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Inviting Injustice: Why the Rhode Island Supreme Court Should Publish Opinions for All Criminal Case Decisions

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Comments

Inviting Injustice: Why the Rhode Island Supreme Court Should Publish Opinions for All Criminal Case Decisions

INTRODUCTION

The Justices of the Rhode Island Supreme Court select which of their cases will become published opinions and which will not.¹ The rationale of the decisions made by each of the five justices is

1. Pursuant to section 8-1-3 of the Rhode Island General Laws, the Rhode Island Supreme Court “shall render written opinions in all cases decided by it wherein points of law, pleading, or practice, have arisen which are novel or of sufficient importance to warrant written opinions.” R.I. GEN. LAWS § 8-1-3 (2002). All such opinions are published. The Rhode Island Supreme Court makes a distinction between such opinions, which are written for cases decided by the court en banc after the submission of briefs and oral arguments by the parties, and orders. Article I 12A of the Rhode Island Supreme Court Rules provides that parties involved with an appeal to the supreme court may be made to appear before a single justice of the court for a conference, after which the justice may issue an order requiring the parties to show cause why the issues raised by the appeal should not be decided via a “show cause argument.” Such an argument in a criminal case is heard either “by the full court or by as many members of the court as are available.” R.I. SUP. CT. R. ART. I 12A(5) (2002). After the show cause argument, the court may issue an order or opinion reversing or modifying the judgment, remanding the case to the trial court for further proceedings, or dismissing the appeal, which is what occurred in *State v. Gonsalves*, No. 2000-256-C.A. (R.I. Feb. 8, 2002). Such an order may or may not be published, which is decided by the justices in a private conference. Also important to note is Article I 16(h) of the Rhode Island Supreme Court Rules, enacted in 1998, which states, “Unpublished orders will not be cited by the court in its opinions and such orders will not be cited by counsel in their briefs. Unpublished orders shall have no precedential effect.” For the sake of simplicity, throughout this Comment the term “decisions” will be used to refer to all cases decided and disposed of by the Rhode Island Supreme Court.

unknowable for certain,² but in at least one case, *State v. Gonsalves*,³ the court opted to not publish its order for a criminal case decision in which it arguably disregarded the law of the United States Constitution as interpreted by the United States Supreme Court.

This Comment will argue that, in *Gonsalves*, the Rhode Island Supreme Court erred by failing to grant the defendant a new trial based on his claim that he had been denied his Sixth Amendment right to cross-examine a key prosecution witness about her potential bias against him. This Comment will also point out what may be more disturbing – that in its unpublished order⁴ the court did not even take up this constitutional issue.

One purpose of this Comment is to bring to light an instance in which the Rhode Island Supreme Court fell short of meeting its duty to the people of the State of Rhode Island by (1) failing to give adequate consideration to a case with clear implications for citizens' right to a fair trial and (2) electing to withhold its order in *Gonsalves* from public scrutiny by not publishing it. Another, more broad, purpose of this Comment is to encourage greater accountability on the part of the Rhode Island Supreme Court and its decisions through such public scrutiny. In an effort to move toward that ultimate end of accountability, as well as for other reasons discussed within, it is the thesis of this Comment that the Rhode Island Supreme Court should publish opinions for all of its criminal case decisions.⁵

2. Justice Robert G. Flanders, Jr. of the Rhode Island Supreme Court has stated that all criminal case decisions by the court are not published so as not to "clutter up the law books" with case opinions that rely on settled law and thus merely repeat what has been said many times before in published opinions. Interview with Robert G. Flanders, Jr., Associate Justice, Rhode Island Supreme Court, in Providence, R.I. (Nov. 20, 2002). Justice Flanders also stated that the factors taken into consideration when the justices decide whether a given case will yield a published opinion or order basically hinge on what, if any, precedential value the case would likely have. *Id.* He further stated that it is not only for the efficiency of the court that the court limits its published opinions, but also for the ease and efficiency of practicing attorneys who should not have to spend time reading cases that have no value beyond deciding the case for the parties involved. *Id.*

3. No. 2000-256-C.A. (R.I. Feb. 8, 2002) [hereinafter *Gonsalves*].

4. See *infra* text accompanying note 37.

5. There is quite a bit of case law, legislative history and scholarly material on a related, but distinct, discussion regarding the citability, non-citability, and potential precedential value of unpublished opinions. Though many of the arguments in this Comment may also be applicable to that related discussion, and

The question must be asked, why advocate publication of opinions for all criminal case decisions, but not civil? Rhode Island's court system has just one appellate court, its supreme court. There are just five justices on the Rhode Island Supreme Court. These five justices likely would not be able to bear the workload that would accompany the implementation of a system in which they are required to write a publishable opinion for every decision they make.⁶ Therefore, although as former United States Supreme Court Chief Justice Warren Burger once pointed out, "[c]onvenience and efficiency are not the primary objectives – or the hallmarks – of democratic government . . .,"⁷ if requiring publication of an opinion for every decision of the Rhode Island Supreme Court would be either impossible or crippling to the judicial system of the State of Rhode Island, then it should not be undertaken. Though publication of opinions for all Rhode Island Supreme Court decisions might be the ideal situation, it is by necessity that this Comment herein advocates the publication of opinions for all criminal cases decided by the Rhode Island Supreme Court.

There are also basic differences between criminal and civil cases that lead to this Comment's advocacy for publication of opinions for all criminal but not all civil case decisions. First, criminal cases are different from civil cases because of the potential in criminal cases for the oppression of an individual or class of individuals by the government, by bringing charges against and prosecuting that individual or class of individuals. Second, criminal charges brought against an individual bring with them the possibility of imprisonment. The taking of a person's liberty (or even in some states and the federal system a person's life, though not in Rhode Island) is inherently a greater deprivation than the taking of a person's property, which may happen as a result of a civil judgment. Third, there is a stigma attached to being charged with and/or convicted of a crime that is not equaled in the civil context. When a person has a criminal record it will likely follow that person forever and become a factor in every part of his life. A civil judgment

though for many reasons similar to those discussed herein it seems likely that unpublished opinions should be citable (though not binding as precedent), that is not the topic of this Comment.

6. As an aside, it is arguable, and possibly even likely, that the State of Rhode Island is in need of an intermediate appellate court. That is also a topic for another article, however.

7. *INS v. Chadha*, 462 U.S. 919, 945 (1983).

against an individual or a corporation simply does not typically engender the same degree of social disapproval or stigma.

Part I of this Comment, an analysis of *State v. Gonsalves*, provides a real criminal case as background for Parts II and III, which discuss why all Rhode Island Supreme Court criminal case decisions should yield published opinions. Part II, in light of this Comment's perceived goals of a criminal justice system, argues that all criminal case decisions should yield published opinions because every case that comes before the Rhode Island Supreme Court has precedential value, since any case may be factually comparable to another and, thereby, be valuable. Also, although unpublished orders are not citable by attorneys as precedent, trial judges may be tempted to use unpublished orders as a type of unofficial precedent, in an effort to ensure that their decisions at the trial level are not overturned on appeal. Part II also presents what may be the strongest argument for publication of opinions for all Rhode Island Supreme Court criminal case decisions – to control the quality, the thoughtfulness, the accurateness, and, ultimately, the legal correctness of those decisions.

Part III discusses two policy concerns of the State of Rhode Island. It posits that publication of opinions for all criminal case decisions will go far towards fostering both the appearance and the reality of a much-needed open and accessible government in the State of Rhode Island, and it highlights the idea that the Rhode Island Supreme Court, because of the size of its state and its practice of publishing opinions for the majority of its criminal case decisions already,⁸ is in a unique position to be able to publish opinions for all of its criminal case decisions, in the process acting as an example of open and accessible government for other states and court systems. This Comment concludes with some thoughts on the ever-elusive idea of justice and how it is defined and achieved.

I. *STATE V. GONSALVES*

The purpose of the discussion of *State v. Gonsalves* at both the trial and appellate levels is to provide an example case as background for the assertion that all Rhode Island Supreme Court

8. See *infra* Appendix.

criminal case decisions should yield published opinions.⁹ There are two main issues that arise from the trial court's ruling that the defendant could not introduce evidence relevant to the bias of the complaining witness. The first is a Rhode Island Rules of Evidence issue, and the second is a federal constitutional issue. Both of these issues should have been considered, but were not, by the trial court and by the Rhode Island Supreme Court.

It is particularly important to discuss the supreme court's inattention to the constitutional issue as a matter that should be of concern to the people of Rhode Island. In theory the Rhode Island Supreme Court serves as an intermediate appellate court when it comes to deciding constitutional issues. However, the United States Supreme Court agrees to hear and decide so few cases that the Rhode Island Supreme Court effectively serves as a court of last resort not only on state issues, but also, usually, on constitutional issues.

A. *The Trial*

The facts of this case were in dispute at the trial in December of 1999, and the disparities between the defendant's story and that of the complaining witness will not, and cannot, be resolved here. This account is an attempt to frame the facts of the case in a way that (1) both the defendant's version and the complaining witness's version of the events of October 9, 1998 will be clear and (2) the reader will have the opportunity to evaluate the key issues being discussed with respect to this case in their proper context.

Wayne DaRosa Gonsalves and Robin Carter began dating in 1994.¹⁰ By 1998 they were living together in Providence and were making plans to marry.¹¹ However, their relationship ended on October 8, 1998 when they had an argument and Carter told Gonsalves to move out of their apartment.¹² The next morning Carter obtained a restraining order against Gonsalves, claiming that he had assaulted her three weeks earlier.¹³ That same day Carter

9. No stance is taken in this Comment as to whether the defendant in *State v. Gonsalves* was guilty or not guilty. It is not the verdict of the jury with which issue is being taken, but the processes and rulings delivered at trial and on appeal.

10: *Gonsalves*, *supra* note 3, at 1.

11. *Id.*

12. *Id.*

13. *Id.*

contacted Gonsalves to arrange for him to pick up his belongings from the apartment, and Gonsalves told her that he would be there by 5:30 p.m.¹⁴

Upon arriving at the designated time, Gonsalves entered the apartment and began to pack his belongings and carry them to his vehicle.¹⁵ While he was collecting his belongings, he and Carter were engaged in what both parties agreed was a heated argument.¹⁶ At this point, Carter's and Gonsalves's stories diverged. Carter claimed that Gonsalves assaulted her by grabbing her by the neck and pinning her up against a wall until she was able to break free and run away.¹⁷ Gonsalves claimed that no such thing happened and that, while he was in an argument with Carter, he did not come into physical contact with her in any way.¹⁸

As a result of Carter's accusation of assault against Gonsalves, he was criminally charged with and tried for simple domestic assault.¹⁹ The issue to be discussed in this Comment arises from Gonsalves's contention that Carter completely fabricated the assault story. Gonsalves claimed that Carter invented the assault story because after a previous incident where Carter smashed Gonsalves's windshield with a baseball bat she had pled *nolo contendere*, or no contest, to a charge of domestic malicious damage, was placed on probation for one year, and was required to attend domestic violence counseling.²⁰ Most importantly, Gonsalves also contended that during the time Carter was attending the domestic violence counseling she repeatedly made statements to the effect that she wished that he had to go to domestic violence counseling as well.²¹

Prior to the trial, the court determined that Gonsalves's attorney would not be allowed to cross-examine Carter regarding this previous incident in order to establish an evidentiary basis for the claim that Carter was biased against the defendant and concocted

14. Pre-Briefing Statement of the Defendant-Appellant at 4, *State v. Gonsalves*, No. 2000-256-C.A. (R.I. Feb. 8, 2002) (on file with author).

15. Trial Record at 150, *State v. Gonsalves*, C.A. No. P3/98-4505A (R.I. Super. Ct. filed June 13, 2000).

16. *Id.* at 29, 149.

17. *Gonsalves*, *supra* note 3, at 2.

18. Record at 184, *Gonsalves* (No. P3/98-4505A-C.A.).

19. *Gonsalves*, *supra* note 3, at 2.

20. Record at 7-8, *Gonsalves* (No. P3/98-4505A-C.A.).

21. *Id.* at 8.

her story of assault. The trial transcript relevant to this issue reads as follows:²²

THE COURT: Now, the criminal record of the complaining witness. I understand that there is no 609²³ testimony that is being offered; that what is being offered, instead, is evidence in accordance with 404(b).²⁴ Am I correct about that, counsel for the State?

PROSECUTION: Correct, Your Honor.

THE COURT: And counsel for the defendant, who would be seeking to offer this evidence, am I correct that you'd be offering it under 404(b), not under 609?

DEFENSE: Given that choice, yes, 404(b).

THE COURT: So you're talking about a prior bad act, not a conviction –

DEFENSE: Not a conviction.

THE COURT: —with a sentence. All right. And as I understand it, several years earlier, there was a charge of domestic assault, a simple assault.

PROSECUTION: It was domestic mal. damage.

THE COURT: Domestic.

PROSECUTION: Domestic malicious damage.

THE COURT: Domestic malicious damage, with the complaining witness, or the victim so to speak being the plaintiff

22. The entire portions of both the trial court transcript and the supreme court order that are relevant to the issues discussed in this Comment are included within. This is both because they are not overly lengthy and because it is important that the reader have the opportunity to read the discussions of the issues in the trial and supreme courts in their entirety and to see for herself the scarcity of attention paid to the constitutional issue.

23. Rule 609 of the Rhode Island Rules of Evidence states:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record. "Convicted of a crime" includes (1) pleas of guilty, (2) pleas of nolo contendere followed by a sentence (i.e. fine or imprisonment), whether or not suspended and (3) adjudications of guilt.

R.I. R. EVID. 609(a). Robin Carter had not been convicted of a crime as defined in Rule 609, so this rule was not applicable to the admissibility of her criminal record.

24. Rule 404(b) of the Rhode Island Rules of Evidence states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or to prove that defendant feared imminent bodily harm and that the fear was reasonable.

R.I. R. EVID. 404(b).

[sic] herein, and the defendant being the victim in that matter, sort of the reverse, victim and perpetrator there. Was counseling ordered as a result?

PROSECUTION: I believe she actually received a year's probation and domestic violence counseling.

THE COURT: She did?

PROSECUTION: Which would still not be a conviction under 409 purposes.

THE COURT: 6 –

PROSECUTION: 609, excuse me.

THE COURT: I'm talking about 404(b), here. Under 404(b), I am unclear, or under 608,²⁵ I guess is really what you'd be moving it under, I'm unclear as to how it falls within the purview of any rule of evidence, since you're not offering it under 609.

Can you tell me how it falls in – give me your rule and give me your argument.

DEFENSE: I'm sorry, I can't give you the rule.

THE COURT: Tell me what – if you don't know the rule number, tell me what you think. Why does it come in, and I'll match it up to some rule.

DEFENSE: I think it comes in because it shows bias; bias by the complaining witness against my client, her inclination to color her testimony against him in this case. The evidence that they're [sic] seeking to bring in is not so much the prior malicious damage, but the fact she had to go to domestic violence counseling, she was upset about that and had said to my client, at least on one occasion, that something to the effect: How would you feel if you had to go through it? And based on that –

THE COURT: I'm sorry. Sheriff.

THE SHERIFF: Yes.

25. Rule 608 of the Rhode Island Rules of Evidence states:

Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, or, in the discretion of the trial judge, evidence of prior similar false accusations, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which the witness being cross-examined has testified.

R.I. R. EVID. 608(b).

THE COURT: The jury is coming, so we'll have the two people move. Hold on. Sheriff, hold one moment, please. Why don't we have – yes, exactly. You're a student, right?

FROM THE ARRAY: Yes.

THE COURT: You're committing yourself to sit here during the impanelment; is that your pleasure?

FROM THE ARRAY: Yes.

THE COURT: Very well.

DEFENSE: It goes to bias.

THE COURT: Why don't you take one seat away – stay where you are. The student. Move one away. I have two people moving. The student, move. There you go. So it doesn't look like you're together. I don't want to give the wrong impression, and I'll explain to the jury why she is sitting there, just because I don't want to confuse anybody.

Well, it would seem to me, Rule 608 goes to evidence of character and conduct of the witness, and I do not see that specific instances of conduct of the witness for purposes of supporting or attacking the credibility of that witness, would be admissible in the discretion of the trial justice.

Evidence of prior similar, false accusations may not be proven by extrinsic evidence. They may, however, in the discretion of the Court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination. This is not a situation where she had previously accused him of similar conduct.

We're talking about something totally different. And we're talking – I don't think that – I think this is remote, and I'm going to exclude it under 403 as any probative value would be substantially outweighed by the prejudice, and I know of no rule under which it would be admissible.

Was there any other issue? Yes? No? There was nothing else. I think I took care of everything.²⁶

First, in this exchange the judge asked the defense counsel for a rule of evidence with which the cross-examination evidence could be admitted. However, assuming that the evidence was relevant, then the evidence was presumptively admissible unless the opponent of the evidence, here the prosecution, provided a reason why the evidence should not be admitted.²⁷ The prosecutor was never

26. Trial Record at 6-9, *State v. Gonsalves*, C.A. No. P3/98-4505A (R.I. Super. Ct. filed June 13, 2000).

27. R.I. R. Evid. 402. Rule 402 states:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of Rhode Island, by

asked for, nor did she offer, a reason why the evidence should not be admitted.

Second, the evidence was relevant. The Rhode Island Rules of Evidence define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."²⁸ The "any tendency" standard for admissibility is a low bar for a proponent of evidence to meet. The evidence that the defendant sought to have admitted did have some tendency to lead a jury to think it was more probable that the complaining witness was fabricating her story of assault than it was without the evidence, which was certainly a fact of consequence to the determination of the case. Therefore, it was relevant.

Third, the judge focused on and assumed that the evidence was being offered as evidence of character. However, the defense attorney's argument was that the purpose of the evidence was to show that the complaining witness was biased against the defendant and had fabricated her story, not to show that because the complaining witness had been arrested for domestic malicious damage she was a bad person and thus should not be believed.

Having been denied admission of the evidence of Carter's potential motive to fabricate the story of assault, Gonsalves was convicted of simple domestic assault and placed on probation for one year.²⁹ Although the trial judge had the responsibility for admitting or excluding the proffered evidence, trial judges can make mistakes. Rulings on evidentiary issues can be made quickly, as the trial judge also has the responsibility to control her courtroom and move along cases on her docket in a rapid fashion. This is one reason why it is necessary for all criminal defendants to have the right to appeal convictions to a higher court. Gonsalves did exercise that right to appeal his conviction to the Rhode Island Supreme Court. In that appeal, Gonsalves's appellate counsel fully briefed the Sixth Amendment Confrontation Clause issue regarding the poten-

Act of Congress, by the General Laws of Rhode Island, by these rules, or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Id.

28. R.I. R. EVID. 401.

29. *Gonsalves*, *supra* note 3, at 2.

tial bias of the complaining witness,³⁰ yet in its unpublished order of February 8, 2002 the Rhode Island Supreme Court did not address this issue.³¹

B. *The Rhode Island Supreme Court's Review of the Case*

Rule 12A of Article I of the Rhode Island Supreme Court Rules provides that parties of an appeal to the supreme court may be made to appear before a single justice of the court for a conference, after which the justice may issue an order requiring the parties to show cause why the issues raised by the appeal should not be decided after hearing a "show cause argument."³² Such an argument in a criminal case is heard either "by the full court or by as many members of the court as are available."³³ After the show cause argument, the court may issue an order or opinion reversing or modifying the judgment, remanding the case to the trial court for further proceedings, or dismissing the appeal.³⁴ In the appeal of *State v. Gonsalves*, the supreme court dismissed Gonsalves's appeal after hearing a show cause argument and being presented with briefs for both parties.³⁵

The portion of the Rhode Island Supreme Court's order relevant to this issue reads as follows:

The defendant first argues that the trial justice erred by refusing to allow him to introduce evidence about a prior domestic dispute with Carter that occurred some years before the fracas in this case. Following that incident, Carter had been charged with and convicted of domestic malicious damage for breaking the defendant's windshield.³⁶ She was required to undergo domestic violence counseling. Before trial

30. See Pre-Briefing Statement of the Defendant-Appellant at 4, *State v. Gonsalves*, No. 2000-256-C.A. (R.I. Feb. 8, 2002) (on file with author).

31. See *infra* text accompanying note 37.

32. R.I. SUP. CT. R. ART. I 12A(5).

33. *Id.*

34. In addition, anytime during the show cause calendar process, the court may decide to move a case over for full briefing and argument before the entire court. *Id.*

35. *Gonsalves*, *supra* note 3, at 6.

36. The Rhode Island Supreme Court may have made an error in stating that Robin Carter had been convicted of domestic malicious damage. She had not, at least not as defined in Rhode Island Rule of Evidence 609. She had pled *nolo contendere*, or no contest, to the charge of domestic malicious damage, and because she received neither prison time nor a monetary fine her plea to the charge did not qualify as a conviction under Rhode Island law. See *supra* note 23.

on the instant charge, the trial justice denied the defendant's motion in limine to admit this evidence and also refused to allow the defendant to speak of it during his testimony.

Relevant evidence is evidence that tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." R.I.R.Evid. 401. It is well-settled that questions concerning the admissibility of evidence on the grounds of relevancy are left to the sound discretion of the trial justice, and this Court will not disturb such a ruling absent a clear abuse of discretion. *State v. Tassone*, 749 A.2d 1112, 1117 (R.I. 2000) (citing *State v. Gabriau*, 696 A.2d 290, 294 (R.I. 1997)).

A trial justice may certainly preclude by pretrial ruling pursuant to a motion in limine, or later during trial, that counsel's proposed line of questioning if it is not relevant to the trial issue, or if the proposed questioning, even if relevant, is outweighed by any of the reasons prescribed in Rule 403 of the Rhode Island Rules of Evidence. *State v. Oliveira*, 730 A.2d 20, 24 (R.I. 1999).

Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial justice's Rule 403 ruling is reviewed only for an abuse of discretion. *State v. Martinez*, 651 A.2d 1189, 1193 (R.I. 1994). In this case, Carter's domestic malicious damage charge occurred several years before trial and was unrelated to the defendant's trial. The evidence largely was irrelevant and primarily constituted an attempt by the defendant to show that Carter's motive for making the instant complaint was to get even with him. The probative value of the years-earlier incident clearly was determined to be outweighed by its prejudicial nature, and the trial justice properly acted within her discretion to exclude this evidence.³⁷

The Rhode Island Supreme Court did not discuss the constitutional issue argued by Gonsalves's attorney on appeal, despite the proclamation in the Constitution's Supremacy Clause that "the Judges of every State shall be bound" by the Constitution of the

37. *Gonsalves*, *supra* note 3, at 2-4.

United States.³⁸ Dissimilar to the analysis undertaken by the Rhode Island Supreme Court, this case can be analyzed on a purely constitutional level, leaving aside the rules of evidence, because the Constitution is the supreme law of the land.³⁹

In all criminal prosecutions, the accused has the right to be confronted with the witnesses against him.⁴⁰ This Sixth Amendment right is held by defendants in state criminal proceedings as well as federal.⁴¹ A primary interest secured by the Sixth Amendment's confrontation clause is the right of the accused to cross-examine the witnesses testifying against him.⁴² "Cross-examination is the right of the party against whom the witness is called, and the right is a valuable means of . . . testing the . . . impartiality . . . and integrity of the witness."⁴³ Not only is it a right, but "in the context of our adversary system, cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth.'⁴⁴ And truth, after all, or "the pursuit of factually accurate outcomes,"⁴⁵ is the object of our adversarial system as a whole.

Cross-examination of a witness regarding possible bias against a defendant, as the defense counsel desired to undertake in *State v. Gonsalves*, is a constitutional issue that has been treated as paramount to a fair trial by the United States Supreme Court.

A . . . particular attack on the witness'[s] credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand We have recognized that the exposure of a witness'[s] motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.⁴⁶

Defense counsel in *Gonsalves* sought to do just that – to expose the complaining witness's motive for testifying against the defendant.

38. U.S. CONST. art. VI, § 1, cl. 2.

39. *Id.*

40. U.S. CONST. amend. VI.

41. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

42. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965).

43. *The Ottawa*, 70 U.S. (3 Wall.) 268, 271 (1865).

44. RONALD J. ALLEN ET AL., EVIDENCE: TEXT, PROBLEMS, AND CASES 464 (Aspen 2002) (quoting 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 32 (James Chadbourn ed., 1974)).

45. *Id.* at 155.

46. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

The trial judge prohibited this "proper and important function" when she disallowed questioning that would establish the possible factual basis for the complaining witness to falsify her testimony.

As in *Davis v. Alaska*,⁴⁷ a leading confrontation clause case, the defense counsel in *Gonsalves* was unable to introduce the necessary facts which would illustrate that the witness might have been biased.⁴⁸ In *Davis*, the defendant was convicted of grand larceny and burglary for stealing a safe from a bar, and his conviction was affirmed by Alaska's highest court.⁴⁹ The United States Supreme Court granted certiorari to rule on the Alaska Supreme Court's evaluation of the adequacy of the scope of the defendant's cross-examination of a witness.⁵⁰ Richard Green was a crucial witness for the prosecution, testifying at trial that he had seen the defendant, holding a crowbar, beside a car on the side of the road.⁵¹ The stolen safe was later discovered at the spot in the road where Green claimed to have seen the defendant.⁵² The defendant's counsel sought to cross-examine Green about possible bias in his testimony, because he had a juvenile record and was on probation at the time the police questioned him about the safe.⁵³ The defense counsel wanted to argue that Green had implicated the defendant out of fear that he would be implicated himself.⁵⁴ "Not only might Green have made a hasty and faulty identification . . . to shift suspicion away from himself . . . , but Green might have been the subject of undue pressure from the police and made his identifications under fear of possible probation revocation."⁵⁵ The Court stated,

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's

47. 415 U.S. 308, 316 (1974).

48. *See id.* at 318.

49. *Id.* at 314.

50. *Id.* at 315.

51. *Id.* at 310.

52. *Id.*

53. *Id.* at 311.

54. *Id.*

55. *Id.*

testimony which provided “a crucial link in the proof . . . of petitioner’s act.”⁵⁶

The Court also stated that although the defense counsel was allowed to ask Green whether he was biased, counsel was not allowed to make a factual record from which to argue *why* Green might have been biased.

On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless attack on the credibility of an apparently blameless witness [I]t seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.⁵⁷

Similarly, the defense counsel in *Gonsalves* should have been allowed to expose the facts from which the jury could draw inferences relating to the reliability of the key prosecution witness, Robin Carter, so as to not appear to be making a baseless attack on her credibility.

The United States Supreme Court continued to emphasize the importance of allowing a defendant sufficient cross-examination of key prosecution witnesses in *Olden v. Kentucky*.⁵⁸ The defendant Olden was indicted on charges of kidnapping, rape, and forcible sodomy and convicted of forcible sodomy.⁵⁹ The pivotal witness in the case was the alleged victim Matthews, who claimed that on the night in question the defendant had forced her to have sex with him.⁶⁰ Testimony at trial established one fact upon which both parties agreed, that Matthews’s boyfriend Russell had seen Olden drop her off at the end of the night.⁶¹ The defendant sought to argue his theory of the case – that Matthews had concocted the rape allegation when Russell saw her exiting Olden’s car to avoid endangering her relationship with Russell.⁶² However, the defendant was prevented from impeaching Matthews regarding the fact

56. *Id.* at 317 (quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)).

57. *Id.* at 318.

58. 488 U.S. 227 (1988).

59. *Id.* at 228, 230.

60. *Id.* at 228.

61. *Id.*

62. *Id.* at 230.

that at the time of trial her relationship with Russell had continued to the point where she was indeed still in a relationship with Russell and was living with him.⁶³ The trial court held, and the Kentucky Court of Appeals affirmed, that the probative value of the evidence in question was outweighed by the possibility of unfair prejudice against Matthews.⁶⁴ The trial court stated that to have admitted into evidence the fact that Matthews, a white woman, was living with Russell, who was black, would have created extreme prejudice against Matthews.⁶⁵

The United States Supreme Court criticized the Kentucky Court of Appeals, because "without acknowledging the significance of, or even advert[ing] to, petitioner's constitutional right to confrontation . . . [it] held that petitioner's right to effective cross-examination was outweighed by the danger" of prejudice.⁶⁶ The Rhode Island Supreme Court made the very same mistake in *Gonsalves*. The courts in both cases speculated as to the possible effect of jurors' biases against the witnesses to attempt to justify the exclusion of cross-examination with strong potential to demonstrate the falsity of testimony that was crucial to the prosecutions' cases.⁶⁷

Trial judges do have wide latitude "to impose reasonable limits on . . . cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant."⁶⁸ However, none of those issues was present to a significant degree in *Gonsalves*. The danger of prejudice, which as previously established means the possibility of the jury making a decision in the case on an improper basis, was minimal. Possible improper bases, based on the excluded evidence, upon which jurors could have made a decision, are (1) the possibility that the jurors would decide to acquit the defendant because, although they thought the defendant was guilty, they also thought that the complaining witness, having been convicted of domestic malicious damage, did not deserve the protection of the law due to a completely innocent victim, and (2) the possibility that the jurors would disbelieve the complaining

63. *Id.*

64. *Id.*

65. *Id.* at 231.

66. *Id.* at 232.

67. *See id.*

68. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

witness because of her domestic malicious damage charge. Those scenarios were unlikely, and when compared to the high probative value of the excluded evidence it is clear that the probative value was not substantially outweighed by danger of unfair prejudice.

[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby “to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.”⁶⁹

Wayne Gonsalves stated such a violation of the Confrontation Clause in his appeal to the Rhode Island Supreme Court, but the court did not see fit to reverse Gonsalves’s conviction and grant him a new trial. In *Chapman v. California*,⁷⁰ the United States Supreme Court held that an error in limiting cross-examination requires reversal of the conviction unless it is found to be harmless beyond a reasonable doubt by the reviewing court.⁷¹ “[T]he constitutionally improper denial of a defendant’s opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis.”⁷²

Whether such error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness’s testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.⁷³

The error in *Gonsalves* was not harmless beyond a reasonable doubt. Without the testimony of the complaining witness the prosecution likely would not have had a case against Gonsalves. The testimony was not cumulative, as the complaining witness was the only person to claim to have witnessed the alleged assault. The only evidence corroborating the complaining witness’s story was

69. *Id.* at 680 (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

70. 386 U.S. 18 (1967).

71. *Id.* at 24.

72. *Van Arsdall*, 475 U.S. at 684.

73. *Id.*

that of a police officer who did not claim to have witnessed the assault, but instead testified to having seen red marks on the neck of the complaining witness shortly after the alleged assault.⁷⁴ Also, while the defense attorney was allowed to cross-examine the complaining witness on a variety of issues, he was not able to ask questions relevant to establishing that the complaining witness had fabricated the assault by the defendant in order to get back at him because she had been ordered to attend domestic violence counseling as a result of their previous confrontation. All together, the strength of the prosecution's case was not great, and the cross-examination of the complaining witness as to her motive to fabricate was an enormous part of the defendant's case, as the excluded questioning could reasonably have caused the jury to question whether the complaining witness fabricated her story. Therefore, Gonsalves's conviction should have been reversed and a new trial granted by the Rhode Island Supreme Court, based on the violation at trial of his Sixth Amendment right to a reasonable cross-examination of the prosecution's key witness, and because the constitutional error at trial was not harmless beyond a reasonable doubt.

This analysis of *State v. Gonsalves* will serve as a background for the following arguments on why the Rhode Island Supreme Court should publish opinions for all of its criminal case decisions. *Gonsalves* will be referenced throughout the remainder of this Comment to show how the arguments for publication have practical application and to show that there should be significant concern over the potential for injustice that now exists in the Rhode Island court system.

II. THE JUSTICE SYSTEM – WHY ALL CRIMINAL DECISIONS SHOULD BE PUBLISHED

This Part operates on the author's belief that the goal of any criminal justice system should be to secure justice for criminal offenders, for victims of crime, and for society as a whole. While any definition of justice is subjective, a transparent criminal justice system will more likely achieve justice, whatever one's meaning of that may be, than a system that is opaque.

74. Trial Record at 107-08, *State v. Gonsalves*, C.A. No. P3/98-4505A (R.I. Super. Ct. filed June 13, 2000).

A. *Every Judgment Has a Generative Power*

All Rhode Island Supreme Court criminal case decisions should yield published opinions, because, even if the substantive law that is applied in a given case is nothing novel, the facts of any case may have precedential value for a future factually similar case. Thus, though the statement of the law may not be precedent-setting, the facts of two cases may be so similar as to lead the parties or the court to conclude that the law applied in the first case should be applied in the second, as well.⁷⁵ Cases are not decided, and laws are not applied, in a vacuum, but only in the context of facts.

In a 1986 article on unpublished opinions, George Weaver, quoting in part Justice Benjamin Cardozo, said, "Every judgment has a generative power. It begets in its own image. Every precedent . . . has a directive force for future cases of the same or similar nature.' Law-making in this broader sense is especially important in appellate courts of last resort."⁷⁶ This broad sense of law making is one of the duties of the Rhode Island Supreme Court. Presumably, if a case substantially similar in its facts to *State v. Gonsalves* were brought in a Rhode Island court, the Rhode Island Supreme Court would want the new case to be decided correctly, or, in other words, to be decided consistently with the Rhode Island Supreme Court's statement of the law and its decision in *Gonsalves*. This would be logical because, although unpublished orders are not citable as precedent under Rhode Island law, the justices of the Rhode Island Supreme Court presumably want to see justice done through consistent application of the law.

Earl Warren, as Chief Justice of the United States Supreme Court, wrote in a case involving obscenity that the Supreme Court heard such cases "not merely to rule upon the alleged obscenity of a specific film or book but to establish principles for the guidance of lower courts and legislatures. Yet most of our decisions [in this area] have been given without opinion and have thus failed to fur-

75. However, as was established earlier, unpublished Rhode Island Supreme Court orders are not citable as precedent in Rhode Island courts either by the judge or by parties. R.I. SUP. CT. R. ART. I 16(h) (2002).

76. George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477, 481 (1986) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 21-22 (1921)).

nish such guidance."⁷⁷ The Rhode Island Supreme Court, as the highest, and in fact the only, appellate level court in its state, has an obligation to provide such guidance to the lower courts of the state. When looking for interpretation of the law of Rhode Island, there is nowhere else for federal courts, lower courts of Rhode Island, and practitioners to turn.

B. *Unpublished Decisions as Secret Precedent*

Closely related to the discussion in section A above is the argument that all criminal case decisions should yield published opinions, and thereby be citable, because of the possibility that unpublished orders will be adhered to as a type of unofficial precedent by lower court judges.⁷⁸ Trial court judges may treat unpublished orders as binding precedent, notwithstanding the prohibition of judges relying on such orders as precedent, in order to avoid having their decisions overturned on appeal.⁷⁹ For example, a Rhode Island Superior Court judge hearing a case similar to *State v. Gonsalves* may be tempted to look to the Rhode Island Supreme Court's order in *Gonsalves* for direction on how to rule on issues that arise in the new case. Whereas, as argued in section A, it is desirable to have the Rhode Island Supreme Court provide guidance about the law to the lower courts, as well as to have the lower courts follow that guidance, it is not desirable for this to happen when the parties to a case are neither aware of a lower court's adherence to an unpublished order nor allowed to analogize their case to or distinguish their case from such an order in their briefs and oral arguments.

In reality, a decision of a lower court judge to base a ruling on an unpublished order, even though it is not citable as precedent, to conform her ruling to what she believes is the current state of the law, would be a choice that is neither surprising nor necessarily flawed. Predicting how an appellate court would rule on an issue is, essentially, the job of a lower court. As stated more eloquently

77. *Jacobellis v. Ohio*, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting).

78. See generally *Weaver*, *supra* note 76 (arguing that because unpublished opinions have the same dispute settling capacity as published opinions, they should be citable as persuasive authority). Also, the reader should note that although the *Gonsalves* decision and many other decisions are not published, they are available at the courthouse to be read and/or copied by the public, including trial court judges.

79. See *id.*

by Justice Learned Hand, "I conceive that the measure of a lower court's duty is to divine, as best it can, what would be the event of an appeal in the case before it."⁸⁰ If this is, indeed, the duty of a lower court, then the lower court judge should have at her disposal all of the resources that might assist her in making such a determination, including *all* past decisions of the Rhode Island Supreme Court.

Also, a lower court judge should not have the burden that necessarily comes with knowing of a Rhode Island Supreme Court opinion yet at the same time knowing that she is not technically bound by that same opinion. Given this burden, lower court judges' awareness of both published and unpublished opinions may cause confusion and inconsistency in the lower courts as to what value to give the various opinions. One federal district court expressed similar dismay at this quandary: "Although [this] Court is mindful of the Fourth Circuit's admonition that [unpublished] memorandum decisions are not to be accorded precedential value, . . . the legal trend evinced by these four memorandum decisions, with all seven active judges participating in one or more of them, leads [this] Court to the conclusion that [the law laid out in these memoranda] is now the law in this circuit . . ." ⁸¹ Similarly, since the Rhode Island Supreme Court spoke as a single unit in its unpublished order in *Gonsalves*, a lower court judge would be justified in determining that what was written in the unpublished order is, in fact, the law in Rhode Island. By making this determination in the course of ruling on issues in a new case, the lower court judge would be fulfilling her judicial responsibility. However, she would also be depriving the parties in the new case of the opportunity to argue either for or against adherence to the unpublished order. As was exhibited in Part I, a party's opportunity to distinguish his case from an unpublished order could be crucial to the outcome of his case. After all, "persons should not be punished for the violation of a law 'not sufficiently promulgated,'" ⁸² and an unpublished order, like the one in *Gonsalves*, is

80. *Specter Motor Serv. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1944) (Hand, J., dissenting).

81. *Durkin v. Davis*, 390 F. Supp. 249, 254 (E.D. Va. 1975), *rev'd on other grounds*, 538 F.2d 1037 (4th Cir. 1976).

82. *Weaver*, *supra* note 76, at 487 (quoting JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 173 (1948)).

essentially this kind of law, because it has not been disseminated to the public.

C. *The Sacrificing of the Best Possible Legal Response*

All Rhode Island Supreme Court criminal case decisions should yield published opinions because a justice, knowing that he will not be personally signing an order and that the order will be neither published nor citable, will not be subject to the same quality control pressures as when he is writing an opinion that is to be published.⁸³ First, an opinion that is not published will not be subject to the same scrutiny by the legal community and by the public as an opinion that is published. Justice Robert G. Flanders, Jr. of the Rhode Island Supreme Court has noted that a judge's opinions that will not be published will "not tend to be as fully articulated, as pointedly researched, or as convincingly argued as they are when they have been embodied in a written draft . . . that the author has prepared for eventual publication."⁸⁴

Second, there may also be a need to prevent the court from concealing questionable decisions.⁸⁵ The court should not be able to hide a decision that may have been made in less than good faith or with less than legal accuracy from practitioners or from the public. If every decision is published as a full opinion, justices will know that every decision is subject to a critique by those people that are qualified to judge the judges. Third, there should be some concern over whether judges are taking sufficient responsibility for the opinions that originate in their chambers. While it is widely accepted as both necessary and proper to have a law clerk do the initial drafting of an appellate opinion, it is questionable whether a judge gives an opinion that is not to be published the same supervisory attention that he gives to an opinion that will be published and that he will sign personally.

Justice Flanders has also written, "The substance of appellate judging – providing the best possible judicial response to the legal

83. See Charles E. Carpenter, *The No-Citation Rule for Unpublished Opinions: Do the Ends of Expediency for Overloaded Appellate Courts Justify the Means of Secrecy?*, 50 S.C. L. REV. 235, 247 (1998) (arguing that the non-citability of unpublished opinions sacrifices the quality of appellate decisions).

84. Robert G. Flanders, Jr., *The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents Are Valuable*, 4 ROGER WILLIAMS U. L. REV. 401, 409 (1999).

85. See Carpenter, *supra* note 83.

problems posed by the cases and controversies that are appealed to courts of last resort – must never be sacrificed to appease the unslakable gods of collegiality and civility”⁸⁶ The Rhode Island Supreme Court’s “best possible judicial response” should also never be sacrificed for the sake of convenience or efficiency. However, it is quite possible, as evidenced by *State v. Gonsalves*, that this “best possible judicial response” is currently being sacrificed as a result of the Rhode Island Supreme Court’s policy regarding publication of opinions and orders. It is also quite possible, then, that it is time to change this policy.

III. PUBLIC POLICY CONCERNS OF RHODE ISLAND

Part II of this Comment discussed reasons for publication of opinions that may apply to any state or federal jurisdiction. This Part, with the uniqueness of Rhode Island in mind and for reasons that may not be as applicable to other states, discusses why Rhode Island both should and can publish opinions for all of its supreme court criminal case decisions.

A. *Rhode Islanders as Addicts and Abuse Victims – A Step Forward*

The Rhode Island Supreme Court’s adoption of a practice of publishing opinions for all of its criminal case decisions would be a small measure toward engendering much-needed public trust in and respect for Rhode Island’s government. Government in the State of Rhode Island has a reputation for corruption and secrecy.⁸⁷ In just the past two decades, Rhode Island has experienced a plethora of events involving corruption in state and city government.⁸⁸ Numerous elected officials have been convicted of crimes involving their offices, including former Pawtucket Mayor Brian Sarault, former Rhode Island Governor Edward DiPrete and former Providence Mayor Vincent “Buddy” Cianci.⁸⁹ Two members of the Rhode Island Supreme Court itself have resigned in the face

86. Flanders, *supra* note 84, at 423.

87. See Mark Sappenfield, *Legacy of Scandal Mars Rhode Island*, CHRISTIAN SCI. MONITOR, Apr. 11, 2001, § 1 at 3.

88. See Scott MacKay, *The DiPrete Case: A History of Public Malfeasance from Almeida to Zanni, Officials Sully State’s Reputation*, PROVIDENCE J., Dec. 12, 1998, at A17.

89. See *id.*

of revelations of unethical conduct and the prospect of impeachment: Chief Justice Joseph Bevilacqua in 1991 and Chief Justice Thomas Fay in 1993.⁹⁰

These instances of individual corruption, together with controversial situations like the collapse of the Rhode Island Share and Deposit Indemnity Corporation (RISDIC),⁹¹ the lack of adequate separation of powers among the three branches of Rhode Island government,⁹² and the three ring circus that has in recent years been the Rhode Island Ethics Commission,⁹³ have subjected Rhode Islanders to more than their fair share of public corruption and impropriety and have developed in Rhode Islanders a distrust of government and governmental officials, while at the same time instilling in them a tolerance for and sense of amusement in public corruption likely unmatched elsewhere. Edward Achorn, deputy editorial-pages editor of *The Providence Journal*, pointed out that Rhode Islanders “often seem not outraged, not even mildly disgusted, but, rather, delighted [by the corruption in Rhode Island]. ‘Only in Rhode Island,’ they sigh, with native pride, a twinkle in their eye.”⁹⁴ On the other hand, Achorn also compared Rhode Islanders to victims of spousal abuse.⁹⁵ “Rhode Islanders are quick with excuses and fond of hoping things will get better if they simply endure. When their politicians beat them, choke them and rob

90. See R.I. GEN. ASSEM., RHODE ISLAND HISTORY: CHAPTER IX, THE ERA OF REFORM, 1984-2000, at <http://www.rilin.state.ri.us/studteaguide/RhodeIslandHistory/chapt9.html> (last visited Mar. 13, 2003).

91. See *id.* RISDIC was the organization that insured state-chartered credit unions, and its failure in 1991, in which credit union and RISDIC officials were implicated, left thousands of Rhode Island depositors without the money they had saved in Rhode Island credit unions. *Id.* Governor Bruce Sundlun later signed legislation that created the Depositors Economic Protection Corporation, which was charged with taking over the assets of the failed credit unions and using the proceeds, in addition to borrowed state funds, to make the depositors whole. *Id.*

92. See Carl T. Bogus, *A Radical Decision by the Rhode Island Supreme Court*, 48 R.I. B.J. 13 (1999).

93. See Common Cause of Rhode Island, Key Issues: Ethics, at <http://www.commoncauseri.org/issues.html> (last visited Mar. 13, 2003). The Rhode Island Ethics Commission, which has in recent years become dominated by lawyers with political connections, has itself been the subject of numerous ethics complaints. *Id.*

94. Edward Achorn, *The Government We Deserve*, PROVIDENCE J., Nov. 19, 2002, at B5.

95. *Id.*

them, they laugh it off, cover up their bruises and insist that, deep down, those guys really love them.”⁹⁶

Publication of opinions for all criminal case decisions by the Rhode Island Supreme Court will not eliminate the persistent problem of unclean government in Rhode Island. It would, however, be a step in the direction of alleviating the sickness that seems to plague Rhode Islanders, Rhode Island’s government and Rhode Island’s public officials. Robert P. Hey, a native Rhode Islander and former senior editor of the *Christian Science Monitor*, remarked, “Addicts often require multiple efforts to kick their addictions, and Rhode Island, in my viewing, has been struggling with its habit for only 60 years or so.”⁹⁷ Transparency in the judiciary can help Rhode Islanders, especially Rhode Island public officials, to overcome their addiction to the soap-opera-like quality of corruption in government. Allowing for public scrutiny of the work of the state’s highest court, in which the current non-citability of unpublished opinions has been compared by one author to “the clang of a door being closed,”⁹⁸ can assist in bringing that transparency about.

The keeping of any government’s decision-making rationale from public scrutiny breeds distrust by the populace and should be avoided when possible. “[D]espite Rhode Island’s reputation and history as a haven for the contrary-minded, its highest court has largely functioned as a bastion of monolithic solidarity.”⁹⁹ This “bastion of monolithic solidarity” needs to have its doors thrown wide open, so people will both feel confident in and be informed about the workings of the court and their government as a whole.

B. *A Shining State upon a Hill*

Finally, it is likely that the above arguments will be met by questions concerning the practicality and feasibility of publication of opinions for all Rhode Island Supreme Court criminal case decisions. It is necessary to address these questions, because even those conceding that the above arguments for publication are convincing may doubt whether publication of opinions for all criminal

96. *Id.*

97. Robert P. Hey, *No Place Like Rhode Island*, *CHRISTIAN SCI. MONITOR*, May 5, 2002, § 1 at 11.

98. Carpenter, *supra* note 83, at 236.

99. Flanders, *supra* note 84, at 422.

case decisions is possible, due to either time or financial restrictions. In reality, however, these cost and time-consumption concerns in Rhode Island may pale in comparison to the same concerns in court systems where the output of criminal cases far exceeds that of Rhode Island.¹⁰⁰ Rhode Island's may be one court system where publication of opinions for all criminal case decisions is not only desirable, but also feasible. First, the small size of the state¹⁰¹ and the reasonably light criminal caseload of the Rhode Island Supreme Court make publication of opinions for all criminal case decisions possible. The average annual number of criminal cases disposed of by the Rhode Island Supreme Court in the years 1997-2001 was approximately ninety-three cases.¹⁰² If every one of these disposed-of criminal cases were accompanied by a publishable opinion, that would require each justice to write eighteen or nineteen publishable criminal case opinions per year. Second, the Rhode Island Supreme Court already publishes opinions for the majority of its criminal case decisions,¹⁰³ so the additional writing burden on the justices and the additional financial strain on the court system will likely not be prohibitive.

Rhode Island, having the capability that many other states may not have to achieve publication of opinions for one hundred percent of its criminal case decisions, should take advantage of its small size by taking a large step toward open government and justice for all of its citizens. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."¹⁰⁴ Rhode Island should be that laboratory.

100. This is simply due to size and population. Rhode Island is, in fact, the smallest state in the United States by area, and among the smallest by population. THE 2002 WORLD ALMANAC AND BOOK OF FACTS 363 (Williams A. McGeeveran, Jr. ed., World Almanac Education Group 2001).

101. *Id.*

102. ADMIN. OFFICE OF STATE COURTS, STATE OF R.I., 2001 REPORT ON THE JUDICIARY 33 (2002). Criminal cases disposed of by the Rhode Island Supreme Court in the years 1997-2001 were as follows: 1997: 98 cases, 1998: 79 cases, 1999: 98 cases, 2000: 95 cases, 2001: 96 cases. *Id.* These criminal cases are appeals from Rhode Island Superior Court (trial level) criminal cases, of which the Rhode Island Superior Court disposed of 6,649 in 1997, 6,573 in 1998, 6,420 in 1999, 6,018 in 2000, and 6,212 in 2001. *Id.* at 34-35. See also *infra* Appendix.

103. See *infra* Appendix.

104. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

Going forward with instituting a policy of publishing an opinion for every Rhode Island Supreme Court criminal case decision is an opportunity that should be seized by the Rhode Island Supreme Court. It is an opportunity for Rhode Island to be a shining city upon a hill¹⁰⁵ in regards to the openness of its judiciary. Rhode Island can serve as an example for other states and the federal system to at least aspire to, whether or not they have the same capability to achieve complete publication of opinions for all criminal case decisions.

CONCLUSION

A couple of lessons can be drawn from *State v. Gonsalves* and from the Rhode Island Supreme Court's practice of not publishing opinions for all of its criminal case decisions. The first is relevant to proving the thesis of this Comment. It has been said that what a person does while no one is watching is the true measure of that person's character. If so, then is it also true that what a court does in its unpublished opinions is the true measure of a court's character? By failing to give the federal constitutional law issue in *State v. Gonsalves* adequate consideration, the Rhode Island Supreme Court treated the Sixth Amendment's Confrontation Clause as unimportant and created an appearance that the court may not have given a good faith effort when deciding this case, regardless of whether that is true. Considering the example of *State v. Gonsalves*, in which the Rhode Island Supreme Court failed to address a basic constitutional right, the court can no longer be allowed to operate as a clandestine institution outside of the watchful eyes of the public and the bar.

105. The idea of a city, state, or nation being a "shining city upon a hill" was first expressed by John Winthrop in 1630, when he "delivered a sermon . . . which contained this idea that the new colony of Massachusetts Bay would be an example to the world of . . . a peacefully interdependent and cooperative community They would, he said, be a shining 'city upon a hill' for all to see and all would follow their example." The University of Louisiana-Monroe, at <http://www.ulm.edu/~eller/amlit/focus/defs/city.htm> (Nov. 2, 2002). Since then, this idea of a "city upon a hill" has been endorsed as the ambition of the United States of America by people as diverse in ideology as Supreme Court Justice William Brennan and President Ronald Reagan. See Bradley C. Canon, Book Review, LAW & POL. BOOK REV. Nov. 1999, at 489-92, <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/michelman.htm>; President Ronald Reagan, Farwell Speech Broadcast to the Nation (Jan. 20, 1989), at <http://reagan.webteamone.com/speeches/farewell.cfm>.

The other lesson is that there are no small injustices. Although Wayne DaRosa Gonsalves's conviction was one for which he received only a year's probation, not a life sentence, and while there may be degrees of injustice whereby wrongly receiving a life sentence is arguably more unjust than receiving a year's probation, there can be no question that a line exists between justice and injustice, and that once that line is crossed any injustice is a harmful one to society. There is also a line between a system that results in instances of injustice and a system that institutionally invites injustice. While no system of laws can wholly eliminate aberrational instances of injustice, Rhode Islanders as a society cannot tolerate a system of laws that has institutionalized the creation of opportunities for injustice. It is the difference between the exception that proves the rule and the exception that swallows the rule. The rule must be justice, and one way to move toward achieving a greater measure of justice is to make government as open and transparent as possible. Publishing an opinion for every single criminal case decision made by the Rhode Island Supreme Court is a step toward transparency, and a step toward justice.

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APPENDIX¹⁰⁶RHODE ISLAND SUPREME COURT – MANNER OF DISPOSITION OF
CRIMINAL CASES IN 1997 – 2002

Disposition	1997	1998	1999	2000	2001	2002
Criminal Cases Disposed Of	98	79	98	95	96	n/a ¹⁰⁷
Published Opinions and Orders	79	56	55	61	68	64
Per-Curiam Opinions ¹⁰⁸	15	15	23	27	25	30
Signed Opinions ¹⁰⁹	34	25	21	29	34	26
Orders ¹¹⁰	30	16	11	5	9	8
Unpublished Decisions	19	23	43	34	28	n/a ¹¹¹

Disposition	Totals 1997-2001	Annual Averages 1997-2001
Criminal Cases Disposed Of	466	93.2
Published Opinions and Orders	319	63.8
Per Curiam Opinions	105	21
Signed Opinions	143	28.6
Orders	71	14.2
Unpublished Decisions	147	29.4

106. The numbers of criminal cases disposed of annually were taken from the 2001 Report on the Rhode Island Judiciary, p. 33, which is on file with the author and is also obtainable for no charge by contacting the Rhode Island Supreme Court by telephone at 401-222-3274. The remainder of the figures in this chart were gathered through the use of the legal research service Westlaw® at <http://www.westlaw.com>.

107. This data was not available at the time of publication, but can be obtained from the Rhode Island Supreme Court when it releases its 2002 Report on the Rhode Island Judiciary either in print or at <http://www.ricourts.com>.

108. Per Curiam opinions are opinions issued by the Rhode Island Supreme Court that are not individually signed by one or more justices, but instead represent the opinion of the Rhode Island Supreme Court as a whole.

109. Signed opinions are opinions issued by the Rhode Island Supreme Court that are written and signed by at least one justice representing a majority of the Court.

110. Orders are issued for cases summarily decided by the Rhode Island Supreme Court pursuant to the process described *supra* note 1. Orders do represent a majority decision of the court, but, like per curiam opinions, are not signed by the justices.

111. See *supra* note 105. The reader is now aware of one unpublished decision from 2002, *State v. Gonsalves*.

