these cases, do some members of the media shy away from defending organizations such as the *Globe* and Paladin Press? A plausible reason may be that the press and other media would like to distance themselves as much as possible from tabloids or "alternative" publishing companies such as Paladin. When Howard Kurtz notes in Mike Wallace's "60 Minutes" interview with Khawar, that "we should [not] apologize for the worst excesses in our business," he adds, "I think we should blow the whistle on them."¹⁸⁵ The media have been accused of tabloid journalism for years,¹⁸⁶ and some journalists wonder aloud how to rise above the stereotypes.¹⁸⁷

Many authors of articles and discussions regarding these cases defend Paladin and the *Globe*,¹⁸⁸ but even more still distance themselves from the publishers.¹⁸⁹ However, "[t]hese are hardly the kinds of facts that First Amendment lawyers die for," writes one editor about the Paladin case.¹⁹⁰ "But as is so often the case with constitutional rights, they must defend the most unsavory characters . . . to protect the rest of us."¹⁹¹

It is unlikely that in either *Paladin* or *Khawar*, the mainstream media would publish these types of articles or books. The media are loosely governed by their own set of rules that the Society of Professional Journalists ("SPJ") promulgated in its Code of Ethics in 1926, and revised in 1973, 1984, 1987 and 1996.¹⁹² The rules pro-

184. The only caveat is that a lawyer may not further a crime or fraud. See MODEL CODE at 7-102.

185. *60 Minutes* (CBS television broadcast, Sept. 6, 1998).

186. See generally JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* (1996) (criticizing major news organizations for accelerating the decline of journalism); HOWARD KURTZ, *HOT AIR: ALL TALK ALL THE TIME* (1996) (saying that the press have given into sensationalism).

187. See, e.g., Jon Lafayette, *RTNDA: Journalists Hash Out Trust Issue: Has Credibility Eroded?*, ELECTRONIC MEDIA, Sept. 22, 1997, at 1A. The article describes the Radio-Television News Directors Association's annual conference where speakers discussed accountability to the public. *Id.*

188. See, e.g., Andrea Neal, *In Defense of the Most Unsavory*, INDIANAPOLIS STAR, Mar. 14, 1996, at A8 (defending Paladin Press, stating that "the information found in *Hit Man* can be found in other works of fiction and non-fiction"); Kirtley, *supra* note 167 ("My support for self-criticism [by the media] stops at the courthouse door.").

189. See, e.g., Fein, *supra* note 100 ("[D]rawing sensible lines is the hallmark of enlightened law The First Amendment is no exception.").

190. Neal, *supra* note 188.

191. *Id.*

192. David A. Logan, "Stunt Journalism," *Professional Norms, and the Public Mistrust of the Media*, 9 U. FLA. J. L. & PUB. POL'Y 151, 160 (1998).

vided for journalists, unlike the Codes, do not come with the threat of disciplinary procedures if they are not followed.¹⁹³ In addition, the journalism codes that are in place deal only in generalities.¹⁹⁴ For example, the American Society of Newspaper Editors calls for “the highest ethical and professional performance,” in its “Statement of Principles” but does not define that term.¹⁹⁵ “[T]here is an obligation on the part of each editor, each reporter, each publisher, to decide upon her or his own ethical standard,” says respected journalist A.M. Rosenthal.¹⁹⁶ “I do not believe in regulation of the newspaper business from the outside, and philosophically, I have to be against regulation from the inside. I do not want to sit in judgment on another newspaper and I do not think it is a healthy thing to do.”¹⁹⁷

Moreover, the press have no guidelines with regard to assisting media defendants – most likely they will do what is in their best interests for their own publications. If this is the case, then it might be in the best interest for a single publication to discredit a defendant or media amici to uphold its own integrity.

Conclusion

For those who chose to criticize the media entities that signed on to the *Paladin* and *Globe* amicus briefs, it may be that these critics have false views of what it means to write an amicus brief. Although the one understanding of amici has come to be advocacy for a certain client,¹⁹⁸ many amici – and in fact those that are probably most effective – are those who argue a legal issue without zealously advocating for a specific defendant.¹⁹⁹ This is actually a return to where amici have stood since the 1800s – as a friend to the court and to the *law*.

However, it may also be the case that a new rule of law would be a crucial defensive or offensive tactic for a party. In such cases, regardless of the enthusiasm for with which a friend advocates, it

193. Deann Evans, *Most Journalists Follow Basic Ethical Rules*, SALT LAKE TRIBUNE, May 22, 1994, at F4.

194. See Brian Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 100 (1994).

195. American Society of Newspaper Editor, *Statement of Principles* (visited June 25, 1999) <<http://www.asne.org/kiosk/archive/principl.htm>>.

196. Remarks by A.M. Rosenthal, ASNE 1987, Proceedings of the 1987 Convention of the American Society of Newspaper Editors, at 36, 45, cited in, Murchison, *supra* note 194, at 101.

197. *Id.*

198. For history of amicus briefs, see *supra* Part I.

199. See ACLU cases, *supra* notes 26-31 and accompanying text.

would set a bad precedent to condemn amici who stand up for their peers and the law.

EXPANDING NEW YORK'S DNA DATABASE: THE FUTURE OF LAW ENFORCEMENT

Robert W. Schumacher II*

Introduction

On a December morning in New York City, a young girl is found by authorities, sexually molested and murdered. There is no evidence present at the crime scene to produce a suspect. The victim's friends and family are questioned, but no one is able to provide any leads. As the investigation continues, however, lab reports uncover semen samples from the victim's body. With today's technology, such evidence can be run through New York State's deoxyribonucleic acid ("DNA") database, with the hope of finding a match between the semen found on the victim's body and a sample already existing in the database. Currently, this database contains DNA profiles from those previously convicted of certain sex offenses, homicide, assault and escape.¹

Unfortunately, the crime scene sample does not match any recorded in the database. The killer murders four more girls in the same way before being captured in the act with victim number six.

Upon detention, it is discovered that the killer had been convicted of two misdemeanors in New York State within the last year—Sexual Misconduct and Reckless Endangerment in the Second Degree. Had New York's compulsory DNA statute been more expansive to mandate samples from all those arrested for fingerprintable offenses, the initial sample collected would have matched this man's DNA profile. The lives of five young girls could have been spared.

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1. See N.Y. EXEC. LAW § 995 (McKinney 1994). Specifically, felons are required to submit a DNA sample when convicted of an assault under N.Y. PENAL LAW sections 120.05, 120.10 and 120.11, a homicide under sections 125.15-125.27 or a sex offense under sections 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.65, 130.67, 130.70 and 255.25. See *id.* § 995.7. Also, submission is required when a felon is convicted under sections 205.10, 205.15, 205.17 and 205.19 relating to escape and other offenses, where the offender has been convicted within the previous five years of one of the other felonies enumerated. See *id.*

This Note analyzes New York City Police Commissioner Howard Safir's ("Safir") proposal to expand New York's DNA Database to include profiles from all persons arrested for a recordable offense. Part I discusses the admissibility of DNA identification technology in New York courts and gives an overview of the molecular biology of DNA, explaining the powerful investigative advantage of DNA and the main profiling methods available. In addition, Part I describes other DNA database programs currently in place and concludes with a detailed outline of Safir's proposal. Part II defines the controversy surrounding Safir's proposal, specifically Fourth Amendment privacy concerns, as well as fears of potential misuse of DNA profile information stored in a computer database. Part III addresses these concerns and details New York's specific need for an expanded statute in light of New York's recidivism rates, recent crime trends, investigative efficiency and lower administrative costs. This Note concludes that Safir's plan is an effective, cutting-edge law enforcement tool that does not overly intrude upon an individual's Fourth Amendment privacy rights.

I. Overview of DNA Uses

DNA identification techniques are capable of assisting law enforcement officials in implicating the guilty and exonerating the innocent.² In the early 1990s, New York State recognized these inherent benefits and began admitting the probative evidence in judicial proceedings.

2. Despite these apparent benefits in criminal prosecutions, opponents to the processes of DNA identification cite two main arguments against the admissibility of findings in criminal proceedings. First, because DNA profiling is a long complex process, opponents attack relaxed testing protocols that could lead to error. See ROBERT J. GOODWIN & JIMMY GURULE, CRIMINAL AND SCIENTIFIC EVIDENCE 285 (1997). Specifically, results are unreliable when mislabeling, contamination and comparison negligence occurs. See *id.* One illustration of the call for quality control and proficiency standards in laboratory DNA testing can be found in *New York v. Castro*, 545 N.Y.S.2d 985, 997-98 (Sup. Ct. 1989), where the court held DNA evidence inadmissible because those testing the sample failed to follow appropriate standards and controls.

Second, critics attack the accuracy of probability estimates concerning the chances of another person having a similar genetic make-up as the accused. See *id.* The probability figures, usually in the one-in-several million range, if wrongfully calculated, are "unreliable, misleading, and highly prejudicial." *Id.*

In 1994, in *People v. Wesley*,³ the New York Court of Appeals found Restriction Fragment Length Polymorphism ("RFLP")⁴ profiling admissible in New York State.⁵ The court ruled that the RFLP profiling method is generally accepted as reliable in the scientific community,⁶ using a test for admissibility of novel scientific evidence similar to that in *Frye v. United States*.⁷ The majority decision noted that questions of procedural negligence and probability inaccuracy were irrelevant to the issue of admissibility, but instead, were matters for jury consideration.⁸

Seven months after *Wesley*, a New York trial court held that Polymerase Chain Reaction ("PCR")⁹ profiling techniques were generally admissible in criminal proceedings in *People v. Palumbo*.¹⁰ Relying on universal acceptance in other jurisdictions,¹¹ the *Palumbo* court found the PCR test to be "generally ac-

3. 633 N.E.2d 451 (1994). This case involved the murder of seventy-nine year-old Helen Kendrick. See *id.* at 453. The investigation of her death led to Wesley when a bloodstained T-shirt with gray and white hairs on it, bloodstained underwear and bloodstained sweatpants were found in the defendant's apartment. See *id.* DNA comparisons provided inculpatory evidence, though the defendant was linked to the crime through a number of incriminating statements and nylon from Wesley's carpet found on the deceased's dress. See *id.* Wesley questioned whether DNA profiling evidence was admissible in New York and, if so, whether it should have been admitted against him. See *id.* at 452.

4. See *infra* text accompanying notes 29-52.

5. See *Wesley*, 633 N.E.2d at 455.

6. See *id.*

7. 293 F. 1013 (D.C. Cir. 1923). The rule of *Frye* is that scientific expert testimony is admissible only after the espoused theory has gained general acceptance in the scientific field. See *id.* at 1014. Specifically, the *Frye* court stated:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. The *Wesley* court felt *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which held that *Frye* was superseded by the Federal Rules of Evidence, was inapplicable here. See *Wesley*, 633 N.E.2d at 454 n.2.

8. See *id.* 457-58. In concurrence, Chief Judge Kaye disputed the finding that RFLP was a reliable scientific technique in 1988, when conducted against Wesley. See *id.* at 463 (Kaye, J., concurring).

9. See *infra* text accompanying notes 53-70.

10. 618 N.Y.S.2d 197 (Sup. Ct. 1994). In a second-degree murder proceeding, the defendant requested a determination on the admissibility of a DNA profile taken using the PCR profiling method. See *id.* at 198.

11. See *id.* at 200-01 (citing *Oregon v. Lyons*, 863 P.2d 1303 (Or. Ct. App. 1993); *Clarke v. Texas*, 813 S.W.2d 654 (Tex. Ct. App. 1991); *Spencer v. Virginia*, 393 S.E.2d 609 (1990); *Washington v. Russell*, 882 P.2d 747 (1994)).

cepted as reliable in the scientific community.”¹² The *Palumbo* court further addressed opponents’ concerns regarding probability issues in stating “[t]hat the PCR test may only show that the defendant and the assailant are part of a relatively large group of people having the same characteristic goes to weight of the evidence, not its admissibility.”¹³

While generally admissible in New York State, however, DNA evidence still generates heated debate, specifically over its use as an identification tool in conjunction with technological revolutions. In order for one to fully understand the relevant issues being raised, an overview of DNA science and profiling techniques is necessary.

A. Molecular Biology of DNA

DNA is the fundamental material that defines the genetic characteristics of all life forms.¹⁴ DNA is present in most body cells, specifically those with nuclei, and can be carried in bodily fluids such as saliva, blood or semen.¹⁵ DNA sequences vary in length and are composed of four organic bases, namely adenine (“A”), cytosine (“C”), thymine (“T”) and guanine (“G”), arranged in long chains that form a double helix.¹⁶ Essentially, the structure resembles a twisted ladder.¹⁷ The sides of the ladder consist of repeated sequences of phosphate and deoxyribose sugar.¹⁸ The rungs of the ladder are formed by pairs of the aforementioned bases.¹⁹ A single DNA molecule consists of over three billion base pairs where A matches only with T, while C exclusively pairs with G.²⁰ Thus, if a section of bases on one side of the ladder is ATTACAGGC, the opposite side would be TAATGTCCG.²¹

12. *Palumbo*, 618 N.Y.S.2d at 201.

13. *Id.*

14. See BRUCE ALBERTS ET AL., *Glossary in MOLECULAR BIOLOGY OF THE CELL* G-8 (3d ed. 1994) (defining DNA as “serv[ing] as the carrier of genetic information”).

15. See BRUCE ALBERTS ET AL., *MOLECULAR BIOLOGY OF THE CELL* 385 (2d ed. 1983); *People v. Castro*, 545 N.Y.S.2d 985, 988 (Sup. Ct. 1989) (detailing the scientific background behind the theory of DNA identification). Red blood cells, for instance, which do not have nuclei, do not carry DNA. See *Castro*, 545 N.Y.S.2d at 988. Also, DNA may be recoverable from other tissue through a cell’s mitochondria. See Barry Scheck, *Privacy: The Impact of DNA Databases* 33 (March 2, 1999) (transcript on file with *Fordham Urban Law Journal*) [hereinafter Scheck Transcript].

16. See ALBERTS ET AL., *supra* note 15, at 99.

17. See *People v. Wesley*, 533 N.Y.S.2d 643, 646 (Albany County Ct. 1988).

18. See *Castro*, 545 N.Y.S.2d at 988.

19. See *id.*

20. See LOUIS LEVINE, *BIOLOGY OF THE GENE* 11 (1969).

21. See *id.*

Over ninety-nine percent of the base pairs described are the same in all humans, responsible for a human's inherent form.²² The remaining base pairs, however, vary from person to person,²³ accounting for physical differences among humans that make each person unique.²⁴

B. DNA Profiling²⁵

DNA profiling technology provides law enforcement officials with a means of identifying individuals by detecting differences in cell structure.²⁶ DNA profiling involves three basic steps:

- (i) an analysis of both the known sample (taken from the suspect) and the unknown sample (recovered from the crime scene) to derive a series of DNA patterns present in each; (ii) a comparison of these profiles to determine if there is a match (indicating that an identity of source is possible) or an exclusion (indicating that such identity is unlikely); and (iii) if there is a match, a statistical analysis to determine what proportion of persons in the same population as the suspect have the same DNA patterns.²⁷

22. See Judith A. McKenna et al., *Reference Guide on Forensic DNA Evidence*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 273, 281 (1994); KEITH INMAN & NORAH RUDIN, AN INTRODUCTION TO FORENSIC DNA ANALYSIS 29 (1997).

23. While DNA is unique to each individual, identical twins, with the same genetic make-up, will possess identical DNA. See McKenna et al., *supra* note 22, at 281.

24. See *id.* Within a cell's nucleus, DNA is apportioned into forty-six sections called chromosomes. See SIMON EASTEAL ET AL., DNA PROFILING: PRINCIPLES PITFALLS AND POTENTIAL 9 (1991). The ordinary human cell contains twenty-three pairs of matching chromosomes, one chromosome per pair inherited from each parent. See *id.* Each human cell actually contains the same twenty-two pairs of chromosomes and a pair of sex chromosomes (male cells contain X and Y chromosomes, while female cells contain two X chromosomes). See *id.* The portion of DNA involved in producing certain physical traits is called a gene. See McKenna et al., *supra* note 22, at 281. Genes are located at specific sites, or loci, upon certain chromosomes. Alternate forms of genes are known as alleles. See *id.* at 282. Alleles have a dramatic impact on cells, accounting for variant physical expression among humans. See EASTEAL ET AL., *supra* note 24, at 12. A locus where the alleles differ among humans is called "polymorphic, and the difference is known as polymorphism." McKenna et al., *supra* note 22, at 282.

25. In 1984, Alec Jeffreys discovered a unique application of technology for personal identification purposes. See INMAN & RUDIN, *supra* note 22, at 19. He termed the method "DNA fingerprinting," but scientists generally agree a better term for the process is "DNA typing" or "DNA profiling." See *id.*

26. See Mira Gur-Arie, *The Science of DNA Profiling*, in NEW YORK'S DNA DATABASE AND COMMISSION ON FORENSIC SCIENCE, AN ANALYSIS OF CHAPTER 737 OF THE LAWS OF 1994, INCLUDING THE COMPLETE TEXT OF THE NEW STATUTORY PROVISIONS 16 (1994) [hereinafter COMMISSION ANALYSIS].

27. *Id.* at 17 (citing NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 51 (1992); Bruce S. Weir, *Population Genetics in the Forensic DNA*

Identifying individuals for law enforcement purposes can be accomplished by utilizing one of several methods for comparing genetic variation.²⁸

1. RFLP Analysis

RFLP analysis determines the size of a repetitive sequence of base pairs.²⁹ "Because the length of these sequences (sometimes called band size) of base pairs [can vary greatly] . . . comparison of several corresponding sequences of DNA from known (suspect) and unknown [crime scene] sources gives information about whether the two samples are from the same source."³⁰

In the first step of RFLP analysis, DNA is separated from a sample of cells through the use of a centrifuge.³¹ After extraction, the DNA is cleaned with organic solutions and divided into fragments with restriction enzymes.³² Through a procedure called "agarose gel electrophoresis," the fragments are then separated by length and placed adjacent to a positive electrode in a container full of agarose gel.³³ Electric current is applied to the sample, causing DNA fragments to separate by length.³⁴

After electrophoresis, the resulting DNA fragments are transferred from the gel to a nylon membrane, through a process called "Southern Blotting."³⁵ The DNA is then unzipped by "heating [and] separating the double helix into single strands[.]"³⁶ exposing

Debate, 89 PROC. NAT'L ACAD. SCI. 11, 654 (1992)); see also *Arizona v. Bible*, 858 P.2d 1152, 1180 (Sup. Ct. 1993).

28. See COMMISSION ANALYSIS, *supra* note 26, at 17.

29. See M. KRAWCZAK & J. SCHMIDTKE, DNA FINGERPRINTING 27 (1994). Base pair sequences consistently repeat. See NATIONAL RESEARCH COUNCIL, THE EVALUATION OF FORENSIC SCIENCE 14 (1996). The repetitive sequences are known as Variable Number of Tandem Repeats. See *id.*

30. McKenna et al., *supra* note 22, at 282.

31. See DEPARTMENT OF CRIMINAL JUSTICE, FORENSIC DNA ANALYSIS: ISSUES 5 (1991) [hereinafter DEPARTMENT ANALYSIS]. A centrifuge is "a machine [used] for whirling fluids rapidly to separate substances of different densities by centrifugal force." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 363 (1986).

32. Restriction enzymes are virtual scissors used to cut DNA chains at specific sites. This stage is known as restriction digestion. See COMMISSION ANALYSIS, *supra* note 26, at 18.

33. See *id.* Agarose Gel is a "gelatin-like material solidified in a slab about five inches thick." McKenna et al., *supra* note 22, at 282.

34. See COMMISSION ANALYSIS, *supra* note 26, at 18. DNA carries a negative charge and will, when electrocuted, move toward the positive electrode. See DEPARTMENT ANALYSIS, *supra* note 31, at 5. The distance a single DNA fragment travels depends on its length, as shorter fragments travel farther than longer, heavier fragments. See *id.*

35. See DEPARTMENT ANALYSIS, *supra* note 31, at 5.

36. McKenna et al., *supra* note 22, at 282.

the A, T, C and G base blocks.³⁷ Next, the unzipped fragments are exposed to radioactive probes,³⁸ "designed to be attracted only to polymorphic DNA segments, those that vary somewhat among individuals."³⁹

The radioactivity of the probes allows for visual tracking via X-rays.⁴⁰ When film is developed, bands called "autorads" are visible, representing an actual print of DNA band patterns.⁴¹ The final stage of RFLP analysis involves band pattern comparison.⁴² "Genetic differences between individuals will be identified by differences in the location and distribution of the band patterns, which correspond to the length of the DNA fragments present."⁴³ If two samples are from the same source, "hybridized DNA fragments of approximately the same length should appear at the same point in the suspect and evidence specimen[s]."⁴⁴ This procedure, therefore, is not an actual comparison of genetic code, but is instead a measure of length of DNA fragments at a particular site on the DNA chain.⁴⁵

RFLP analysis is a useful technique because it is capable of discriminating between samples.⁴⁶ If at different markers there is band consistency, a high probability⁴⁷ exists that the DNA came

37. See DEPARTMENT ANALYSIS, *supra* note 31, at 5.

38. The probes are laboratory developed fragments carrying radioactive markers. See *id.* Each probe seeks out a matching sequence and binds to the complimentary strands. See *id.*

39. COMMISSION ANALYSIS, *supra* note 26, at 18. This process is known as "hybridization." *Id.* The probes will seek out sequences with which they match and attach themselves to the strand. See DEPARTMENT ANALYSIS, *supra* note 31, at 5. Therefore, a strand of "ATTGCA, for example, will bind with TAACGT." *Id.* at 6.

40. See DEPARTMENT ANALYSIS, *supra* note 31, at 6.

41. See COMMISSION ANALYSIS, *supra* note 26, at 18. This image of bars is a comparable configuration to that found on a supermarket bar code. See INMAN & RUDIN, *supra* note 22, at 65.

42. The autorads can be compared either visually or by computer. See COMMISSION ANALYSIS, *supra* note 26, at 18. Machine comparison converts the bar pattern into numeric code for purposes of analysis. See *id.*

43. DEPARTMENT ANALYSIS, *supra* note 31, at 6.

44. McKenna et al., *supra* note 22, at 283.

45. See COMMISSION ANALYSIS, *supra* note 26, at 18. Each fragment tends to vary in length among individuals. See *id.* While no single fragment is unique, an identical combination of lengths is extremely rare. See *id.* When a match is made, therefore, an estimate of the "frequency with which such a set of fragment length patterns is likely to appear in a given population[]" is necessary to evaluate the significance of the match. *Id.* at 18-19.

46. See Scheck Transcript, *supra* note 15, at 27.

47. A five marker match would indicate that the same pattern could only be found in one-in-ten to one hundred million individuals. See *id.* at 27.

from the same source, thereby identifying a suspect.⁴⁸ Moreover, matching more bands increases the discrimination power of the analysis.⁴⁹ Conversely, inconsistency at markers is dispositive that the suspect should be excluded.⁵⁰

One potential drawback to RFLP analysis is that a sufficient sample size is required to initiate the process.⁵¹ Similarly, older samples cannot be utilized via this process because bacteria eats away at the DNA sample, rendering it useless for identification purposes.⁵²

2. PCR Technique

PCR is another effective identification technique available when there is an insufficient amount of DNA for RFLP analysis.⁵³ Essentially, the process replicates a minuscule DNA sample to enable genetic analysis.⁵⁴

The first step, called denaturation, involves separating the two strands of the double helix so each can be used to generate a new strand.⁵⁵ Next, DNA primers⁵⁶ are used to establish a foundation on which DNA can replicate.⁵⁷ The primers must have a complimentary sequence of bases to the sample so that synthesis is possible.⁵⁸ An enzyme is applied to the sample, causing the primers to synthesize with their complimentary strands.⁵⁹ This process is performed over and over, resulting in millions of copies of DNA iden-

48. *See id.* A commonly misunderstood point is that a DNA match via RFLP is not a declaration that a defendant is the source of the specimen tested. *See* COMMISSION ANALYSIS, *supra* note 26, at 19. Rather, the match of a DNA profile is merely an estimate of the frequency "with which this particular pattern of fragment lengths is likely to occur in the defendant's relevant ethnic population." *Id.*

49. *See* Scheck Transcript, *supra* note 15, at 27.

50. *See id.* at 28.

51. *See* INMAN & RUDIN, *supra* note 22, at 69.

52. *See* Scheck Transcript, *supra* note 15, at 28.

53. *See* DEPARTMENT ANALYSIS, *supra* note 31, at 6. Another benefit of using this technique compared to RFLP is that one sample can be tested several times. *See* Scheck Transcript, *supra* note 15, at 30. Comparatively, RFLP analysis usually only permits but one test if a limited sample is present. *See id.* at 28.

54. *See* EASTEAL ET AL., *supra* note 24, at 129.

55. *See* INMAN & RUDIN, *supra* note 22, at 69. Separating the double helix requires heating the sample to 94°C. *See* EASTEAL ET AL., *supra* note 24, at 129.

56. Primers are "short synthetic pieces of DNA that match defined locations by complimentary base pairing." INMAN & RUDIN, *supra* note 22, at 70.

57. *See* DEPARTMENT ANALYSIS, *supra* note 31, at 6.

58. *See id.*

59. *See id.*

tical to the original sample.⁶⁰ Finally, DNA is placed in a filter to evaluate the amplified sample.⁶¹

One manner of analysis is the DQ Alpha technique. Under this process, the amplified DNA sample is placed over strips of probes containing DNA segments corresponding to a base known to exist at the studied site.⁶² A reagent is then applied that produces colored dots to appear where binding is successful between the amplified DNA and the probe DNA, confirming the presence of targeted alleles.⁶³ Because a high percentage of the population may carry a given allele,⁶⁴ the analysis must be completed several times at different loci to narrow the percentage of people that could carry the fragments present in the DNA sample.⁶⁵ The problem with this technique, therefore, is its lack of discrimination, raising concerns over a coincidental match.⁶⁶

Another analytic technique is the D1S80 method. Similar to RFLP, D1S80 analyzes the variation present at a given locus of a defined DNA fragment.⁶⁷ However, because the sample size is small, it is amplified using PCR.⁶⁸ Like RFLP, D1S80 distinguishes the sample manually using a chart resembling a supermarket barcode.⁶⁹ Because only a limited number of loci are analyzed under this system, the power of discrimination is not as great as that of RFLP.⁷⁰

3. Mitochondrial DNA

While both the RFLP and PCR methods analyze genetic material residing within a cell's nucleus, other bits of genetic material

60. The process is also known as "molecular Xeroxing" because of this duplication effect. See INMAN & RUDIN, *supra* note 22, at 70.

61. See *People v. Lee*, 537 N.W.2d 233, 251 (Mich. Ct. App. 1995).

62. See INMAN & RUDIN, *supra* note 22, at 70-71.

63. This comparison process is therefore known as "reverse-dot blot procedure or the blue-dot procedure." *Lee*, 537 N.W.2d at 251.

64. At any given locus, for example, there may be alleles resulting merely in brown or green eyes. See DEPARTMENT ANALYSIS, *supra* note 31, at 6.

65. See *id.*

66. This method guarantees only that one of every 5000 individuals will possess this genetic make-up. See Scheck Transcript, *supra* note 15, at 31.

67. See INMAN & RUDIN, *supra* note 22, at 47.

68. However, unlike RFLP, the power of discrimination is limited because usually only one locus is analyzed. See *id.*

69. See *id.* Another comparison method, Short Tandem Repeats (STR) is strikingly similar to the D1S80 system, except repeat units are shorter. See *id.* at 48.

70. Also, the significance of the test may be further reduced if it analyzes alleles common among individuals in particular racial groups. See *id.* at 47.

exist in a cell's mitochondria.⁷¹ The main advantage of analyzing mitochondrial DNA ("mDNA") is that it is available in hair and bone, materials that would prove useless with other testing techniques.⁷² However, discrimination is a substantial problem because mDNA, transmitted maternally, is identical in siblings and between mother and child.⁷³

C. DNA Databases

DNA evidence has limited use as an identification tool without the utilization of a computer database.⁷⁴ A DNA database is a computerized collection of DNA profiles capable of being used for criminal identification purposes.⁷⁵ DNA profiles are ideal for such storage because the information can be stored in numeric code, thereby requiring minimal technology.⁷⁶ Essentially, a DNA test result derived from a crime scene sample can be checked against the digital profiles stored in the database.⁷⁷ Any matches made with database profiles can then be used as probable cause to obtain a sample from a suspect for further testing.⁷⁸ This procedure guards against sampling errors that could have occurred during data entry.⁷⁹

71. Mitochondria are subcellular compartments or organelles that supply power to the cell. See NATIONAL RESEARCH COUNCIL, *supra* note 29, at 72.

72. See Scheck Transcript, *supra* note 15, at 34.

73. See EASTEAL ET AL., *supra* note 24, at 136.

74. Without the use of random DNA profiles to check it against, a sample of DNA recovered from a crime scene would only be valuable if there were a suspect in custody who provided a sample matching the unknown sample. See generally KRAWCZAK & SCHMIDTKE, *supra* note 29, at 93 (acknowledging the limited impact of DNA evidence in a criminal justice system that does not utilize databases). Therefore, without other evidence at a crime scene that produces a suspect, DNA evidence has little value. See *id.*

75. See INMAN & RUDIN, *supra* note 22, at 133.

76. See *id.* at 134. While DNA databases store the computerized DNA profile of an individual, the genetic samples from which the profiles are derived are often also kept in storage for future analysis. See Jean M. McEwen, *DNA Databanks*, in GENETIC SECRETS 231 (Mark A. Rothstein ed., 1997).

77. See DEPARTMENT ANALYSIS, *supra* note 31, at 25. This process is inherently similar to the one currently used to track latent fingerprints. See INMAN & RUDIN, *supra* note 22, at 133. The Automated Fingerprint Identification System (AFIS) contains millions of citizens' fingerprints on computer file. See *id.* Fingerprints, like DNA, are unique to the individual and do not change over the course of one's life. See NATIONAL RESEARCH COUNCIL, *supra* note 29, at 57. Prints dusted at crime scenes can, therefore, be compared with those in the system to generate suspects or lead to convictions. See *id.*

78. See INMAN & RUDIN, *supra* note 22, at 134.

79. See *id.*

1. *Current State Laws on Criminal DNA Databases*

As of June 1998, all fifty states have passed legislation to create state DNA databases.⁸⁰ Generally, these laws require designated offenders to provide a genetic sample⁸¹ for inclusion in the state DNA bank.⁸² States usually cite the assistance of law enforcement in identification and detection or exclusion of individuals under criminal investigation as the main purpose of database legislation.⁸³

The scope of criminals included in DNA databases varies from state to state. Most statutes simply require a DNA sample from persons convicted of sex offenses and violent felonies.⁸⁴ Mean-

80. See ALA. CODE § 36-18-20 (1994); ALASKA STAT. § 44.41.035 (Michie 1996); ARIZ. REV. STAT. ANN. § 31-281 (1993); ARK. CODE ANN. § 12-12-1101 (Michie 1994); CAL. PENAL CODE § 290.2 (West 1994); COLO. REV. STAT. ANN. § 17-2-201(5)(g)(I) (West 1995); CONN. GEN. STAT. ANN. § 54-102g (West 1994); DEL. CODE ANN. tit. 29, § 4713 (1994); FLA. STAT. ANN. § 943.325 (West 1994); GA. CODE ANN. § 24-4-60 (1992); HAW. REV. STAT. ANN. § 706-603 (Michie 1992); IDAHO CODE § 19-5504 (1996); 720 ILL. COMP. STAT. ANN. 5/12-13 (West 1992); IND. CODE ANN. § 10-1-9-8 (West 1996); IOWA CODE ANN. § 13.10 (West 1991); KAN. STAT. ANN. § 21-2511 (1991); KY. REV. STAT. ANN. § 17.170 (Banks-Baldwin 1992); LA. REV. STAT. ANN. § 15:605 (West 1999); ME. REV. STAT. ANN. tit. 25, § 1573 (West 1996); MD. CODE ANN., CTS. & JUD. PROC. § 10-915 (1994); MASS. GEN. LAWS ANN. ch. 22E, § 3 (Law. Co-op. 1997); MICH. COMP. LAWS ANN. § 750.520m (West 1994); MINN. STAT. ANN. § 299C.155 (West 1993); MISS. CODE ANN. § 45-33-15 (1995); MO. ANN. STAT. § 650.050 (West 1991); MONT. CODE ANN. § 44-6-102 (1995); NEB. REV. STAT. § 29-4104 (1997); NEV. REV. STAT. ANN. § 176.0913 (Michie 1989); N.H. REV. STAT. ANN. § 632-A:22 (1996); N.J. STAT. ANN. § 53:1-20.17 (West 1994); N.M. STAT. ANN. § 29-16-2 (Michie 1997); N.Y. EXEC. LAW § 995 (McKinney 1994); N.C. GEN. STAT. § 15A-266 (1993); N.D. CENT. CODE § 31-13-05 (1995); OHIO REV. CODE ANN. § 2901.07 (West 1995); OKLA. STAT. ANN. tit. 57, § 584 (West 1996); OR. REV. STAT. § 181.085 (1998); 35 PA. CONS. STAT. ANN. § 7651.302 (West 1995); R.I. GEN. LAWS § 12-1.5-4 (1998); S.C. CODE ANN. § 23-3-600 (Law. Co-op. 1995); S.D. CODIFIED LAWS § 23-5-14 (Michie 1990); TENN. CODE ANN. § 38-6-113 (1991); TEX. GOV'T CODE ANN. § 411.141 (West 1995); UTAH CODE ANN. § 53-10-406 (1994); VT. STAT. ANN. tit. 20, § 1931 (1998); VA. CODE ANN. § 19.2-310.2 (Michie 1993); WASH. REV. CODE ANN. § 43.43.752 (West 1990); W. VA. CODE § 15-2B-1 (1995); WIS. STAT. ANN. § 165.77 (West 1993); WYO. STAT. ANN. § 7-19-402 (Michie 1997).

81. Some states require a blood sample for testing. See, e.g., HAW. REV. STAT. ANN. § 706-603(b) (Michie 1992); OKLA. STAT. ANN. tit. 57, § 584.A.2 (West 1996); FLA. STAT. ANN. § 943.325(1)(a) (West 1994); GA. CODE ANN. § 24-4-60 (1992); N.Y. EXEC. LAW § 995-7 (McKinney 1994). Others, alternatively, call for a saliva swab. See, e.g., KAN. STAT. ANN. § 21-2511(a)(1991); ARK. CODE ANN. § 12-12-1103(7) (Michie 1994).

82. See McEwen, *supra* note 76, at 232.

83. See, e.g., ARK. CODE ANN. § 12-12-1103(2) (Michie 1994); ALASKA STAT. § 44.41.035(a) (Michie 1996); KY. REV. STAT. ANN. § 17.175(2) (Banks-Baldwin 1992).

84. See, e.g., HAW. REV. STAT. ANN. § 706-603(3) (Michie 1992); KAN. STAT. ANN. § 21-2511(a) (1991); ARK. CODE ANN. § 12-12-1103(10-11) (Michie 1994); N.J. STAT. ANN. § 53:1-20.20(a) (West 1994); N.Y. EXEC. LAW § 995-c.3. (McKinney 1994).

while, other states have increased the legislative scope to include persons convicted of any felony.⁸⁵

2. National DNA Database Policy

The federal government also has taken steps in conjunction with states to apply technology to national criminal investigations. The DNA Identification Act of 1994⁸⁶ authorized the FBI to establish the Combined DNA Index System ("CODIS").⁸⁷ CODIS is a three-tiered⁸⁸ computer system used to facilitate the exchange of DNA profile information across the nation.⁸⁹ The national tier of the CODIS network, the National DNA Index System ("NDIS"), is "a repository for DNA profiles submitted by participating states. The NDIS allows states to exchange DNA profiles and perform inter-state [searches]."⁹⁰ To aid in administration, DNA profiles are stored in three indices: convicted offenders, unknown suspects and a population file used for statistical purposes.⁹¹ States therefore are not limited to their own databases, and can search more effectively for suspects who cross state lines.⁹²

85. See, e.g., VA. CODE ANN. § 19.2-310.2 (Michie 1993); W. VA. CODE § 15-2B-1 (1995).

86. 42 U.S.C. § 14131 (1994).

87. See *id.* § 14132.

88. CODIS' three hierarchical levels include local, state and national tiers. See *What's the Difference Between NDIS and CODIS* (visited Jan 20, 1999) <<http://www.fbi.gov/pressrel/diff>> [hereinafter FBI Release]. All three contain DNA profiles, but each are flexible to meet the specific legislative or technical needs of state and local enforcement agencies. See *id.* The Local DNA Index System (LDIS) is "installed at crime laboratories operated by police departments or sheriff's offices. All DNA profiles originate at the local level, then flow to the state and national levels." *Id.* The State DNA Index System ("SDIS"), "allows laboratories within a state to exchange DNA profiles. The SDIS is also the communications path between the local and national tiers. The SDIS is typically operated by the agency responsible for implementing as a state convicted offender statute." *Id.*

89. See McEwen, *supra* note 76, at 233.

90. FBI Release, *supra* note 88.

91. See Howard Safir, Remarks to the Students of Bronx High School of Science (Dec. 14, 1998) at 9-10 (transcript on file with *Fordham Urban Law Journal*) [hereinafter Safir's Plan].

92. See McEwen, *supra* note 76, at 233. For example, in December 1997, within minutes of networking eight states into CODIS, a perpetrator in a 1989 Wisconsin rape and attempted murder was identified as a convicted Illinois sex offender. See Safir's Plan, *supra* note 91, at 10. Also, by September 1996, databases accounted for matching 58 profiles where unknown DNA from a crime scene was found to be the same as a criminal profile of a known offender in another state. See McEwen, *supra* note 76, at 233.

3. *More Intrusive DNA Databases*

The theory behind more expansive databases, storing the profiles of all those arrested, is not an unprecedented concept. Great Britain currently permits its law enforcement officials to collect non-intimate samples, such as hair and saliva, from all individuals arrested for a recordable offense.⁹³

The British system, operational since April 1995, has met with resounding investigative success.⁹⁴ Approximately 135,000 samples were collected within the system's first year⁹⁵ and 463,000 samples currently are included.⁹⁶ To date, over 38,000 suspect to crime matches have been obtained in investigations, with a success rate of three to five hundred matches per week.⁹⁷ Over the last five years, 40,000 crimes have been solved with the help of DNA database profiles and more than 51,000 suspects have been exonerated.⁹⁸ Additionally, over 6,000 links have been made between separate crime scenes, proving crimes were being committed by the same individual.⁹⁹ These statistics exemplify the investigative benefits offered by an expansive DNA database.

D. *Safir's Proposal*

On December 14, 1998, New York City Police Commissioner Howard Safir launched a bold campaign to widen the scope of New York's compulsory DNA statute to encompass aspects of Great Britain's system.¹⁰⁰ Safir's plan calls for the universal DNA testing

93. See Criminal Justice and Public Order Act, Pt. IV, § 55 (1994) (Eng.). The samples taken include non-intimate tissue such as hair or saliva. Louisiana also authorized a similar system to begin in the Fall of 1999. See Eric Fettmann, *Isn't Crime the Worst Privacy Invasion of All?*, N.Y. Post, Dec. 20, 1998, at 81.

94. In addition to using its database, Great Britain also practices "Bloodings" in circumstances where an offender is known to live among a certain population. Law enforcement officials will collect blood from every person in the area to ferret out the guilty. See Scheck Transcript, *supra* note 15, at 42. Such DNA samples, however, are not placed into the State databank. See *id.*

95. See McEwen, *supra* note 76, at 236.

96. See Scheck Transcript, *supra* note 15, at 45.

97. See Safir's Plan, *supra* note 91, at 13. The greatest number of hits in a week was over 1000. See Scheck Transcript, *supra* note 15, at 47.

98. See *Today: Police Commissioner Howard Safir and Norman Siegel of New York Civil Liberties Union Debate Proposed Policy of Taking DNA Sample and Other Tests on Everyone Arrested in New York City* (NBC television broadcast, Dec. 15, 1998) [hereinafter *Today Debate*] (quoting Safir's comments on Great Britain's investigation success).

99. See Fettmann, *supra* note 93, at 81.

100. Safir introduced the initiative for the first time while addressing the students of the Bronx High School of Science. See Safir's Plan, *supra* note 91, at 1.

of all those arrested so that the individual's DNA can be included in a DNA database.¹⁰¹ If passed, such an amendment would expand section 995 of the New York Executive Law,¹⁰² which currently permits involuntary DNA samples to be taken from designated offenders for inclusion into a statewide database.¹⁰³ This DNA database includes DNA identification information from persons convicted of assault, homicide and certain sex offenses.¹⁰⁴

In short, Safir's plan is to begin taking DNA samples from *all* individuals arrested for a recordable offense, as opposed to limiting testing to designated offenders under section 995.¹⁰⁵ Under the proposal, police would swab a suspect's mouth for about thirty seconds to collect DNA present in saliva.¹⁰⁶ The DNA sample would then be used to create a computerized DNA profile, which would then be stored in a statewide database. This information would aid in suspect identification by matching genetic material found at crime scenes against a pool of known offenders, similar to the method currently employed in matching latent fingerprints against criminal records.¹⁰⁷ According to Safir, creation of a universal DNA database will enable police to narrow the field of possible suspects in a crime more quickly (exposing the guilty and exonerating the innocent), efficiently arrest repeat offenders and save costs.¹⁰⁸

Meanwhile, Safir assures steps would be taken to minimize the risk of abuse of the collected specimens.¹⁰⁹ First, the computerized DNA profile would be expunged and the DNA sample destroyed upon acquittal or pardon of an offense.¹¹⁰ Second, access to the database would be limited so the information could not be misap-

101. *See id.*

102. *See* N.Y. EXEC. LAW § 995 (McKinney 1994).

103. *See id.* § 995-c.3.

104. *See id.* § 995.7.; *see also supra* note 1 (detailing specific offenses enumerated within the statute). This current program covers only eight percent of felony offenders. *See* Gary Spencer, *Action Predicted on Bills on DNA, Ending Parole*, N.Y. L.J., Feb. 8, 1999, at 7. Blood samples have been taken from about 6000 offenders since the program began in 1996. *See id.*

105. *See Today Debate, supra* note 98. Safir wants to assure the public that unrecordable offenses, such as traffic infractions, would not fall within the scope of this proposal. *See id.*

106. *See* Safir's Plan, *supra* note 91, at 13.

107. *See* Spencer, *supra* note 104, at 7.

108. *See* Safir's Plan, *supra* note 91, at 14-17.

109. *See infra* text accompanying notes 204-205.

110. *See* Safir's Plan, *supra* note 91, at 13.

propriated, but instead used exclusively for law enforcement identification purposes.¹¹¹

Publicly, Safir's plan has been met with mixed reaction. New York City mayor Rudolph Giuliani wholly endorses the plan as a novel, effective law enforcement tool.¹¹² A number of other politicians likewise support the program, but to varying degrees.¹¹³ For instance, some would simply prefer to expand the statute to include DNA from only convicted felons, and not those convicted of all offenses as Safir suggests.¹¹⁴ On the other hand, some are adamantly opposed to amending the statute altogether.¹¹⁵

II. Conflict Surrounding Safir's Plan

A. Constitutional Argument Against Safir's Plan

Opponents of DNA extraction for use in a universal database argue that the procedure violates the Fourth Amendment guarantee against unreasonable searches and seizures on the grounds that such bodily searches are conducted in the absence of individualized suspicion.¹¹⁶ For instance, Norman Siegel, executive director of the New York Civil Liberties Union contends that the practice is unconstitutional because "in order to get DNA under the Fourth

111. *See id.*

112. *See* Mayor Rudolph W. Giuliani: Celebrating Our Progress in Building a Safer City, and Moving Forward (WINS Radio Broadcast, Jan. 3, 1999) (visited Jan. 14, 1999) <<http://www.ci.nyc.ny.us/html/om/html/99a/me990103.html>>. Specifically, Mayor Giuliani stated:

[A] few weeks ago Police Commissioner Safir called for what we believe can be another important tool to continue reducing crime in the City: DNA testing. Sampling the DNA of all those who are arrested through a very simple, non-invasive procedure that involves briefly placing a swab in the mouth to collect saliva is essentially a more advanced and more precise form of fingerprinting. In concert with strict privacy protections so that the process cannot be misused, DNA represents an important new tool in policing that can help convict the guilty and, equally important, keep the innocent free.

Id.

113. For example, State Senator Roy Goodman hails the proposal as offering a high-tech crimefighting tool. Senator Goodman states, "This is a better fingerprint. Call it a throat print. I think it makes all sorts of sense." Tracey Tully, *Dem[ocrat]s Rip Safir's DNA Plan, Pol[itician]s See 'Police State' Tactic*, N.Y. DAILY NEWS, Dec. 16, 1998, at 8.

114. State Senator Dale Volker feels Safir's idea has a more realistic chance of becoming law if it limits DNA testing to suspects arrested on felony charges. *See* Matthew Cox, *Cool Response to Safir DNA Plan*, N.Y. NEWSDAY, Dec. 16, 1998, at A30. New York Governor George Pataki plans to propose such an idea alongside Safir's Plan to the State Assembly. *See* Spencer, *supra* note 104, at 7.

115. *See infra* text accompanying note 117.

116. *See* Jones v. Murray, 962 F.2d 302, 305 (4th Cir. 1992); Boling v. Romer, 101 F.3d 1336, 1338 (10th Cir. 1996); State v. Olivas, 856 P.2d 1076, 1081 (1993).

Amendment, [the government] would have to show that the gathering of the DNA is relevant to the crime. That means that [the government has] to show that there was blood, semen, [or] saliva at the crime scene in order to make the match."¹¹⁷ Proponents of such plans, however, observe that if individualized suspicion must exist before a suspect is required to submit a sample, an effective DNA database would be impossible to implement.¹¹⁸ DNA databases refute the idea of individualized suspicion because the collection of samples is intended to "solve future cases for which no present suspicion can exist."¹¹⁹

1. *The Fourth Amendment Standard*

The primary function of the Fourth Amendment is to ensure a citizen's personal privacy against unwarranted State intrusions.¹²⁰ Specifically, the Fourth Amendment reads, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, . . . particularly describing the place to be searched, and the persons or things to be seized."¹²¹ This federal guarantee also prohibits unreasonable searches and seizures conducted by state officers via the Fourteenth Amendment.¹²² To prove an action violates Fourth Amendment rights, therefore, one must first show that the government action constituted a search, then prove it lacked the requisite amount of reasonableness.

2. *The Search Requirement*

Implication of Fourth Amendment protection first requires the determination of whether a government official's action constitutes a search.¹²³ In *Katz v. United States*,¹²⁴ the Supreme Court intro-

117. *Today Debate*, *supra* note 98.

118. *See Jones*, 962 F.2d at 305.

119. *Id.*

120. *See United States v. Martinez Fuerte*, 428 U.S. 543, 554 (1975); *Schmerber v. California*, 384 U.S. 757, 767 (1966).

121. U.S. CONST. amend. IV.

122. *See New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that "[s]ince the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment], it is enforceable against them by the same sanction of exclusion as is used against the Federal Government").

123. *See Hon Charles E. Moylan, Jr., A Conceptualization of the Fourth Amendment*, in WILLIAM W. GREENHALGH, *THE FOURTH AMENDMENT HANDBOOK, A CHRONOLOGICAL SURVEY OF SUPREME COURT DECISIONS* 6 (1995).

duced the appropriate standard as to what actions constitute a "search" within the dictates of the Fourth Amendment.¹²⁵ The Court held:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.¹²⁶

In a concurring opinion, Justice Harlan refined the Court's analysis, defining a "search" as a government intrusion into an area where an individual has a "reasonable expectation of privacy."¹²⁷

Given this framework, the Supreme Court has determined the withdrawal of blood to be a search under the Fourth Amendment.¹²⁸ Specifically, in *Schmerber v. California*,¹²⁹ the Court definitively stated, "[i]t could not reasonably be argued . . . that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches . . . within the meaning of that Amendment."¹³⁰

124. 389 U.S. 347 (1967).

125. In *Katz*, FBI agents, without first obtaining a warrant, used electronic eavesdropping equipment to record Charles Katz's conversation in a public telephone booth. Officials recorded Katz's voice as he transmitted wagering information over the telephone. It was clear the agents violated Katz's Fourth Amendment rights because they did not obtain a court order for placement of the equipment. The issue, however, was whether the Fourth Amendment even covered such a situation without a physical intrusion into a constitutionally protected area. See *Katz v. United States*, 369 F.2d 130 (9th Cir. 1966).

126. See *Katz*, 389 U.S. at 351. The Court then found "[t]he Government's activities in electronically listening to and recording [Katz's] words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353.

127. *Id.* at 360 (Harlan, J., concurring).

128. See *Schmerber v. California*, 384 U.S. 757 (1966). In *Schmerber*, the Supreme Court held a state could withdraw blood from a motorist suspected of drunk driving, despite his refusal to consent to the search. See *id.* at 758-59. The Court felt the action did not violate the motorist's Fourth Amendment rights because the Fourth Amendment's proper use is to protect only against intrusions that are not justified under the circumstances or made in an improper manner. See *id.* at 768. The blood test was performed properly, "taken by a physician in a hospital environment according to accepted medical practices." *Id.* at 771. The intrusion, meanwhile, was classified as insignificant since "tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quality of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Id.*

129. See *id.* at 757.

130. *Id.* at 767.

Since *Schmerber*, the withdrawal of blood consistently is referred to as a "search."¹³¹

Collection and analysis of urine similarly has been deemed a Fourth Amendment search by the Court.¹³² In *Skinner v. Railway Labor Executives' Ass'n*,¹³³ the Supreme Court announced, "it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . and . . . these intrusions must be deemed searches under the Fourth Amendment."¹³⁴ *Skinner* further documents unanimous recognition of this principle among the Federal Courts of Appeals.¹³⁵

3. *The Reasonableness Requirement*

Finding a practice to be a "search" under the Fourth Amendment is only the first step toward setting the standard governing such intrusions.¹³⁶ "The Fourth Amendment does not proscribe all searches and seizures but only those that are unreasonable."¹³⁷

131. See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989) ("We have long recognized that a 'compelled intrusio[n] into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search."); *Winston v. Lee*, 470 U.S. 753, 760 (1985) (reaffirming the *Schmerber* analysis); *Rise v. Oregon*, 59 F.3d 1156, 1159 (9th Cir. 1995) ("Non-consensual extraction of blood implicated Fourth Amendment privacy rights."); *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992) (noting that "the bodily intrusion resulting from taking a blood sample constitutes a search within the scope of the Fourth Amendment").

132. See *Skinner*, 489 U.S. at 617. In *Skinner*, the Court upheld the Federal Railroad Administration's drug and alcohol tests as constitutional. See *id.* at 634. The Court concluded the testing was reasonable under the Fourth Amendment even in the absence of a search warrant or reasonable suspicion of any particular employee due to the compelling government interest served by the mandate, which outweighed the voiced privacy concerns. See *id.*

133. See *id.* at 602.

134. *Id.* at 617.

135. See *id.* (citing, for example, *Lovvorn v. Chattanooga*, 846 F.2d 1539, 1542 (6th Cir. 1988); *Copeland v. Philadelphia Police Dep't*, 840 F.2d 1139, 1143 (3d Cir. 1988); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987)).

136. See *id.*, at 618-19; *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

137. *Skinner*, 489 U.S. at 619 (citing *United States v. Sharpe*, 470 U.S. 675, 682 (1985)); *Schmerber v. California*, 384 U.S. 757, 768 (1966). This reasonableness requirement arises from the Constitutional language itself. See U.S. CONST. amend. IV. (guaranteeing security against "unreasonable searches and seizures"). *Schmerber* also articulately stresses the need for a reasonable search:

[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the question[] we must decide in this case [is] . . . whether the means and procedures employed in [the search] respected relevant Fourth Amendment standards of reasonableness.

Schmerber, 384 U.S. at 768.

Reasonableness “depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.”¹³⁸ Therefore, the viability of a search “‘is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.’”¹³⁹

The *Skinner*¹⁴⁰ Court recognized that in most criminal cases the aforementioned balance is struck by requiring a search warrant in the Fourth Amendment.¹⁴¹ When non-consensual extraction of bodily fluids is performed without a warrant or individualized suspicion, the Court demands that the state have “‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.”¹⁴² Specifically, the Court stressed:

[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important government interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.¹⁴³

B. Potential for Misuse of Obtained Information

In addition to the documented constitutional arguments,¹⁴⁴ opponents of DNA databanking also highlight the serious risk of abusing the vast amount of information available in an individual’s

138. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *T.L.O.*, 469 U.S. at 337 (“[W]hat is reasonable depends on the context within which a search takes place.”).

139. *Skinner*, 489 U.S. at 619 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)); see also, *T.L.O.* 469 U.S. at 337; *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *Jones v. Murray*, 962 F.2d 302, 305 (4th Cir. 1992).

140. 489 U.S. at 602.

141. See *id.* at 619.

142. *Id.* at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)). See *supra* note 132 (summarizing *Skinner*). The Court stated the scrutinized regulation furthered the government’s special need to prevent accidents and casualties in railroad operations that result from railroad employees under the influence of drugs or alcohol. See *Skinner*, 489 U.S. at 620-21. Once this “special need” for testing was found, the Court concluded the warrant requirement in this case would not further traditional purposes of a warrant because drugs and alcohol dissipate quickly from the body. See *id.* at 623. Requiring a warrant would, therefore, frustrate the government’s interest in the search. See *id.*

143. *Skinner*, 489 U.S. at 624.

144. See *supra* text accompanying note 116.

DNA.¹⁴⁵ The DNA of an individual, serving as the human code,¹⁴⁶ is a virtual blueprint of genetic make-up that carries a map of that person's biological past and future.¹⁴⁷ Opponents cite numerous instances where such information, when misappropriated, can be used for nefarious purposes.¹⁴⁸ For instance, some are concerned that employers would use private genetic information in a discriminatory manner.¹⁴⁹ Also, there is a fear that insurance companies might use the information of disease propensity to raise health insurance premiums or deny coverage altogether.¹⁵⁰ Even the government is cited as a potential candidate for misappropriation of the information.¹⁵¹ These arguments are further supplemented by Justice Brennan's¹⁵² concurrence in *Whalen v. Roe*,¹⁵³ stating pro-

145. See C. Teddy Li, *Boling v. Romer: Federal Courts Condone Forced Withdrawal of Blood for DNA Databanks Despite Constitutional Concerns*, 1 J. HEALTH CARE L. & POL'Y 421, 431 (1998) (citing Yale H. Yee, Note, *Criminal DNA Databanks: Revolution for Law Enforcement or Threat to Individual Privacy?*, 22 AM. J. CRIM. L. 461, 462 (1995)).

146. See *id.*

147. See Karen Ann Jensen, Note, *Genetic Privacy in Washington State: Policy Considerations and a Model Genetic Privacy Act*, 21 SEATTLE U. L. REV. 357, 359-60 (1997). This commentary utilizes the term "future diary", which is applicable to the instant contentions. See *id.* at 360. Acknowledging a diary contains past information of a personal and private nature, genetic information stored in DNA can be called a "future diary" because it carries information about future health. See *id.*

148. See Fettmann, *supra* note 93, at 81.

149. See Kathy Day, *Genetic Testing Leads to Discrimination Questions*, SAN DIEGO DAILY TRANSCRIPT, Aug. 4, 1992, at 1 (raising the issue of whether employers who possess knowledge of an individual's high susceptibility to an occupational disease would deny a job); see also Michael Kirby, *Genetic Testing and Discrimination: The Development of Genetic Testing Confronts Humanity with Urgent Challenges*, UNESCO COURIER, May 1, 1998, at 29 (stressing that an employer's desire to know of a worker's disease susceptibility in light of potential costs such as disability benefits, sick leave and replacement pay).

150. See Kirby, *supra*, note 149, at 29. Insurance in the past was relatively fixed by analyzing the risks of the "onset of a multitude of genetic disorders amongst all members of the insuring public." *Id.* Kirby argues that now the insurance company will gain an upper hand in offering higher premiums or flatly denying coverage because of the availability of particular genetic information of inherited orders. See *id.* Insurers merely argue they should be able to obtain such information because it is merely "substituting the latest scientific information for the old-fashioned medical check-ups and replacing generalized data of life expectancy with accurate predictive data of genetic disorders." *Id.*

151. See George J. Annas, *Privacy Rules for DNA Databanks: Protecting Coded 'Future Diaries'*, 270 JAMA 2346, 2348 (1993). Annas envisions law enforcement or child protection agencies using DNA information to ensure parents of children with inherent genetic conditions are providing proper medical care. See *id.*

152. See *id.* at 2346.

153. 429 U.S. 589 (1977). This case concerned an action brought by physicians and patients challenging a New York statute requiring the state to be provided with a copy of a prescription for certain drugs. See *id.* The Court held the statute to be a reason-

phetically: "The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology."¹⁵⁴

While "genetic redlining"¹⁵⁵ may be easy to dismiss as an alarmist or extremist reaction,¹⁵⁶ a simple look at American genetic practices over the last century illustrate why there is a cause for concern. During the 1920s, for example, strong judicial support was lent to the eugenics movement, calling for sterilization of citizens deemed undesirable.¹⁵⁷ Specifically, the Supreme Court upheld a Virginia statute compelling sterilization for those judged to be "manifestly unfit from continuing their kind."¹⁵⁸

Evidence of genetic redlining is not so dated, however. In fact, during the 1970s, states enacted legislation to identify carriers of the sickle cell anemia gene to discourage them from bearing children.¹⁵⁹ African-Americans, as the primary carriers of the gene, immediately felt discriminatory repercussions in the form of decreased job opportunities and higher insurance premiums.¹⁶⁰

III. Analysis

A. DNA Extraction Under Safir's Plan is a Search Within the Meaning of the Fourth Amendment

Under the analyses of *Schmerber* and *Skinner*, Safir's plan, calling for swabbing an accused's cheek to obtain a saliva sample for DNA analysis,¹⁶¹ should be deemed a Fourth Amendment search.

able exercise of the state's broad police power, responding to concerns that drugs were being appropriated for unlawful use. *See id.*

154. *Id.* at 607 (Brennan, J., concurring).

155. "Genetic Redlining" is "differentiated treatment based on apparent or perceived human variation." Janet C. Hoeffel, Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465, 534 (1990).

156. *See Today Debate*, *supra* note 98. (including Safir's classification of the liberal view as "alarmist").

157. *See Hoeffel*, *supra* note 155, at 534 (citing PHILIP REILLY, GENETICS, LAW AND SOCIAL POLICY 124 (1977)).

158. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

159. *See Hoeffel*, *supra* note 155, at 534.

160. *See id.* at 534-35; *see also Day*, *supra* note 149, at 1 (describing how the identification of sickle cell anemia carriers led to exclusion of opportunities in the military from amphibious and flight assignments).

161. *See Safir's Plan*, *supra* note 91, at 13.

Although a relatively new analysis,¹⁶² saliva sampling is favorably comparable with the testing of blood and urine.¹⁶³ First, the procedure involves an intrusion reaching “beyond the physical characteristics exposed to the public and into the security of the person.”¹⁶⁴ Second, a saliva sample can, like blood and urine, provide significant amounts of genetic identity information.¹⁶⁵ Over the last decade, courts utilized these factors in asserting that an oral swabbing procedure, like the one suggested by Safir, implicates the Fourth Amendment.¹⁶⁶ At least one New York Federal District Court is among those in compliance.¹⁶⁷

B. Safir's Plan is Reasonable

Because saliva extraction can be considered a “search” under the Fourth Amendment, the next question is whether the practice is reasonable and can be answered by balancing the intrusion against the promotion of legitimate government interests. The constitutional challenge to DNA databanks consistently has been overruled through consideration of a number of factors. Limited privacy rights, strong government interest and minimal bodily intrusion each prove the validity of the practice in question.

162. See *Henry v. Ryan*, 775 F. Supp. 247, 253 (N.D. Ill. 1991) (commenting that while no court to date had explicitly held saliva extraction to be a Fourth Amendment search, this court would make the assertion).

163. See *Schlicher v. Peters*, 103 F.3d 940, 943 (10th Cir. 1996); *United States v. Nicolosi*, 885 F. Supp. 50, 55 (E.D.N.Y. 1995); *Henry*, 775 F. Supp. at 255.

164. *Henry*, 775 F. Supp. at 253 (citing *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)).

165. See *Nicolosi*, 885 F. Supp. at 55.

166. See *Shelton v. Gundmanson*, 934 F. Supp. 1048, 1050 (W.D. Wis. 1996) (involving swabbing the inside of an individual's mouth cheek with a sponge-like toothbrush); *Nicolosi*, 885 F. Supp. at 55 (assuming the saliva sample would be obtained by swabbing the inside of the subject's mouth with a pad of some sort).

167. See *Nicolosi*, 885 F. Supp. at 55. This case involved a prosecution for sending threatening communications through the mail in violation of 18 U.S.C. § 876. See *id.* at 51. The government obtained a “so-ordered” subpoena directing the accused to provide a saliva sample. See *id.* The defendant refused, claiming the prosecution must first obtain a valid search warrant in conformance with the requirements of the Fourth Amendment. See *id.* The District Court was asked to decide whether the Fourth Amendment applied to the ability of the Government to obtain saliva samples. See *id.* The court held that, in light of the facts that the search implicated a dignity interest by swabbing the inside of the defendant's mouth and the sample can provide a significant amount of genetic information not within the public domain, proper compliance with the Fourth Amendment is necessary. See *id.* at 55.

1. *Limited Privacy Right Upon Arrest*

In *Jones v. Murray*,¹⁶⁸ perhaps the definitive authority on the constitutionality of body fluid extraction for use in DNA databases,¹⁶⁹ the Fourth Circuit Court of Appeals concluded the DNA testing statute in question did not violate an inmate's Fourth Amendment privacy right.¹⁷⁰ The court reasoned, in part: "probable cause had already supplied the basis for bringing the person within the criminal justice system. With the person's loss of liberty upon arrest comes the loss of at least some, if not all, rights to personal privacy otherwise protected by the Fourth Amendment."¹⁷¹ The Supreme Court has recognized this principal in holding both body cavity searches of prisoners¹⁷² and penitentiary cell searches¹⁷³ constitutional. Accordingly, while a free citizen need not expect such routine searches, that same individual cannot raise privacy objections upon arrest.¹⁷⁴

2. *Strong Government Interest*

Upon arrest, a suspect's identification becomes a matter of legitimate state interest, relevant to solving the crime for which the arrest took place and for establishing a record to aid in solving past and future crimes.¹⁷⁵ As such, criminals remain willing to take certain steps to hamper positive identification by law enforcement officials by disguising faces, changing names or even altering

168. 962 F.2d 302 (4th Cir. 1992). This case involved the challenge that a Virginia statute requiring DNA testing for all felons violated the individual's civil rights. See *id.* at 305.

169. See *State v. Olivas*, 856 P.2d 1076, 1085 (1993) ("*Jones v. Murray* . . . is persuasive authority for the proposition that drawing of blood from convicted felons to establish a DNA data bank for use in future prosecution of recidivist acts does not violate the Fourth Amendment.").

170. See *Jones*, 962 F.2d at 311.

171. *Id.* at 306 (emphasis added).

172. See *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Bell*, prisoners in a federal penitentiary questioned the constitutionality of visual body cavity searches in light of their Fourth Amendment rights. See *id.* at 558. The Court upheld the searches, concluding the limited privacy rights of prisoners to be outweighed substantially by the governments' need for penal security. See *id.* at 559.

173. See *Hudson v. Palmer*, 468 U.S. 517 (1984). In *Hudson*, an inmate brought an action against an officer for destruction of his property during a prison cell search. See *id.* at 520. In rejecting the prisoner's claim, the Court declared: "[W]e conclude that prisoners have no legitimate expectation of privacy and that the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells[.]" *Id.* at 530.

174. See James P. O'Brien, Jr., Note, *DNA Fingerprinting: The Virginia Approach*, 35 WM. & MARY L. REV. 767, 801-2 (1994).

175. See *Jones*, 962 F.2d at 306.

features.¹⁷⁶ As the *Jones* court reasons, however, DNA databases can play a pivotal role in aiding officials with legitimate pursuit of suspect identification:

DNA . . . is claimed to be unique to each individual and cannot, within current scientific knowledge, be altered. The individuality of the DNA provides a dramatic new tool for the law enforcement effort to match suspects and criminal conduct. Even a suspect with altered physical features cannot escape the match that [he] . . . left at the scene of a crime within samples of blood, skin, semen, or hair follicles. The governmental justification, . . . therefore, relies on no argument different in kind from that traditionally advanced for taking fingerprints and photographs, but with additional force because of the potentially greater precision of DNA sampling and matching methods.¹⁷⁷

Along with the government's interest in identification, deterrence of both criminal and harmful actions is also a documented government interest in DNA databanking.¹⁷⁸ DNA databases can address this national interest by serving as a significant deterrent against recidivist activity.¹⁷⁹ In theory, those with prior arrests who previously submitted a DNA sample would be deterred from future criminal behavior due to an increase in likelihood of capture accompanying the strong identification power of DNA evidence.¹⁸⁰

3. *Minor Intrusion in DNA Extraction*

The bodily intrusion requested under Safir's plan, namely extracting DNA with a swab of the oral cavity to obtain a saliva sample,¹⁸¹ must be evaluated against the aforementioned governmental interests. In *People v. Wealer*,¹⁸² upholding a correctional code provision for mandatory blood and saliva sampling from state prisoners, the court presented a persuasive argument about the intru-

176. *See id.* at 307.

177. *Id.*

178. *See, e.g.,* *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620-21 (1989) (upholding mandatory drug testing of railroad employees because of the importance of preventing harmful accidents and casualties); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (highlighting the need for sober customs officials to protect national borders from contraband smuggling).

179. *See* *State v. Olivas*, 856 P.2d 1076, 1085-86 (1993) (disclosing the rationale behind the Virginia compulsory DNA statute at issue in *Jones*).

180. *Accord* O'Brien, *supra* note 174, at 797 (asserting that "DNA fingerprints on file . . . deter future criminal behavior and . . . increase the likelihood of capturing repeat offenders").

181. *See* Safir's Plan, *supra* note 91, at 13.

182. 636 N.E.2d 1129 (Ill. App. Ct. 1994).

sive levels of saliva extraction.¹⁸³ The *Wealer* court reasoned the procedure involved in taking saliva samples is inherently less intrusive than that required for extracting blood.¹⁸⁴ Therefore, if taking blood samples withstands constitutional scrutiny, taking saliva samples likewise is reasonable.¹⁸⁵ It thus follows that if blood sampling no longer is to be considered an overly intrusive procedure,¹⁸⁶ saliva sampling cannot be an inherently violative process either.¹⁸⁷

C. Safeguards Can Protect Against Misuse of Information

Learning valuable lessons from the dark moments of genetic redlining in American history, legislators may consider several alternatives to ensure DNA information stored in a database will only be used for the stated purposes.

1. Unambiguous Legislative Drafting

Clear, unambiguous legislation such as the DNA Identification Act of 1994,¹⁸⁸ is one solution.¹⁸⁹ This particular federal law provides that the results of DNA tests performed for a federal law enforcement agency may be disclosed only to criminal justice agencies for the purpose of law enforcement identification,¹⁹⁰ judicial

183. See *id.* at 1132.

184. See *id.*

185. See *id.*

186. See *supra* note 131, at 771 (chronicling reasons why blood testing is not an overly intrusive procedure).

187. See *Wealer*, 636 N.E.2d at 1136. Where blood testing involves actually piercing skin, a saliva extraction gently swabs the inside of an individual's mouth cheek to gain the necessary sample. See *United States v. Nicolosi*, 885 F. Supp. 50, 55 (E.D.N.Y. 1995).

Similarly, an argument can be made that the swabbing procedure is less physically intrusive than the constitutionally protected fingerprinting process. While swabbing invades the oral cavity, it is a quick, pain-free action. During fingerprinting, however, arrestees may need to be physically guided to mark the inepad and print card. *Accord* *People v. Sallow*, 165 N.Y.S. 915, 924 (Ct. Gen. Sess. 1917) (acknowledging the constitutionality of the fingerprinting process while stressing the importance of an arrestee's freedom from torture or duress). This ordeal presents a constitutional physical intrusion greater than swabbing for saliva.

188. 42 U.S.C. § 14131 (1995).

189. See *Annas, supra* note 151, at 2349 (“[D]ata protection principles suggest that there should be . . . stringent rules for the . . . distribution of . . . information derived from [DNA molecules] because of the unique characteristics of genetic information, including the fact that DNA molecules contain an individual's probabilistic future diary.”).

190. 42 U.S.C. § 14133(b)(1)(A).

proceedings,¹⁹¹ criminal defense,¹⁹² inclusion in a population statistics database, identification research and protocol development for quality control.¹⁹³ The DNA Identification Act then outlines specific penalties for unauthorized disclosure of DNA information available in a federal database and for unauthorized possession of DNA samples indexed in a database or individually identifiable DNA information.¹⁹⁴ Violation of any of these mandates may be punishable with a fine up to 100,000 dollars.¹⁹⁵ States, including New York, with DNA databank statutes in place have modeled their legislation to mirror the federal act in this regard.¹⁹⁶ In drafting more expansive legislation to replace section 995, New York could easily pattern the statute to reflect that currently in place.¹⁹⁷

2. *Anti-Discrimination Legislation*

Anti-discrimination legislation is another alternative to combat genetic redlining.¹⁹⁸ For example, New York amended its anti-discrimination laws to deem it an unlawful, discriminatory practice for an employer to refuse employment or to discharge an employee based on "genetic predisposition or carrier status."¹⁹⁹ The specter

191. Results of DNA tests performed for law enforcement purposes may be disclosed in judicial proceedings only if "otherwise admissible pursuant to applicable statutes or rules." *Id.* § 14133(b)(1)(B).

192. *Id.* § 14133(b)(1)(C).

193. Test results may only be used for these three purposes where personal identifiable information is removed. *See id.* § 14133(b)(2).

194. *See id.* § 14133(c)(1)-(2).

195. *See id.*

196. *See, e.g.,* LA. REV. STAT. ANN. §§ 15:612, 15:617-18 (West 1999).

197. *See* N.Y. EXEC. LAW § 995-c-f. (McKinney 1994). New York law currently mandates that records in its state DNA index only be released for law enforcement identification purposes to a federal, state or local law enforcement agency, district attorney's office, for criminal defense purposes, to a defendant or representative or for inclusion into a population statistical database, development of identification research and protocol or quality control when personal identifiable information has been removed. *See id.* § 995-c.6.(a)-(c). Also, confidentiality requirements stipulate such information may not be released to "insurance companies, employers, or potential employers, health providers, employment screening or personnel companies, or . . . private investigation services." *Id.* § 995-d.1. Any person who intentionally discloses a DNA record or results of a DNA test to an unauthorized agency or intentionally uses such information for unauthorized purposes is guilty of a class A misdemeanor and, upon conviction, subject to a fine of up to 10,000 dollars. *See id.* § 995-f.

198. *See generally*, Michael M.J. Lin, *Conferring a Federal Property Right in Genetic Material; Stepping into the Future with the Genetic Privacy Act*, 22 AM. J. L. & MED. 109, 128 (1996).

199. N.Y. EXEC. LAW § 296.1.(a) (McKinney 1993) (amended 1996); *see also*, N.J. STAT. ANN. § 10:5-12a. (West 1994) (amended 1996) ("It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination for an employer,

of criminal prosecution or civil liability can serve to deter possible offenders and pacify liberal activists.

3. *Manner of Storage*

The nature of the DNA information stored in a databank can also quell the concern for misappropriation of information. Standard DNA profiles, capable of being stored as a mere numeric code, will provide little information regarding inherited medical or physical traits.²⁰⁰ The privacy issues in databanking arise instead from retention of samples themselves, once identification information is entered into the database.²⁰¹ These samples are where the wealth of genetic information is stored because further testing could be performed on them in the future.²⁰² In light of these privacy risks, one suggestion for preserving confidentiality more effectively would be to destroy genetic samples after analysis.²⁰³ Such an approach would provide law enforcement officials with data necessary for identification purposes, while addressing the obvious concerns for abuse of any other readily obtainable information.

Additionally, Safir's plan recognizes the debate surrounding genetic information available in a DNA sample.²⁰⁴ Wanting to avoid comparisons to a virtual police state, where all citizens' profiles are available for identification purposes, Safir proposes that an arrested citizen's sample would be destroyed and the DNA profile erased from the databank once the person is found innocent or exempt from prosecution.²⁰⁵ This practice succeeds in being sensitive to concerns of information misappropriation by taking an affirmative step in assuring certain information is unobtainable (via expungement) to unauthorized parties.

because of . . . genetic information . . . [to] refuse to hire or employ or to bar or discharge . . . from employment such individual.").

200. See Paul B. Ferrara, *DNA Benefits Outweigh Any Risk*, N.Y. NEWSDAY, February 11, 1999, at A49.

201. See McEwen, *supra* note 76, at 237.

202. See *id.*

203. See *id.* at 238. McEwen, however, questions the feasibility of this approach in light of a crime lab's need to save samples for reanalysis as technology improves, the needs of a defendant to challenge the sample itself in a future case or the need for routine quality control checks. See *id.* To solve this problem, perhaps, an additional sample could be recollected at a future date, retested for identification purposes and subsequently destroyed. See Jensen, *supra* note 147, at 382.

204. See Safir's Plan, *supra* note 91, at 13.

205. See *id.* Under the current New York law, upon reversal of a conviction or grant of a pardon of an individual whose DNA record has been stored in the state database, the DNA record is expunged from the index and all samples, analyses and other documents are destroyed. See N.Y. EXEC. LAW § 995-c.9. (McKinney 1994).

D. New York City's Need for an Expanded DNA Database

While Safir's plan withstands constitutional scrutiny,²⁰⁶ as well as questions involving misappropriation,²⁰⁷ the benefits of the practice for New York City also support passage into legislation.

1. *Suspect Identification*

Perhaps the greatest benefit an expanded DNA database yields is the increased number of suspects identifiable under a more inclusive law who, under current legislation, are not being profiled. In his proposal, Safir provides one example of how identification information becomes more useful under the proposed system.²⁰⁸ In examining the last one hundred forcible rape or sodomy cases in which arrests were made, seventy-five arrestees had prior arrests.²⁰⁹ According to Safir, however, "in only eighteen of the cases did the perpetrator have prior arrests and convictions for crimes that would place them in . . . [the] convicted offender DNA database."²¹⁰ The logical conclusion, therefore, is that a significant number of investigations and apprehensions could be conducted with greater speed and efficiency if New York collected DNA profiles from all those arrested.²¹¹

A consultation of New York State inmate profiles supports this assertion.²¹² Across New York State, only 7.9% of inmates had no prior convictions and only 12.9% had no prior arrests.²¹³ These statistics show an overwhelming majority of inmates serving time who had prior infractions with the law²¹⁴ and would therefore have been eligible for a DNA profile under Safir's plan, perhaps expe-

206. See *supra* text accompanying notes 161-187.

207. See *supra* text accompanying notes 188-205.

208. See Safir's Plan, *supra* note 91, at 15.

209. See *id.*

210. *Id.*

211. See *id.* at 16. Safir then goes on to cite the program in Great Britain as evidence of this theory. See *id.* Safir states that over an eighteen-month period ending in October 1998, British law enforcement identified 175 rape suspects, 46 murder suspects and over 19,000 burglary suspects with help from their expansive DNA database. See *id.*

212. See STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, DIVISION OF PROGRAM PLANNING, RESEARCH AND EVALUATION, THE HUB SYSTEM: PROFILE OF INMATES UNDER CUSTODY ON JANUARY 1, 1998 (1998) [hereinafter 1998 PROFILE].

213. See *id.* at 32.

214. Statewide, a majority of inmates (69.0%) had either served a prior jail term (23.8%) or a prior prison term (35.2%) and 20.1% had a prior conviction without jail or prison. See *id.* at 32.

ditioning the investigation and arrest for each inmate for his or her criminal commission.

Meanwhile, in light of the total number of inmates under custody,²¹⁵ a large percentage of DNA profiles could be taken for use in future investigations. While those persons serving terms for select homicides, assaults and sexual offenses are already included in the state DNA database under current law, a majority of inmates in New York State prisons are not being profiled.²¹⁶ Specifically, almost a third of inmates (32.8%) are committed for drug offenses, 18.8% for robbery and 5.9% for burglary.²¹⁷ If each of these offenders were to be profiled under Safir's plan, approximately 40,000 more DNA profiles would be available to law enforcement statewide to aid in future investigations.²¹⁸

The relevance of these 40,000 additional profiles comes to light when recidivism rates in New York are provided. While there are many ways to measure recidivism, it will be defined as the return or recommitment to New York State Department of Correctional Services' custody for purposes of this Note.²¹⁹

Approximately forty-four percent of the inmates released in 1993 were recommitted within three years of their release.²²⁰ Sta-

215. As of January 1, 1998, there were 69,099 inmates under custody in New York State. *See id.* at 2.

216. According to the 1998 *Profile*, of all those inmates under custody in New York State currently eligible for inclusion in the state's DNA databank, 9.1% are serving for Murder, 2.6% for Attempted Murder, 4.6% for Manslaughter, 2.9% for Rape in the First Degree, 1.9% for Assault in the First Degree, 1.6% for Assault in the Second Degree, 1.5% for Sodomy in the First Degree and 1.0% for Sodomy in the Second Degree. *See id.* at 26.

217. *See id.* at 25-26. These percentages represent the largest commission statistics, with others, such as kidnapping, weapons offenses, arson, etc. rounding out the rest of the prison population. *See id.*

218. 40,000 represents 57.5% of the 69,099 inmates under custody listed in the 1998 *Profile*. *See id.* at 2.

219. *See* STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, DIVISION OF PROGRAM PLANNING, RESEARCH AND EVALUATION, 1993 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 3 (1997) [hereinafter 1993 RELEASES]. There are several forms of releases such as release of an inmate to a health facility, parole or completion of sentence. *See id.* at 1. The 1993 *Releases* includes only releases on parole and sentence completion. *See id.* Therefore, readmission to a New York correctional facility and, thus recidivism, is measured by either parole violation, occurring when a released inmate violates rules of parole and is returned to prison to continue serving time on a remaining sentence, or new felony commitment, occurring when an inmate commits a new crime within the community and receives a new sentence for it. *See id.* at 4. Essentially, the 1993 *Releases* provides return to custody statistics for all inmates released from New York State prisons in 1993 during a three-year follow-up period. *See id.* at 1.

220. *See id.* at 3.

tistics for return rates of those originally serving time for offenses not currently covered by section 995 prove the benefits of including all offenders in a statewide DNA database.²²¹ For example, the category defined as "Property and Other Offenses," which includes inmates committed for Burglary in the Third Degree, Grand Larceny, Forgery, Stolen Property, Driving While Intoxicated and other crimes, demonstrated that within three years, fifty percent of offenders were recommitted for another offense.²²² Similarly, of those who served time for drug offenses, forty percent returned.²²³ Among other current crimes not covered by section 995, "offenses that demonstrated high return rates were Robbery 3rd (fifty-six percent), Burglary 3rd (fifty-five percent), Stolen Property (fifty-two percent) and Grand Larceny (fifty-one percent)."²²⁴

Indeed, these numbers suggest a striking trend: the same individuals constantly are being recycled through New York's prisons for repeat offenses. If DNA samples were taken from all arrestees, these individuals' computerized profiles would be included upon their first sentence. While obviously not helpful in all investigations, DNA database profiles would be immensely helpful in those investigations which include genetic samples left behind at crime scenes. Because many of the same individuals are recommitting crimes, proliferation of this investigative tool can help ease the burden on police, thereby reducing the time and cost of investigations.

2. *Maintaining New York City's Low Level of Crime*

Over the past decade, New York City has undergone a social renaissance, transforming itself into an inherently safer metropo-

221. Interestingly, homicide releases, currently covered by section 995, demonstrated one of the lowest recidivism rates. *See id.* at 16. Of 176,991 inmates released during 1985-1993, 6399 had been committed for a homicide offense (Murder, Attempted Murder, Manslaughter and all other Homicide offenses), only 25% returned to prison within three years. *See id.* "Approximately 9% of those released with homicide offenses returned as new court commitment; only 6% returned for a new homicide offense." *Id.* Similarly, sex offenders (i.e. Rape, Sodomy, Sexual Abuse and all other Sex Crimes), covered under section 995, returned 33% within three years, another lower return rate. *See id.* at 18. "Of the sex offenders who returned to prison for the commission of new crime, 25% returned for the commission of another sex offense, 19% returned for a drug offense, and 17% returned for robbery." *Id.*

222. *See id.* at 11.

223. *See id.*

224. *Id.* at 10. Offenses currently included under section 995 showed comparable percentages, but represented a smaller number of inmates. For example, where Rape in the First Degree had a 46.8% return rate, 124 violators out of 265 were recommitted. *See id.* at 11. Comparatively, Robbery in the First Degree, with a 46.2% return rate, represents the return of 995 out of 2217 violators. *See id.*

lis.²²⁵ A brief consultation of crime rate statistics over this period lends weight to this assertion. For example, in 1998, only 628 homicides were reported in New York City,²²⁶ less than a third of the number of homicides in 1990, when a record 2262 were committed.²²⁷ Overall, major crimes in the city dropped approximately eleven percent from 1997, with the most drastic declines recorded in homicides, down nineteen percent, and car thefts, which dropped fifteen percent.²²⁸ Also, in 1998, “[t]here were fewer reported robberies, assaults, burglaries, grand larcenies and car thefts, and — despite early indications that the drop in rape was leveling off — [there has been an] 11 percent . . . [drop in] rapes.”²²⁹

Criminologists debate the causes of the consistent and dramatic drop in New York City's crime rates. Some cite factors such as the booming economy, the drop in the number of people in their late teens and early twenties, the decline of drug use and the increase of incarceration as reasons for the decline.²³⁰ Others even suggest that the current generation of teens witnessed first hand the effect of lawlessness on their families and have become weary of its costs.²³¹

One factor resulting in the dramatic crime rate drop, however, can be found in the aggressive policing of New York City's populace.²³² Among other implemented strategies, the move away from community policing, calling for officers to simply walk neighborhood beats, towards utilizing modern technology to fight crime has

225. See David Kocieniewski, *Murders Drop 25% as Violent City Crime Falls Again*, N.Y. TIMES, July 2, 1998, at B3 (quoting Mayor Rudolph Giuliani's characterization: "Over the past four years, New York City has been transformed from the crime capital of the world to the safest large city in the United States").

226. See Micheal Cooper, *Chicago Logs More Killing than New York City in '98*, N.Y. TIMES, Jan. 1, 1999, at B3 (observing that New York City, with an estimated 7.3 million population logged 69 less homicides than did Chicago, a city with a 2.7 million population).

227. See Micheal Cooper, *Homicides Decline Below 1964 Level in New York City*, N.Y. TIMES, Dec. 24, 1998, at A1 (stating homicide levels today are the lowest since 1964, when 636 homicides were reported).

228. See *id.*

229. *Id.* Between 1990 and 1997, the total number of felony convictions has decreased 19.1%. See Division of Criminal Justice Services, *Criminal Justice Indicators by Percent Change, New York City: 1990-1997* (visited Jan. 10, 1999) <<http://criminaljustice.state.ny.us>>.

230. See *id.*

231. See David Kocieniewski, *Crime in City Down in '97 by 9.1 Percent*, N.Y. TIMES, Jan. 3, 1998, at B1. Kocieniewski refers to this reason as the "little brother factor." *Id.*

232. See Kocieniewski, *Murders*, *supra* note 225, at B3.

been very helpful in lowering crime.²³³ Moreover, Mayor Giuliani's constant call for a proliferated police force,²³⁴ the devotion of police resources to an anti-drug campaign,²³⁵ and the work of the department's street crime unit²³⁶ each play a role in addressing criminal problems.

The expansion of New York's DNA database is another aggressive police tactic that can help keep crime rates in New York City at these low levels. While some would question the allocation of funds toward more policing,²³⁷ expansion of law enforcement tactics and crime reduction play too crucial a role in New York City's revitalization, from the growth in tourism to "the impressionistic sense that residents feel better about their hometown."²³⁸ Plans to increase police efficiency, such as Safir's plan, cannot be dismissed because the city can not lose its momentum if there is an expectation to drive down crime.²³⁹

Meanwhile, due to the investigative efficiency posed by Safir's plan, costs associated with lengthy police investigations (such as interviewing multiple suspects, attempts to uncover inculpatory evidence and preparing eyewitnesses for prosecution) would drastically decrease, as a profile match in a database would prove highly probative in either exonerating the innocent or convicting the guilty.²⁴⁰ Cost and time aside, a review of the success of a similar program in Great Britain²⁴¹ proves the effects of the practice on crime fighting, showing the strategy would aid in maintaining (or bettering) the low crime rate existing in New York City today.

233. For example, police are using computer maps to chart crimes and assign officers where they will be used most effectively throughout the five boroughs. See Cooper, *Homicides*, *supra* note 227, at A1.

234. The size of the New York City police force has swelled to nearly 40,000 officers. See Kocieniewski, *Murders*, *supra* note 225, at B3.

235. The anti-drug initiative seeks to exile narcotics dealers from neighborhoods by saturating high-crime areas with law enforcement officials. See *id.*

236. This police unit seizes illegal weapons, helping to reduce the number of shootings from 2500 in the first half of 1993 to fewer than 1000 in the first half of 1998. See *id.*

237. For example, Peter F. Vallone, the Speaker of the City Council, and Glenn Passman, the Associate Director of the Public Policy Organization, City Project, question whether the Mayor is already doing too much with law enforcement at the expense of other city services such as education, health care and social services. See Dan Barry, *Mayor Says Adding Officers is Key to City's Health*, N.Y. TIMES, Jan. 29, 1999, at B10.

238. *Id.*

239. See *id.* (quoting Eli Silverman, a professor at John Jay College of Criminal Justice).

240. See Safir's Plan, *supra* note 91, at 15.

241. See *supra* text accompanying notes 93-99.

3. Backlog Caveat

While the positive logical effects of an expanded DNA database are apparent, one prevalent administrative issue must be addressed before New York can seriously consider putting Safir's plan into action. That problem is state DNA laboratories lack the funds, facilities and personnel to type enough cases. Consequently, a significant backlog results, even under the current, less expansive, DNA collection statute.²⁴²

According to Professor Barry C. Scheck,²⁴³ the backlog results from samples that have been collected but not profiled due to sheer volume.²⁴⁴ Similarly, New York has a significant number of rape kits from unsolved sexual crimes that include genetic samples that have not been profiled and checked against the state databank.²⁴⁵ Yet another problem resulting from the overload is the large number of owed samples that have yet to be collected from convicted felons under the current statute because they are out on parole.²⁴⁶

The effects of backlog in New York are numerous. Databases are not being utilized to their full investigative advantage because they are not being kept current.²⁴⁷ Even when labs are able to analyze a profile, it takes months to produce results,²⁴⁸ by which time a suspect may already be awaiting trial, thereby creating unnecessary expenses for the judicial system²⁴⁹ and overall injustice to the de-

242. See Barry C. Scheck, *Getting Smart About DNA (US Does Not Use DNA Technology to Full Advantage)*, NEWSWEEK 69 Nov. 16, 1998; Mike Pezzella, *FBI DNA Dragnet to Track Fugitives in 50 States*, BIOTECHNOLOGY NEWSWATCH, Oct. 19, 1998, at 1. Nationally, over 450,000 samples exist at crime laboratories that have not yet been analyzed. See Kendall Anderson, *Panel Debates Taking DNA Upon Arrest; Some at Dallas Meeting Say Samples Backlogged*, THE DALLAS MORNING NEWS, March 2, 1999, at 13A.

243. Barry C. Scheck is a law professor and co-director of the Innocence Project at the Benjamin N. Cardozo School of Law in New York City. See Scheck, *DNA*, *supra* note 242, at 69. The Innocence Project utilizes DNA testing to aid in defending inmates wrongfully convicted of crimes. See *id.* Professor Scheck is also a commissioner on New York's Forensic Science Review Board, which created and maintains the state's DNA databank. See *id.*

244. See Scheck Transcript, *supra* note 15, at 54.

245. Professor Scheck estimates there are approximately 10,000 such kits in New York, which were formerly being thrown away before a change in policy. See *id.* at 59.

246. See *id.* at 56.

247. See *id.* at 54.

248. See Scheck Transcript, *supra* note 15, at 62; see also *Cellmark to Use New DNA Test to Link Criminals to Unsolved Crimes*, PR NEWSWIRE, Feb. 15, 1999.

249. "[D]efendants are likely to plead guilty quickly after getting bad DNA results." *Cellmark*, *supra* note 248.

tained.²⁵⁰ Comparatively, the British, who have made the investment in sufficient personnel and facilities, are able to profile their crime scene DNA within two weeks because they do not have backlog problems.²⁵¹

The solution to the problem of backlog simply would be to fund the state laboratories so that they are able to efficiently transform incoming evidence into computerized profiles, as well as eliminate the current backlog at these labs.²⁵² In a recent budget proposal, President Clinton set aside federal funds to aid anti-crime initiatives.²⁵³ Recognizing the backlog issue, the proposal allots fifteen million dollars to eliminate over one million backlogged convicted offender DNA samples at state laboratories.²⁵⁴ When these old samples are digitized, states can allocate funds to provide facilities and personnel to handle the volumes of incoming samples and thus prevent future backlog.

Conclusion

The ability to store the genetic records of criminals in a database is an invaluable tool when used for law enforcement identification purposes. Such a technique, however, is not used to its utmost potential when only selected criminals are included in the database. The implementation of a system where DNA is taken from all those arrested for inclusion in a statewide DNA database would strengthen the fight against crime in New York by deterring recidivism, assisting in maintaining record low crime rates and easing investigative burdens on law enforcement agencies.

The proposed system, in light of inherent government interest in crime fighting, does not violate an arrestee's privacy rights. Although steps first should be taken to address the misappropriation of information and backlog, the New York State Legislature should adopt Safir's plan into law because of its potential as an invaluable law enforcement tool.

250. "[I]ndigent defendants, unable to make bail, spend time in jail for crimes they did not commit." *Id.*

251. *See id.*; *See also* Scheck Transcript, *supra* note 15, at 62.

252. *See* Scheck, *DNA*, *supra* note 242, at 69; *see also* Anderson, *supra* note 242, at 13A.

253. *See* Juan Otero, *Clinton Focuses Funds on Anti-Crime Initiatives*, NATION'S CITIES WKLY. Feb. 8, 1999, at 13.

254. *See id.*

DAMNED TO THE INFERNO? A NEW VISION OF LAWYERS AT THE DAWNING OF THE MILLENNIUM

Robert J. Cosgrove*

Introduction

Through Me the Way Into the Woeful City,
Through Me the Way to the Eternal Pain,
Through Me the Way Among the Lost People,
Justice Moved My Maker on High,
Divine Power Made Me and Supreme Wisdom and Primal Love;
Before Me Nothing Was Created But Eternal Things and I
Endure Eternally.
Abandon Every Hope, Ye That Enter.¹

So engraved are the gates of Hell in Dante's *Inferno*. In the deepest regions of hell, damned for all time, lie the fraudulent and treacherous — those individuals who used their great skills, their great powers of reason, for ends contrary to the common good.² Here, in the eighth and ninth circles of the inferno, forever rest the souls of those to whom much was given, much expected and very little returned. Most prominent among the damned of these circles are the religious, political and legal leadership of ancient times who failed to use their authority³ to bring their community closer to happiness.⁴ Rather than using their power to pursue basic goods,⁵

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1. DANTE ALIGHIERI, *THE DIVINE COMEDY* 47 (John D. Sinclair ed. and trans., 1939).

2. *See id.* at 329. As used in this Comment, the phrase "common good" will refer to those self-evident basic goods whose pursuit leads to integral human fulfillment or *eudymonia*. Basic goods are basic reasons for action. They are the only aspects of human well-being that are self-evident and indemonstrable. Through "non-inferential acts of understanding by the mind working inductively on the data of inclination and experience" basic goods are made known to humans. ROBERT P. GEORGE, *MAKING MEN MORAL* 13, 15 (1992).

3. As defined by John Finnis authority is the power of those in command to order the polis' activities in accordance with the pursuit of the common good. *See* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 246 (1980).

4. *See* ARISTOTLE, *NICOMACHEAN ETHICS* vi (David Ross, ed. and trans., 1925) (discussing Aristotle and his conception of the most enviable form of life). When I

these souls successfully lined their own pockets with ill-gotten gains.

If American public perception is to be believed,⁶ the modern American lawyer will soon be joining individuals like Fra Gomita⁷ and Ulysses⁸ in the bowels of hell. Certainly, disrespect for the legal profession is nothing new.⁹ From the ancient Goths¹⁰ to the writings of William Shakespeare,¹¹ lawyers have often borne the brunt of public discontent. The plethora of lawyer jokes available today is firm evidence that this trend continues.¹² Indeed, a 1997 *New York Times* review of the film, "The Devil's Advocate" went

use the word happiness, what I am really talking about is eudymonia. Eudymonia is the end of all action, the good for man and woman. Eudymonia is sought for its own sake. It is human flourishing that results from living a virtuous, good life — a life in which the basic goods are sought. See CAMBRIDGE DICTIONARY OF PHILOSOPHY 44 (Robert Audi ed., 1995).

5. See, e.g., FINNIS, *supra* note 3, at 86-89 (listing his conception of basic goods: life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion).

6. See Robert F. Cochran, *Lawyers and Virtue*, 71 NOTRE DAME L. REV. 707, 707 (1996) (discussing popular discontent with the legal profession in the aftermath of Watergate).

7. Fra Gomita was the deputy of Nino Visconti, Judge of Gallura, a division of Sardinia, a part of medieval Italy who was hanged for his knavery. See DANTE, *supra* note 1, at 277.

8. In his *Inferno*, Dante turns the classic tale of Ulysses on its ear. He places Ulysses in the eighth bolgia, the circle of hell reserved for the evil counsellors who used their great mental gifts for guile. Because of their greater natural endowments, "their sin is reckoned greater, and their place is lower than that of thieves." Here, rather than focusing on the heroic, Dante stresses Virgil's description of Ulysses as the "contriver of crimes." *Id.* at 329-332.

9. For an old-fashioned lawyer bashing, see the work of Samuel Coleridge, "He saw a lawyer killing a Viper on a dunghill hard by his own stable; And the Devil smiled, for it put in mind of Cain and his brother Abel." Samuel Taylor Coleridge, *The Devil's Thoughts*, in THE COMPLETE WORKS OF SAMUEL TAYLOR COLERIDGE 320 (1912), reprinted in CORPUS JURIS HUMOROUS 251 (John B. McClay & Wendy Matthews eds., 1994).

10. See MONTESQUIEU, THE SPIRIT OF THE LAWS 308 (Anne M. Cohler et. al. eds. and trans., 1989) (when speaking of the Goths, noted approvingly, "They cut out lawyers' tongues and say, "Viper, stop hissing.") The Goths were "a Germanic people who settled near the Black Sea around the second century A.D." The western branch of the Goths, the Visigoths, was instrumental in the sacking of Rome in 395 A.D. The Goths were what are popularly known as barbarians. See WEBSTER'S NEW WORLD ENCYCLOPEDIA 477 (1992).

11. See Lorie M. Graham, *Aristotle's Ethics and the Virtuous Lawyer*, 20 J. LEGAL PROF. 5, 6 (1995/96) (discussing Shakespeare's well-known comment on killing all the lawyers).

12. For an illuminating and often humorous analysis of this phenomenon, see Thomas W. Overton, *Lawyers, Light Bulbs, and Dead Snakes: The Lawyer Joke as Societal Text*, 42 UCLA L. REV. 1069, 1107 (1995).

so far as to ask, "What does it say about our society that the worst guy we can imagine is a fast-talking lawyer?"¹³

But why such hostility toward lawyers? Easy answers abound. According to some, it is the disproportionate amount of influence that lawyers wield in American politics that stirs the flames of resentment.¹⁴ Others contend that the problem lies in the high salaries and extravagant lifestyles, commonly thought to be the norm of the lawyer's life, but foreign to most Americans.¹⁵

Such explanations are largely unsatisfactory however. Lawyers as a group are particularly active in politics, but this has been true since the dawn of the republic when respect for the legal profession was far greater than it is now.¹⁶ As for the perceived salary gap, it is present when one compares the salaries of the highest paid lawyers at America's largest law firms with the average American income, but only a small percentage of practicing lawyers work for such firms. Most lawyers work for far less money at much smaller organizations.¹⁷ The root cause of public hostility thus must lie elsewhere.

This Comment argues that the problem lies not in the behavioral practices of lawyers, i.e., not in their societal function or consumption habits, but rather in a cultural shift of the purposes and ends of law itself.¹⁸ Specifically, this Comment contends that as the result of several historical trends, great popular confusion about the end or Aristotelian final cause¹⁹ of law has arisen. To deal with the

13. Michiko Kakutani, *Whatever Happened to the Devil?*, N.Y. TIMES MAG., Dec. 7, 1997, at 36.

14. See HEINZ EULAU & JOHN SPRAGUE, *LAWYERS IN POLITICS* 11 (1964) (providing a statistical analysis of the number of lawyers in positions of power in federal and state governments).

15. See Donald B. Ayer, *Stewardship*, 91 MICH. L. REV. 2150, 2153 (1993) (noting the pervasive "yuppie" mentality of new associates at big firms).

16. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272 (Daniel Boorstin ed., 1990) (noting lawyers' role as America's governing class).

17. See MARY ANN GLENDON, *A NATION UNDER LAWYERS* 87-91 (1994).

18. Thus, I do not view the crisis in legal ethics or professionalism as one of business/professional paradigmatic thinking. See, e.g., Russell G. Pearce, *The Professional Paradigm Shift*, 70 N.Y.U. L. REV. 1229 (1995) (discussing business/professional paradigmatic thinking); Timothy Terrell & James Wilson, *Rethinking Professionalism*, 41 EMORY L.J. 403 (1992) (same). Rather, my tack is much broader and sweeping and makes great use of interdisciplinary sources. In my view, the problem with lawyers is not that they do not act in accordance with academic predictions or recommendations. Instead, the problem lies in the American psyche and how law itself is viewed.

19. For a discussion of Aristotelian causation, see DANIEL ROBINSON, *AN INTELLECTUAL HISTORY OF PSYCHOLOGY* 89-90 (1986).

If we examine a statue, there is a sense in which we attribute the cause of it to the substance of which it is made, for example, stone. Here, we have what

resulting uncertainty people have channeled or directed their hostility²⁰ toward the law and ultimately its high priests, lawyers.²¹

To support this position, five issues will be addressed: (1) the definition and purpose of law; (2) the republican theory of lawyering;²² (3) the realities of the modern law school and its effectiveness in training republican lawyers; (4) whether or not a republican theory of lawyering is in line with modern American realities; and (5) prescriptions for the future.

Before entering the heart of this Comment, a brief word on the importance of this issue is in order. Why does it matter if law and the legal profession are the subject of scorn and ridicule resulting from confusion? The answer is simple. America, unique among all other nations, is built upon the rule of law.²³ Law is the glue that molds this nation of diverse immigrants into a relatively unified and stable polis.²⁴ Absent faith in law, America cannot survive and prosper in the next millennium²⁵

Of perhaps greatest concern is disenchantment with the law in America's urban centers. It is in urban centers that lawyers are most heavily concentrated.²⁶ America's cities house her largest law firms, need the most criminal prosecutors and defense attorneys

Aristotle referred to as the material cause. The difference between a lump of stone and a statue is that the latter has a certain essence or form – not any single one, but one that is not random . . . [This is the essence of a statue] . . . or its formal cause. Returning to the statue, one might attribute the cause of it to the changes produced by hammer and chisel. Blow by blow, these changes lead to the finished work. A causal explanation based upon these actions expresses what Aristotle called the efficient cause [The final cause] is the goal or end of the artist." [It is why stone is changed into statue.]

Id.

20. An analysis of transference of emotion and ingroup-outgroup behavior is beyond the scope of this Comments. Generally however, sociologists use the term "ingroup" to refer to those groups whose members identify themselves primarily by their common hatred for another group, an "outgroup." For a more detailed discussion, see JOAN FERRANTE, *SOCIOLOGY: A GLOBAL PERSPECTIVE* 162 (1995).

21. This explanation has the added advantage of helping to explain why so many lawyers are dissatisfied with their own lives. See GLENDON, *supra* note 17, at 84 (discussing the unhappiness of many lawyers).

22. The republican theory will be exclusively examined for the simple reason that it best ties in with the classical formulation of law argued in this Comment.

23. See GLENDON, *supra* note 17, at 11.

24. See GEORGE KENNAN, *AROUND THE CRAGGED HILL* 157 (1993).

25. For a discussion of the importance of something to believe in as a precursor to societal order, see Benedetto Croce, *Of Liberty* 92, reprinted in *THE AMERICAN ENCOUNTER* (James F. Hoge Jr. & Fareed Zakaria eds., 1997).

26. As an example of this phenomenon, note that almost all of the top-grossing American law firms are based in major metropolitan areas, most notably, New York. See generally John E. Morris, *The Global 50*, AM. LAW. NOV. 1998, at 45.

and have the greatest demand for classical public interest²⁷ lawyers.²⁸ The modern American is most likely to have contact with a lawyer in the big city, and it is from these urban contacts that their conception of what the law can be is shaped.

At the same time, it is the cities that receive the bulk of new immigrants to the United States.²⁹ As has always been the case, these immigrants bring with them their own cultural values and norms. But unlike the immigrants of the nineteenth century, modern immigrants do not come primarily from a homogenous Europe.³⁰ This makes their incorporation into a society where the rule of law is paramount more difficult. To insure the continued viability of American democracy, great effort must be expended to make certain that the newest of Americans are blended into the polis by keeping law as the glue that binds Americans together.

I. Law: Definitions and Purpose

Any definition of law must first take into account human nature.³¹ The vision of human potential that one accepts will largely dictate one's conception of law (i.e., is the purpose of law to make men more moral³² or to constrain human weakness).³³ Pared down to its essence, there are two visions of human nature, often intertwined, that have exerted the most influence on the development of legal philosophy over the centuries: humans as reasonable animals or humans as self-interested individualists.

The theory of humans as reasoned animals gets its start in Greek philosophy.³⁴ According to Plato, the mark of a good man³⁵ was a rational and cultivated mind, for it was the power of reason that

27. That is, poverty law. See MARTHA F. DAVIS, *BRUTAL NEED* 14-16 (1993) (discussing the formation of The Legal Aid Society).

28. In his remarks at Fordham University in the spring of 1997, Peter Edelman noted this very fact. See generally Peter Edelman, *Opening Address*, 25 *FORDHAM URB. L.J.* 685 (1998) (remarks at a conference entitled "Lawyering for Poor Communities in the Twenty-First Century").

29. See ANDREW BOYD, *AN ATLAS OF WORLD AFFAIRS* 197 (9th ed. 1991).

30. See EDWARD N. LUTTWAK, *THE ENDANGERED AMERICAN DREAM* 181-183 (1993).

31. See ANTHONY KRONMAN, *THE LOST LAWYER* 175, 176 (1993); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543, 547, 548 (1986) (discussing the interaction between conceptions of human nature and the rule of law).

32. See GEORGE, *supra* note 2, at 1.

33. See ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS* 79 (5th ed. 1961).

34. See DANIEL ROBINSON, *WILD BEASTS & IDLE HUMOURS* 16 (1996).

separated man from the animals.³⁶ In one of their rare moments of agreement, Aristotle built upon Plato's work and argued that man was by nature a political animal who found greatest happiness in the development of his faculties of practical wisdom³⁷ in the community.³⁸ In the middle ages, Thomas Aquinas built upon the writings of Aristotle and conceived of man as the lone being in the universe with intelligence, will and reason.³⁹ Underlying these conceptions is the idea that humans are perfectible; that through the powers of the polis — societal pressure and law — men and women could be helped to lead more virtuous lives.⁴⁰ Also fundamental to these theories was the idea that, from the moment of birth, humans were fundamentally unequal. Whether speaking of Plato's myth of the metals⁴¹ or Aristotle and Aquinas' beliefs that justice was not a function of arithmetic, but rather distributive or role based equality,⁴² the conception of individuals who possessed different rights and obligations, despite their common orientation to the good, runs strong through this classical tradition.

In contrast is the seventeenth-century notion of man as nothing more than a supreme individualist, who if not constrained by the powers of the law, would surely destroy all those around him.⁴³ Unlike their classical counterparts, the moderns, led by Hobbes,⁴⁴ argued for the universal fundamental equality of all humans who differed only in their relative strength and power. In this tradition, humans are not considered pre-ordained to the good or to a communal life. Rather, their sole concern is the acquisition of and sus-

35. "Man" is Plato's choice of words, not mine. All future such references should be assumed to be a specific reference to the work of the individual philosopher discussed.

36. See PLATO, *THE REPUBLIC* 260 (Richard Sterling & William Scott trans., 1985).

37. Practical wisdom is in its essence, reason, virtuously exercised. See CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 4, at 44.

38. See Miriam Galsto, *Taking Aristotle Seriously*, 82 CALIF. L. REV. 331, 338 (1994).

39. See THOMAS AQUINAS, *SUMMA THEOLOGIAE* 56 (R.J. Henle ed. and trans., 1993).

40. See, e.g., Russell Hittinger, *Natural Law and Virtue* 62-63 in *NATURAL LAW THEORY* (Robert George ed., 1992).

41. See PLATO, *supra* note 36, at 113. He writes, "We should tell them [the people] that although they are all brothers, god differentiated those qualified to rule by mixing in gold at their birth. Hence they are most to be honored. The auxiliaries [the guardian class] he compounded with silver, and the craftsmen and farmers with iron and brass."

42. See AQUINAS, *supra* note 39, at 72.

43. See ROBINSON, *supra* note 19, at 304.

44. See generally, THOMAS HOBBS, *LEVIATHAN* (C.B. Macpherson ed., 1985)

tained dominance over sources of wealth — namely property.⁴⁵ The purpose of law in this tradition is not to make men and women more moral, but rather simply to constrain their otherwise hostile and antisocial tendencies.⁴⁶

The development of American law has largely been a product of the latter school of thought.⁴⁷ But although our system of law is premised on this notion, in political discourse, Americans do not think of their legal system as a constraining mechanism on human vice, but rather as a vehicle through which the common good of the nation can be achieved.⁴⁸ This has resulted in a schizophrenia in our collective consciousness. We cannot understand why the law is talked about as the bedrock of America (e.g., “we are a nation of laws and not of men”⁴⁹), but then used to further unsavory ends.⁵⁰

A large part of the problem lies in the distinction, which we have somehow lost, between private and public law.⁵¹ As in the days of the Romans, private law is and should be concerned primarily with the transactional relations between individuals.⁵² It is in this arena that lawyers should generally follow the advice of Lord Brougham and do all that they can to save the client and further his or her ends.⁵³ Here the lawyer has an obligation to ensure that in reciprocal exchanges, principles of equality are upheld.⁵⁴ This is not to suggest that the lawyer should use any means available to achieve his or her objectives, however. Rather, operating within the “spirit of the laws,”⁵⁵ the lawyer should attempt to provide her client with the best counsel available.⁵⁶

45. See ROBINSON, *supra* note 19, at 305.

46. See NORMAN BOWIE AND ROBERT SIMON, *THE INDIVIDUAL AND THE POLITICAL ORDER* 13-14 (2d ed. 1986).

47. See Sherry, *supra* note 31, at 543.

48. See George Kennan, *Moralism-Legalism*, reprinted in *MAJOR PROBLEMS IN AMERICAN FOREIGN POLICY* 3 (Thomas Patterson ed., 1989).

49. GLENDON, *supra* note 17, at 8.

50. See Ayer, *supra* note 15, at 2154.

51. But see Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 22 (1988) (for a discussion of the problems with this approach). After all, in a very real way, all private disputes have a public component and vice-versa.

52. See BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 8 (1962).

53. GLENDON, *supra* note 17, at 40.

54. See ARISTOTLE, *supra* note 4, at xiii-xiv; see also AQUINAS, *supra* note 39, at 72.

55. By “spirit of the laws,” I borrow from Montesquieu and refer to the idea that law has purpose — specifically to help man abide by his moral, political and civil duties. See MONTESQUIEU, *supra* note 10, at 5.

56. See KRONMAN, *supra* note 31, at 143

Consider, for example, the case of a local merchant, Peter.⁵⁷ His livelihood depends on the sale of oranges which he buys from Sally, a local orange farmer. The contract he signed with Sally provides in relevant part that, for the next ten years, Sally will provide Peter with all the oranges he needs for one dollar an orange. No lawyers participated in the drafting of this contract.⁵⁸ Five years into the contract, terrible weather destroys the bulk of the region's orange crop. Only Sally, through her use of expensive precautionary measures, is able to save her crop. Because of these measures selling Peter oranges for one dollar each would result in a great pecuniary loss to Sally. At the same time, on the open market, oranges are being sold for five dollars each, a price certain to inflict hardship on Peter. Sally obviously wants to get out of the contract — her financial security depends on it. Peter obviously wants to keep the contract — his financial future depends on it. They each seek counsel after recognizing that they cannot amicably resolve their dispute.⁵⁹ What should the contacted lawyers do?

In this case, Lord Brougham's motto is a point well-taken. Given an ambiguous fact pattern with neither party entirely right or wrong, there is nothing wrong with the lawyer using all the tools at her disposal to achieve the best result for her client.⁶⁰ In the hypothetical case of Peter and Sally, neither party is all right or all wrong. After all, when Peter and Sally entered the contract, neither party could have known that bad weather would destroy the bulk of the region's crop, nor that Sally would save her crop only at considerable expense.⁶¹ Obviously, it was not either party's intent to sell or buy oranges at a price far below market value. Rather, Sally wanted to ensure a buyer of and Peter a supplier for oranges at reasonable market value.

To assist the parties in cleaning up the mess they created, aggressive advocacy by lawyers for both sides is essential. Sally needs a lawyer who, stressing contractual principles of "unjust enrichment," can convince a judge or jury that the contract is void on its

57. This hypothetical assumes that, as a matter of law, a Corbinian public policy emphasis is placed on contract interpretation. *See generally* A.L. CORBIN, CORBIN ON CONTRACTS (1950).

58. This point is important, for it assumes equality of bargaining between Peter and Sally when they drafted the contract. The implications of the scenario in which only one party is represented by a lawyer is beyond the scope of this Comment.

59. Again so that equality of bargaining is assured.

60. It is in such circumstances that the idea of zealous advocacy is best pursued.

61. Certainly, if they had acted more prudently they could have created an "exigent circumstance" opt-out provision, but such foresight was not shown by either party.

face. Peter, on the other hand, needs a lawyer to argue that parties are bound to finish what they have begun; once assumed, a responsibility is not so easily shirked. Both arguments have merit. The ultimate question of who can best bear the loss (or rather on whom the loss should fall) is a factual question on which reasonable people can differ. In this private law matter, lawyers act best when they work to ensure their client gets a fair shake — that an equitable result is reached.

In contrast, public law concerns itself with the promotion of the common good, with the pursuit of integral human fulfillment. It is, in Aquinas' words, "a dictate of practical reason, for the Common Good, made by him who has the care of the community, and promulgated."⁶² Here the primary emphasis is not on relationships between individuals, but rather on the coordination of societal resources and talents so as to assist individuals in realizing happiness.⁶³ The lawyer's role in this scheme is to act as guardian, as a high priest of the law. The realization of basic goods⁶⁴ should be the desired end.

Consider again for a moment the case of Peter and Sally. Assume now, that for nutritional reasons, oranges are a necessary part of life in Peter's town. No supplements are available. Without the oranges, the entire population of Peter's town will become bedridden. Peter is the only seller of oranges in his town and the people cannot afford more than one dollar an orange. Should Sally's lawyer act in the same way she did in the first scenario?

No reasonable person can contend that public policy is best served by letting the inhabitants of Peter's town become ill.⁶⁵ If this is an unreasonable intellectual premise, why should a lawyer be allowed to make such an argument in court? The public good is not served by Sally's winning. Rather, it is only furthered if the people of Peter's town can stay healthy and are given the opportunity to lead productive lives. In reality however, many lawyers would make just such an illogical argument.

For example, it is clearly not in anyone's best interest to have toxic paints in schools, yet lawyers in mass tort cases defend the

62. AQUINAS, *supra* note 39, at 51.

63. See FINNIS, *supra* note 3, at 276.

64. In this scenario the public policy favoring upholding the bargain between two parties (see FRIEDRICH KESSLER, *CONTRACTS* 21 (3d ed. 1986)) is outweighed by the competing social policy of self-preservation (see FINNIS, *supra* note 3, at 86).

65. In making this assertion I explicitly reject the notion that the operation of the market or the "Invisible Hand" always results in the best possible end.

producers of these paints.⁶⁶ What good is served by such a defense?⁶⁷ None quickly springs to mind. In dealing with such a case, or the case of Sally, the lawyer should factor these public policy considerations into his or her decision-making process. In cases where one party is clearly acting improperly, the goal of representation should not be winning the client's case at all costs. Rather, the focus should be on achieving a result that most accords with the culpability of the client's behavior and the public policy interests involved. This certainly requires the lawyer to exercise his or her practical wisdom, but so what? That is the mark of humanity,⁶⁸ the reasoned animal, whose most notable creation is law itself.

This vision of lawyering begs the question: should the legal profession require lawyers not only to represent clients to the best of their abilities, but also to determine the culpability of their clients and whether a particular factual dispute is private or public? Yes. As Ulysses failed to learn, from those to whom much is given, much is expected. The privilege of practicing law carries with it a certain burden — the burden of exercising practical wisdom. It is not too much to ask to require lawyers to use their great education and experiences to make judgement calls. Indeed, this is what they do every day right now. What is different in this approach is the requirement that lawyers consider the ends for which they are working.

The problem with this theory however is that it is foreign to the modern (post 1960s) lawyer's sensibilities. It is not what he is taught in law school. It is not what she is taught in a firm. Value neutrality, the predominant religion of the modern law school,⁶⁹ makes judgement calls as to ends difficult. And this value neutrality is emphasized as being equally valid in application to either private or public transactions. But, as has been discussed, public law is fundamentally not about value neutrality. Rather, it is about choosing ends that most benefit the entire community. While reasonable people might differ as to what the best end is, there is a

66. See Peter Passell, *The Split Over Punitive Damages*, N.Y. TIMES, July 10, 1997, at D2 (discussing the implications of lead paint and tobacco class action suits).

67. Here, I am not suggesting that the adversarial system is completely flawed, nor without merits in and of itself. In an imperfect world, with imperfect information, it is often the only way we have to insure that a just result is achieved. But in making such a statement, I am reminded of Churchill's saying on democracy — it is the worst form of government except for all the rest.

68. Reason as the hallmark of humanity is an idea first articulated by Pericles, the ancient Athenian orator. See ROBINSON, *supra* note 19, at 45.

69. See Roger C. Cramton, *The Ordinary Religion of the Law School Classroom* 29 J. LEGAL EDUC. 247, 255 (1977).

marked difference between saying that in a range of good options "x" is better than "y," and claiming that any option regardless of its wisdom is valid. It is in the latter camp that most modern lawyers fall.⁷⁰ While this is fine in the realm of private law, it does nothing to promote the common good on issues of concern to the entire community.

Most Americans do not understand this vision of lawyers. They think of law as a chalk-line that separates right from wrong, permissible from impermissible conduct.⁷¹ Moreover, philosophical distinctions between issues of public and private law are difficult to draw. In the resulting maelstrom of confusion, lawyers have become a distrusted, feared and sadly, often hated, group. Unless changes are made to the development of the modern American lawyer, such popular distaste is only likely to grow.

In brief then, part of the popular discontent with the legal profession and law itself is a failure to recognize the distinction between private law that holds individuals' needs paramount and public law that inculcates virtue in the citizenry thereby promoting the flourishing of the "good life" for the broader community. This dichotomy must be better explained both to lawyers and the general populace if law is to regain a position of respect within society. Otherwise, the current norm of mercenary lawyers and a dissatisfied public will continue.

II. The Republican Theory of Lawyering

Thus far, this Essay has detailed some of the current problems affecting the law and the legal profession. It has hinted that lawyers should take the lead in undertaking the kinds of systemic reforms needed to re-fuse law with popular culture. What has not been answered is why lawyers should assume this mantle. An analysis of classical republican theory provides an illuminating answer.

In its broadest sense, the phrase "classical republican" refers to a philosophical school of thought that traces its roots back to Aristotle's contention that man is fundamentally a political animal.⁷² What this functionally means is that humans have within them the potential to develop virtue through a process of education and habit leading to happiness. This can best happen within the framework of a political society. To achieve this end, it is of paramount importance that the individual assumes an active role in the affairs

70. *Id.* at 247.

71. See, e.g., *AMERICA'S PURPOSE 2* (Owen Harries ed., 1991).

72. See Galsto, *supra* note 38, at 339.

of this polis, for it is only through such activity that character can be developed.⁷³ Underlining this concept is the classical notion that the communal life in which humans work together is an essential element of what it means to be human in the first place.⁷⁴ To be fully human, one must work with other humans to create an end result that is greater than the sum of its parts.

Traditionally, however, this did not mean that every member of a society should play the same role.⁷⁵ Rather, given the unequal distribution of talents and resources within a community, each citizen should be provided the opportunity to fulfill his or her role based on their interests and ability.⁷⁶ Particularly important in the ordering of a society was that certain individuals assume the authority and power necessary to organize communal affairs for the common good.⁷⁷

In America, this role was filled by lawyers.⁷⁸ De Tocqueville remarked that in nineteenth-century America, lawyers fashioned the country to suit their own needs.⁷⁹ So too, was the pattern of behavior for lawyers in the early twentieth century. From judges like Learned Hand⁸⁰ to lawyer-statesmen like Dean Acheson,⁸¹ lawyers attempted to create order out of chaos, thereby (consciously or not) re-shaping America in their own image. Of primary note here is the emphasis these lawyers placed on the rule of law, on the idea that it is law and law alone that separates the civilized life from the barbaric.⁸²

The lawyers' legal ethics code has roots in this republican ethos.⁸³ George Sharswood argued that a lawyer's primary mission

73. See Martin Diamond, *Ethics and Politics* 80-81 in *MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* (Robert Horwitz, ed., 3d ed. 1986).

74. See FINNIS, *supra* note 3, at 88.

75. See generally SEBASTIAN DE GRAZIA, *MACCHIAVELLI IN HELL* (1989) (discussing Macchiavelli's political and moral theories).

76. Taken to extremes, you have Plato's myth of the metals. See PLATO, *supra* note 36, at 113-115.

77. See FINNIS, *supra* note 3, at 242.

78. See MARK MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS* 1-6 (1995).

79. See DE TOCQUEVILLE, *supra* note 16, at 280.

80. See generally GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

81. See generally WALTER ISSACSON & EVAN THOMAS, *THE WISE MEN* (1986).

82. Acheson, for example, played an instrumental role in the establishment of the United Nations. This transnational institution is premised on the idea that sovereign states can be obligated to follow a common ethos as to permissible and unacceptable conduct. See MARK JANIS ET. AL., *EUROPEAN HUMAN RIGHTS LAW TEXT AND MATERIALS* 19 (1995).

83. Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Code*, 6 GEO. J. LEGAL ETHICS 241 (1992).

was the service of the polis' common good – even when such service conflicted with the needs and wishes of the lawyer's own client.⁸⁴ This contention was widely accepted until the 1960s when economic pressures began to change the dynamics of the provision of legal services.⁸⁵ It was during this decade that idea of republican lawyering met its demise.⁸⁶

Of particular importance is the fact that during the 1960s, lawyers began to lose the distinction between public and private law. Too often, lawyers advocated positions in politics that they as citizens would never deem acceptable. The age of value-neutral lawyer/technicians had begun.⁸⁷ Lawyers began to think of their role in society not as guardians/promoters of the common good, but rather as zealous-advocates or hired guns, willing to do whatever it took, regardless of the social cost, to ensure their client's victory. Too often victory for the individual was won at the cost of communal good.

The net result today is a nation under lawyers who fail to understand the purpose of law. This is why Americans are unhappy with lawyers and why so many lawyers are unhappy with themselves. Law used to be a calling which had, as an added bonus, the potential to provide one with a comfortable life.⁸⁸ Today, law as a calling is an idea foreign to practicing lawyers. Thanks to the value neutrality of the legal academy, lawyers view their work as just another job, another way to make a living.

Yet despite all of this, law schools continue to produce a sizable percentage of all future political leaders and staffers in America.⁸⁹ Thus, whatever the flaws of the current system, the reality is that those who find the idea of law appealing are also among the most likely to find a career in politics rewarding. America is still a nation under lawyers. The trick is to make sure lawyers are up to the task.

84. *See id.* (discussing Sharswood's conception of a lawyer's obligation to the common good).

85. *See* Gordon, *supra* note 51, at 2-3.

86. *See* KRONMAN, *supra* note 31, at 50.

87. *See* Gordon, *supra* note 51, at 2-3.

88. *See* Sol Linowitz, *Speeches from the Cornell Law School Centennial Celebration, April 15-16, 1988 — Keynote Address*, 73 CORNELL L. REV 1255, 1256 (1988).

89. *See* MILLER, *supra* note 78, at 1-6.

III. The Modern Law School: Toward a Guardian Class or a Community of Sophists?

Complicit in the shifting tides of public favor for the legal profession are the actions of the modern law school. As any second-year student can tell you, the pressures to enter a big firm, even at schools renowned for their public interest slant, are intense.⁹⁰ These pressures are all the more persuasive given the value skepticism taught as an integral part of the law school curriculum.⁹¹ Law students are thereby shorn of their idealism and left in the position of being very well-educated Sophists⁹² who see the application of their talents to the pursuit of money as valid as any alternative schema.

The birth of the modern law school can be directly traced to Christopher Langdell and the Harvard legal science revolution of the 1870s. There law changed from being a magico-mystical pursuit in which law was derived from universal norms to a hard-nosed science in which, through the application of the case method, legal truths could be derived from the available case law.⁹³ In line with the scientific faith of the time,⁹⁴ the Harvard revolution caught on and became the predominant method of American legal education. Of paramount importance to this philosophical school was treatise writing in which the principles of specific bodies of law were laid out in a systematic fashion.⁹⁵

This notion of legal scientific certainty came under much attack in the twentieth century — first from the legal realists and later from the critical legal theorists and law and economics adherents. Legal realists argued that law was nothing more than the result of the personal biases of judges and lawyers.⁹⁶ Critical theorists con-

90. See Brett S. Martin, *Why Most Law Schools Are Failing at Public Interest Law*, NAT'L JURIST, Oct. 1997, at 7. Martin argues that in most law schools career planning offices encourage students to pursue jobs in firms without fully discussing the public interest alternatives available.

91. See Cramton, *supra* note 69, at 247, 255.

92. Sophists were ancient Greeks who professed to teach, for a fee, rhetoric, philosophy and how to succeed in life. They have historically been portrayed as intellectual charlatans. Sophist philosophers were among the first to argue that there is no truth, only opinion. See CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 4, at 752.

93. See Robert Gordon, *Legal Education and Practice: The Case for and Against Harvard*, 93 MICH. L. REV. 1231, 1231 (1995).

94. See, e.g., SIGMUND FREUD, *THE FUTURE OF AN ILLUSION*, (James Strachey ed. and trans., 1961) (arguing that the long-cherished "opiate of the masses," religion, should be replaced with faith in science).

95. See GLENDON, *supra* note 17, at 185.

96. See *id.* at 189.

tended that law could only be taught through an interdisciplinary approach in which black-letter law was understood simply as an attempt by existing elites to maintain their grasp on power.⁹⁷ Proponents of the law and economics school proposed that law is intelligible only if viewed through the lens of the insatiable human desire for the acquisition of property.⁹⁸ More than their revolutionary predecessor of legal science, these schools of thought devalued the notion of universal or transcendental norms.⁹⁹ They devalued the notion of laws as a means through which societal good can be realized. They are the norm of the modern academy.¹⁰⁰

These academic battles for the heart and soul of the modern law school have had several results. First, and perhaps most frightening, they have fostered within law students, and thus America's future oligarchs, a cynicism and distrust of law as anything more than personal perspective.¹⁰¹ Take for example, a typical first year constitutional law class. The professor who runs the class is likely to emphasize the "principles" on which the justices of the Supreme Court base their decisions. But often lost in the discussion is whether these principles actually benefit society. Certainly, law students need to learn how to interpret Supreme Court opinions, but in analyzing these decisions why is the question of whether the opinion is right or wrong never asked? Put another way, why are not students asked to give the best possible result given a *tabula rasa*?¹⁰² Perhaps, it is simply a lack of time. But if lawyers are not challenged to think through the theories which underscore their beliefs in law school, then when will it happen? Given the lack of a universal undergraduate curriculum,¹⁰³ there is currently no institu-

97. *See id.* at 210.

98. *See* KRONMAN, *supra* note 31, at 227.

99. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 159-197 (1996).

100. *See* KRONMAN, *supra* note 31, at 225.

101. *See* Cramton, *supra* note 69, at 255.

102. By "*tabula rasa*" I mean a blank tablet on which empirical experiences have not yet formed an imprint. *See* CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 4, at 439.

103. *See generally* HAROLD BLOOM, THE DEATH OF THE WESTERN CANON Chap. 1 (1994). The problem with students who do not speak the same language by virtue of the same basic grounding is simple — they cannot understand each other, much as the best educated German cannot understand the best educated Arab. Lacking this common linguistic currency, a discussion on the best end to be pursued is impossible. Such is the lesson of the biblical tower of Babel. There is a reason that medieval philosophers were so concerned with the question of how many angels could fit on the head of a pin. *See generally* STEPHEN JAY GOULD, DINOSAUR IN A HAYSTACK: REFLECTIONS IN NATURAL HISTORY Chap. 4 (1994).

tion where students are given the opportunity to challenge each other's beliefs on the same points after studying the same material. This does not bode well for the judges and leaders of tomorrow, whose personal beliefs never will have been challenged.

The net result of all this is lawyers who do not believe that law really can orient people toward the good. While distrust of law is certainly a feature of law in despotic societies, it is a harmful attitude in a democratic one based on the rule of law.¹⁰⁴ For if lawyers do not believe that the damsel they are sworn to protect is anything more than a harlot in disguise, how can they lead a nation premised on the notion that law has moral force?¹⁰⁵

Second, these academic battles have had little relation or connection to the larger legal community. Because of a combination of radical political beliefs and an increasing specialization, legal scholars have become an "insular minority" incapable of communicating with the outside world.¹⁰⁶ As a general rule, most law professors have limited work experience — usually a clerkship and two or three years of practice.¹⁰⁷ And the limited experience they have received, because of the problems outlined previously, has re-cemented their close-mindedness toward the law. Since most students do not eventually become law professors, this is quite worrisome. Law students are being sent out in the world, with no real sense of the intricacies of their practice or the skills needed to run a nation.¹⁰⁸

This previous point is particularly troublesome in light of the breakdown of the old system in which law school taught you to think like a lawyer and the firms taught you the actual intricacies of being a practicing lawyer — specifically the human side of the law.¹⁰⁹ Today starting associates have limited contact with their superiors, as they spend several years alone in a library researching and drafting memos. Client contact does not come until late in the

104. See Bilahari Kausikan, *Asia's Different Standard*, 92 FOREIGN POLICY 24, 226 (1993).

105. See RICHARD HOFSTADTER, THE FOUNDING FATHERS 62-74 (discussing moral conceptions of the Founding Fathers and their impact on America legal development) in MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC, *supra* note 73.

106. See GLENDON, *supra* note 17, at 221.

107. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 2191 (1992).

108. See generally Richard Cappalli, *The Disappearance of Legal Method*, 70 TEMPLE L. REV. 393 (1997).

109. See Linowitz, *supra* note 88, at 1257.

game.¹¹⁰ The human thus becomes foreign and the notion of community dissolves in the bargain.

Finally, because of the decreased emphasis on public service in terms of both theory courses that teach students about the common good and clinical courses that apply the taught theory, law students are increasingly incapable of meeting the demands of being republican lawyers.¹¹¹ In most cases, in most law schools, law students are not encouraged to take a public service legal job. Often, jobs in public service are seen as a fall-back for those law students who did not make the cut for the prestige firms. This is hardly the kind of attitude that should be inculcated if law students are someday going to be the ruling elite.

Despite these flaws however, law schools remain the best place to train a guardian class. Barring a fundamental change in America's undergraduate institutions, only in the legal academy will students be versed in a common language. Knights of old were trained in the ways of the swords and the principles of chivalry before they were sent out on the fields of battle. Today, our battles are fought not on open fields, but rather in courtrooms and senate chambers.¹¹² Our knights thus must be trained in procedure and legal method, before they are allowed to fight the fights needed to achieve social justice and order.

III. Modern Realities: Can Law Be Saved?

There's an old cliché that states "you can take a horse to water, but you can't make him drink." It is a particularly apt description of the current crisis in American law. Thus far this Comment has argued that (1) there is general popular confusion as to the nature and purpose of law; (2) lawyers have the potential, by virtue of their status as American oligarchs, to assist in the lifting of this veil of ignorance; and (3) that despite its structural flaws, the American law school remains a valid vehicle through which a guardian class can be taught. The net conclusion derived from these arguments is that lawyers can help America regain her faith in the law. What has not been asked is whether Americans want to regain their lost faith.

Several historical developments warrant attention. First is the increased distrust Western civilization has had for universal themes

110. See generally P.Z. Parsa, *The Drudge Report: Brief Grief*, NEW YORK MAG., 24-31, June 21, 1999.

111. See KRONMAN, *supra* note 31, at 269.

112. As an example of this phenomenon see DAVIS, *supra* note 27, at 39.

since the Enlightenment.¹¹³ Effectively, Enlightenment philosophers began to attack the Christian vision of "God" and a universal end which made the cosmos intelligible.¹¹⁴ For political reasons, the power of divine sovereigns was questioned and the notion of "good" set to rest on majority opinion. While there is nothing wrong with democratic rule, the work of J.S. Mill and other writers stressed majority will as the dispositive factor.¹¹⁵ This belief represented a dramatic shift from the Athenian notion of democracy with its conception of some things being fundamentally "right" or "wrong."¹¹⁶ Conceptions of right and wrong came to be seen merely as vehicles through which leviathans could maintain their dominion over society.¹¹⁷ In place of the gods of old the Enlightenment raised the new idol of science and scientific method.¹¹⁸ Faith in science however has never satisfied the human subconscious to the extent that its proponents once believed it would.¹¹⁹ But, since the gods have already been destroyed, all that is left is a hole in the self — a missing center of identity and definition as part of a larger community.¹²⁰

Further complicating matters is the increased weakness of the nation-state, the building block of Western order since the Treaty of Westphalia in 1648.¹²¹ For a long time, it was the state that filled the void created by the death of religion. In an attempt to find meaning, citizens were willing to trust, believe in and ultimately fight for the nation.¹²² In a world in which great power battles and showdowns are increasingly rare,¹²³ it is unlikely that faith in the

113. See ROBINSON, *supra* note 19, at 204.

114. See PAUL JOHNSON, *THE BIRTH OF THE MODERN* 820-821 (1991).

115. See BOWIE, *supra* note 46, at 35-38.

116. See, e.g., AQUINAS, *supra* note 40, at 76-79 (discussing why temperance is better than indulgence).

117. See BOWIE, *supra* note 46.

118. See generally RICHARD WEAVER, *IDEAS HAVE CONSEQUENCES* (1948).

119. *Id.* at 300. Although it is still a popular idea. See *Resolved: Science Is at an End. Or Is It?*, N.Y. TIMES, Nov. 10, 1998, at F5.

120. Also note that Enlightenment philosophers moved away from the notion of distributive equality. This has had the effect of weakening public support for the idea that some people's skills and talents are best used in leadership capacities — in orienting the community toward the common good. The hole in the self can also be attributed to this phenomenon.

121. See generally JEAN-MARIE GUEHENNO, *THE END OF THE NATION STATE* (1995).

122. See generally GIDON GOTTLIEB, *NATION AGAINST STATE: A NEW APPROACH TO ETHNIC CONFLICTS AND THE DECLINE OF SOVEREIGNTY* (1993) (examining the role of nationalism in the formation of the modern state).

123. See, e.g., JOHN MUELLER, *RETREAT FROM DOOMSDAY: THE OBSOLESCENCE OF MAJOR WAR* (1996).

nation will continue to suffice for many people. For in the absence of war, of a chance to define oneself by what one is not, how can states possibly hope to garner the faith of their populace?

In such an era, where there are no gods and no states, is it any wonder that the human thymos¹²⁴ is currently most satisfied in the pursuit of a capitalist commercial life?¹²⁵ The commercial life, is, as Fukuyama argued, the one quasi-warlike creative vice left through which the individual can be defined.¹²⁶ The last man of the modern era is the businessman-capitalist not the lawyer-statesmen or the philosopher-king, for kings and statesmen no longer have kingdoms to rule. Tomorrow's battles will seemingly be fought in the world of economics. The question is for how long?

Psychology teaches us that, the one constant, throughout all time, across all civilizations, is the need of a society to believe in something — to have something to fight for.¹²⁷ The mere pursuit of money has never been a sufficient something.¹²⁸ Something else must take its place. But what? Given the diversity of religions, political viewpoints, etc., in modern America, it is unlikely (and indeed undesirable) that a new Christendom or the like can be founded. But what all Americans do have in common is a faith, however skeptical or bruised, in law.¹²⁹ If lawyers can begin to renew their understanding and commitment to the law as the efficient cause¹³⁰ of the common good and happiness, this faith can fill the void left in the wake of the destruction of the old gods. In so acting, American society can move beyond its current fixation on the stock market and on to more pressing issues in social justice and welfare.¹³¹

124. Thymos is an "innately political virtue necessary for the survival of any political community, because it is the basis on which private man is drawn out from the selfish life of desire and made to look toward the common good." FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 183 (1992).

125. See generally *id.*

126. See *id.* at 190.

127. See ABRAHAM ROSMAN & PAULA G. RUBEL, *THE TAPESTRY OF CULTURE* 190 (1995) (discussing humanity's need to have its cognitive, substantive and psychological needs fulfilled — an end historically achieved through the use of religion).

128. See PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* 538-541 (1987) (for a discussion of how great economic powers have historically translated that power into military and political clout).

129. See STEPHEN SOLARZ, *OF VICTORY AND DEFICITS* 89-95, in *AMERICA'S PURPOSE*, *supra* note 71.

130. See *supra* note 19 (discussing Aristotelian causation).

131. See David Hendelman, *Stocks Till We Drop*, N.Y. TIMES, June 17, 1999, at A31.

IV. Recommendations for Change

It is apparent that structural reforms need to be undertaken, both within the legal community and in the community at large, if "we are to remain (or return to being) a nation of laws and not of men."¹³² Three reforms in particular seem warranted. Through the application of these reforms, the intrinsic advantages possessed by lawyers can be brought to the forefront. Consequently, a greater return on those to whom much was given can be demanded.

Most importantly, the modern law school needs to be re-examined. There needs to be an increased acceptance in law school faculties of classical notions of law. Students must be taught that belief in law as something more than random whim of judges and politicians is acceptable. Studies in ethics seminars which include both a theoretical and service component should become an essential element of every law student's curriculum. These programs should include not only discussions of traditional *pro bono* work, but also of non-traditional legal jobs such as public service or government work.¹³³ Law schools also need to better fund post-graduate public interest legal programs, thereby manifesting a greater commitment to public interest law. Given the great cost of such an undertaking, law schools would be wise to work with the leaders of the bar to create a greater number of post-graduate fellowships and loan-forgiveness programs that are in part funded by the profits of the large firms.¹³⁴

Second, law schools and the bar associations need to work closely together to implement legal public education programs at the nation's high schools and universities. Much as Sol Linowitz has suggested,¹³⁵ both high school and college students need to receive training about the purpose of law, the content of law, the

132. See GLENDON, *supra* note 17, at 8.

133. A good example of just this type of program exists at Fordham University School of Law. Members of Fordham's Stein Scholars Program in Law and Ethics (a competitive public interest program that designates certain students as Stein Scholars based upon their previous public interest experiences and desire to perform such work in the future) are required to take a semester long course in the spring of their second year which incorporates both a theoretical and clinical component. For example, during my second year, I was fortunate enough to work with Lawyers Alliance for New York on the incorporation of a day-care center in an under-developed area of Brooklyn, New York. The practical work on this project (e.g., meeting with the client, drafting the articles of incorporation and by-laws) was supplemented with heavy academic reading in theories of lawyering and public interest law.

134. For a fuller discussion of this idea, see Edelman, *supra* note 28.

135. See Linowitz, *supra* note 88, at 1257.

notion of rights — both collective and individual — and finally of obligations. Not only would this benefit the majority of Americans who will never attend law school, but it is also likely to have the added bonus of increasing the dialogue between academics and practitioners. They will have to cooperate to design a curriculum.

Finally, perhaps it is time to do more than re-examine the zealous advocacy paradigm of lawyering. While alternative notions of lawyering abound (e.g., community activist, community liaison, community empowerer, etc.) in the main, the organized bar remains wedded to the notion of zealous advocacy.¹³⁶ As has been noted however, zealous advocacy does not properly take into account public law's concern for the common good. Alternative visions that place a greater emphasis on practical wisdom, need to be better integrated into the legal mainstream. Active lobbying by academics and concerned practitioners for such changes would do much to put the ball in motion.

Conclusion

In summary, this Comment has argued that because of a series of historical events, Americans have become confused about the purpose of law. Rather than seeing law as a culture specific derivation of eternal principles, many Americans now see law as an arbitrary and capricious device — which does not equate with their understanding of what law should be. Such a belief is reinforced by lawyers, who in pursuit of the client's interests, fail to care for the common good. Law schools, in their training of the high priests of the law, have hardened this principle into their willing clay, first through the Holmesian legal science revolution and more recently through legal realism, law and economics and critical legal studies. It is of little surprise then, that the "best and brightest" of the modern law-student do not attempt to become philosopher-kings or lawyer-statesmen, but rather value-neutral technicians.

Such a state of affairs cannot stand if America is to prosper into the next century. Today's lawyers, despite their training, given their continued role as a political elite, must begin to return the law to its purpose as the instrument for the realization of basic goods and ultimately happiness. To achieve this end, law schools must be reformed, new education techniques implemented in high schools and colleges, and the credo of individual client first, last and always re-examined. The fruits of this labor, while not likely to be imme-

136. See Pearce, *supra* note 83.

diately apparent, have long term significance for a more healthy, greater good. For not only will we have saved law and the legal profession, but more importantly, we will have begun to save ourselves. People need to believe in something and the erection of a "god of law" is at least something all Americans can believe in.

If such changes can be realized, perhaps, unlike our predecessors, we will not be doomed to the lowest reaches of hell. Rather, we can be a modern Virgil,¹³⁷ who, through our developed practical wisdom and a touch of grace, can lead the American populace up to Paradiso,¹³⁸ up to our own golden city on a hill. If used wisely and creatively, the law has within it the power and potential to implement the systemic reforms necessary to reshape America into the "champion and vindicator of liberty" that John Adams once promised she would be.¹³⁹ Such a course will not be without its challenges and it certainly will not come easy. But as Virgil once counseled Dante, "Here must all distrust be left behind, here must all cowardice be ended."¹⁴⁰ For it is only through the rejection of our fears and doubts, that great things can be done.

137. In Dante's *Divine Comedy*, Virgil, the ancient poet, plays guide to Dante, the poet and pilgrim, who has lost his way in the "middle of the journey" of his life. See ALIGHIERI, *supra* note 1, at 23.

138. Dante's end journey in the *Divine Comedy*. See DANTE ALIGHIERI, *PARADISO* (John D. Sinclair ed. and trans., 1948).

139. See ARTHUR SCHLESINGER, JR., HUMAN RIGHTS AND THE AMERICAN TRADITION 384, in *THE AMERICAN ENCOUNTER*, *supra* note 25.

140. ALIGHIERI, *supra* note 1, at 47.