RECENT DEVELOPMENTS

THE U.S. SUPREME COURT, 1990 TERM

INFERRING ACTUAL MALICE FROM ALTERED QUOTATIONS, *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991).

Since its landmark decision in *New York Times Co. v. Sullivan*,[1] the Supreme Court has grappled with the tension between the First Amendment and state defamation laws without providing a satisfactory reconciliation. At stake are the competing policies of promotion of public discourse and protection of individual reputation, each of which has shifted in relative importance over time. Initial Court concern for the preservation of public debate has given way to increased concern for the preservation of individual reputation. The Court's decision last term in *Masson v. New Yorker Magazine, Inc.*,[2] allowing the media to modify quotations as long as they do not "materially alter" the speaker's meaning, marks a retrenchment from the high point of public discourse jurisprudence in *Rosenbloom v. Metromedia, Inc.*[3] While at first glance the holding in *Masson* appears to extend latitude to the media, the holding actually creates an amorphous standard that will work to frustrate the press and public discourse.

The Court's opinion in *Sullivan* represented the first time that the First Amendment had been invoked to limit state defamation laws.[4] The decision set forth the doctrine of actual malice, under which certain classes of plaintiffs must meet a heightened evidentiary standard when bringing a defamation action against media defendants.[5] According to Justice Brennan's majority opinion in *Sullivan*,[6] the safeguard for First Amendment freedoms lies in a rule requiring a public official to

1. 376 U.S. 254 (1964).
2. 111 S. Ct. 2419 (1991).
3. 403 U.S. 29 (1971).
4. Before 1964, the Court subscribed to the view that defamatory language exceeded the scope of First Amendment protection. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (listing categories of speech that were not entitled to First Amendment protection); Beauharnais v. Illinois, 343 U.S. 250 (1952) (holding that libelous statements that defame groups are excluded from First Amendment protection).
5. *See Sullivan*, 376 U.S. at 280. The Court has acknowledged that the term "actual malice" "can confuse as well as enlighten." Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2430 (1991); *see also* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666 (1989) (listing cases critical of the term "actual malice").
6. Justice Brennan wrote the opinion of the Court. Justice Black, joined by Justice

prove "actual malice," defined as "knowledge of falsity or reckless disregard as to truth or falsity," when bringing a libel action against the media for publishing statements concerning his official conduct.[7]

Justice Brennan's opinion in *Sullivan* assessed the competing policy interests at stake and concluded in favor of those emanating from the First Amendment. He noted that "debate on public issues should be uninhibited, robust, and wide-open."[8] A decision against the press would frustrate this policy, because "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[9] Yet Justice Brennan's concern for individual privacy and reputation was also evident in the narrow scope of the holding: It would apply only to defamation cases brought by a public official concerning comments made by the press about his official conduct.

Libel cases in the wake of *Sullivan* were nearly uniform in their extension of protection to the media.[10] In 1965, the *Garrison v. Louisiana* Court made the need for a finding of actual malice applicable to criminal libel laws.[11] Two years later, in *Curtis Publishing Co. v. Butts*,[12] the Court extended the protection to communications about public figures who, while not elected officials, were "nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[13]

The majority opinion in *Time, Inc. v. Pape*[14] apparently went so far as to preclude a finding of actual malice from misquotations. The petitioners in *Pape* had published an abridged Civil Rights Commission report on police brutality without indicat-

Douglas, submitted a concurring opinion. Justice Goldberg, also joined by Justice Douglas, submitted an opinion concurring in the result.

7. *Sullivan*, 376 U.S. at 280.

8. *Id.* at 270.

9. *Id.* at 278.

10. For discussions of the changing status of defamation law vis-a-vis the First Amendment, see Joel D. Eaton, *The American Law of Defamation through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986); Sheldon W. Halpern, *Of Libel, Language, and Law:* New York Times v. Sullivan *at Twenty-Five*, 68 N.C. L. REV. 273 (1990); Symposium, *Defamation and the First Amendment: New Perspectives*, 25 WM. & MARY L. REV. 743 (1983).

11. 379 U.S. 64 (1965).

12. 388 U.S. 130 (1967).

13. *Id.* at 164 (Warren, C.J., concurring).

14. 401 U.S. 279 (1971).

ing that the summary of facts contained only allegations from a civil complaint. Although acknowledging that "[a]ny departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices,"[15] the Court nonetheless allowed the publication of the quotations without the qualifying statement.[16] The concern for open channels of debate had eclipsed the concern for strict factual accuracy.

This trend towards increased media latitude climaxed in *Rosenbloom v. Metromedia, Inc.*,[17] which involved allegedly defamatory statements made about a distributor of pornographic magazines. In rejecting the distributor's claims, a markedly divided Court proffered three different conceptions of *Sullivan*. Justice Brennan, writing for the three-justice plurality,[18] suggested that the requirement of actual malice be extended to encompass all statements of "public or general concern, without regard to whether the persons involved are famous or anonymous."[19] Justice Black, concurring in the judgment, went even further; he opined that the First Amendment granted an absolute immunity to the media from liability for defamation, subject to the restraints established in *Sullivan*.[20] In contrast, Justice Harlan, expanding upon his opinion in *Curtis Publishing*,[21] opted to dispense with the requirement of actual malice for defamatory statements made about private citizens.[22]

Cases since *Rosenbloom*, however, have focused on the protection of individual reputation. The Court in *Gertz v. Robert Welch,*

15. *Id.* at 286.

16. *Id.* at 290.

17. 403 U.S. 29 (1971).

18. Justice Brennan was joined by Chief Justice Burger and Justice Blackmun.

19. *Rosenbloom*, 403 U.S. at 44. Justice Brennan criticized the public figure-private figure plaintiff distinction as artificial, noting a growing blur in the distinction between government and private sector. Instead, Justice Brennan shifted the focus from the status of the complainant to the content of the statement. *Id.* at 41; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 361 (1974) (Brennan, J., dissenting).

20. *See Rosenbloom*, 403 U.S. at 62; *Sullivan*, 370 U.S. at 293 (Black, J., concurring) (voting to reverse on grounds of absolute immunity for media); ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 150-52 (1991) (discussing Black's *Sullivan* opinion). *Accord Gertz*, 418 U.S. at 356 (Douglas, J., dissenting) ("[T]he rights of free speech and of a free press were protected by the Framers in verbiage whose prescription seems clear.").

21. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

22. *See Rosenbloom*, 403 U.S. at 70 (Harlan, J., dissenting). Justice Harlan noted that the private individual generally had less access "to channels of communication sufficient to rebut falsehoods concerning him" than public officials. He felt, moreover, that the imposition of a duty of due care on the press would not subvert the freedoms of speech or press. *Id.*

Inc.[23] expressly rejected Justice Brennan's rationale in *Rosenbloom*, concluding that "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them."[24] The Court assessed the same policy considerations that Justice Brennan had in *Sullivan*, but this time arrived at a different result:

> This conclusion [allowing a less demanding standard than *Sullivan* in defamation suits by a private individual] is not based on a belief that the considerations which prompted the adoption of the [*Sullivan*] privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation.[25]

Subsequent decisions have balanced two variables: whether the claimant was a public or private figure and whether the statement addressed a public or private concern.[26]

The Court's most recent actual malice decision, *Masson v. New Yorker Magazine, Inc.*[27] represents a further retrenchment from *Rosenbloom* and a logical progression from the Court's decisions in *Hustler Magazine v. Falwell*[28] and *Milkovich v. Lorain Journal Co.*[29] The "material alteration" standard the Court announced is not, however, one that can be used with any certainty to determine whether the requisite knowledge of falsity for actual malice is present in a particular altered quotation. In addition, the *Masson* decision rejects several tests adopted by

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23. 418 U.S. 323 (1974).

24. *Id.* at 343. The Court did acknowledge, however, that stringent libel statutes might hamper public discourse: [P]unishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability . . . may lead to intolerable self-censorship. *Id.* at 340.

25. *Id.* at 348-49.

26. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (holding that false credit report statements are not a matter of public concern which would require a showing of actual malice); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (holding that where a newspaper published a speech of public concern about a private figure, the plaintiff has the burden of proving falsity); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (holding that a public figure cannot recover damages for intentional infliction of emotional distress without a showing of actual malice).

27. 111 S. Ct. 2419 (1991).

28. 485 U.S. 46 (1988).

29. 110 S. Ct. 2695 (1990) (declining to create a separate standard for statements of opinion).

the lower federal courts for the disposition of defamation claims without providing an adequate substitute.

Jeffrey M. Masson was a prominent, if iconoclastic, psychoanalyst who worked as Projects Director of the Sigmund Freud Archives. While at the Archives, Masson grew disenchanted with conventional Freudian theory and began to advance his own ideas. His well-publicized lectures, including one in which he decried the "sterility" of psychoanalysis, eventually precipitated his firing.[30] Janet Malcolm, a seasoned author and contributor to *The New Yorker*, conducted a series of interviews with Masson concerning his relationship with the Archives, forty hours of which Malcolm recorded on tape. Despite Masson's alleged concerns about the accuracy of Malcolm's rendition of his statements,[31] *The New Yorker* published the interviews in magazine form[32] and Alfred A. Knopf, Inc. later collected the interviews in the book *In the Freud Archives*.[33]

Masson brought suit in the federal District Court for the Northern District of California under state libel law, which afforded a cause of action where published statements exposed the plaintiff to "hatred, contempt, ridicule, or obloquy."[34] The court stated that to avoid summary judgment, a public figure such as Masson "must produce clear and convincing evidence that defendants knowingly and falsely published the alleged defamatory statements, or in fact entertained serious doubts as to the truth of the alleged statements, yet recklessly disregarded those doubts."[35] Analyzing the contested statements individually, the district court found that each was either a "rational

30. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1536 (9th Cir. 1989).

31. When Masson was contacted by a member of *The New Yorker*'s fact-checking department before the article's publication, Masson allegedly expressed concern at a number of perceived inaccuracies in the passages quoted. In one instance, Malcolm quoted Masson as calling himself an "intellectual gigolo," when he had in fact mused that he was "much too junior within the hierarchy of analysis" to be given much credence. *Masson*, 111 S. Ct. at 2426. A later portion of the article, discussing his forthcoming book THE ASSAULT OF TRUTH, contains Masson's characterization of himself as the "greatest analyst who ever lived." Masson had merely suggested, however, that his tenure at the Archives gave him a unique insight into Freudian theory. *See id.* at 2427-28. The other alleged misquotations are discussed at length in the Supreme Court's majority opinion. *See id.* at 2426-28.

32. *See The Annals of Scholarship: Trouble in the Archives*, THE NEW YORKER, December 5, 1983, at 59, December 12, 1983, at 60. Much of the two-part series contained ostensible first-person narratives—extensive statements set off in quotation marks and attributed to a particular party.

33. *See* JANET MALCOLM, IN THE FREUD ARCHIVES (1984).

34. CAL. CIV. CODE ANNO. § 45 (West 1982).

35. Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1398 (N.D. Cal. 1987).

interpretation" of the speaker's remarks[36] or a "proper exercise of literary license."[37] The court ultimately granted summary judgment in favor of the defendants.

The Ninth Circuit Court of Appeals affirmed the district court's decision. Examining the case law on libelous quotations, Judge Alarcon concluded that actual malice could be found only if the statements were wholly a product of the author's invention.[38] Judge Alarcon conceded that "author[s] may . . . under certain circumstances, fictionalize quotations";[39] however, actual malice could not be inferred from a statement that was a rational interpretation of an ambiguous remark or that did not "alter the substantive content" of an unambiguous statement.[40] Applying these tests, the Court of Appeals ruled that actual malice could not be inferred from the disputed quotations.[41]

In a spirited dissent, Judge Kozinski challenged the majority's reliance on the "rational interpretation" test:

> An unqualified quotation attributed to a third party is commonly understood to contain *no* interpretation; by using quotation marks the writer warrants that she has interposed no editorial comment, has resolved no ambiguities, has added or detracted nothing of substance.
>
> . . . It is this concealment—the use of quotation marks to deceive the reader about the author's editorial role—that libel law prohibits and the Constitution does not, in my opinion, protect.[42]

Judge Kozinski also questioned the underpinnings of the legal standard embraced by the majority, opining that the cases cited only supported the proposition that quotations could be altered in translation from a foreign language.[43] He suggested a

36. *Id.* at 1407. *Cf.* Bose Corp. v. Consumer's Union of the United States, 466 U.S. 485 (1984) (applying the rational interpretation test).

37. *Masson*, 686 F. Supp. at 1400.

38. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d. 1535, 1539 (9th Cir. 1989).

39. *Id.*

40. *Id.* (quoting Hotchner v. Castillo-Puche, 551 F.2d 910, 914, (2d Cir. 1977), *cert. denied sub nom.* Hotchner v. Doubleday & Co., 434 U.S. 834 (1977)).

41. With respect to the "intellectual gigolo" passage, the court agreed with the District Court that Malcolm had not altered the substantive content of Masson's remarks. In addition, it invoked the doctrine of "incremental harm," under which challenged statements that inflict little harm beyond the remainder of the publication are deemed non-actionable, in finding the passage non-defamatory. *Masson*, 895 F.2d at 1541; *see also* Herbert v. Lando, 781 F.2d 298, 310-11 (2d Cir. 1986), *cert. denied*, 476 U.S. 1182 (1986).

42. *Masson*, 895 F.2d at 1549-50 (Kozinski, J., dissenting).

43. *See id.* at 1554-58 (Kozinski, J., dissenting); *see also* Dunn v. Gannett New York

five-part inquiry for determining malice: Did the statement purport to be verbatim? Was it inaccurate? Was the inaccuracy material? Was the inaccuracy defamatory? Was the inaccuracy the result of malice?[44] Applying his test to the challenged statements, Judge Kozinski concluded that there was no indication that the words purported to be anything other than a verbatim transcription, the quotes were inaccurate, these inaccuracies were material, the inaccuracies taken as a whole were defamatory, and knowledge of falsity or reckless disregard as to truth or falsity was arguably present; therefore, a jury question as to actual malice existed.[45]

The Supreme Court granted certiorari[46] and heard arguments on six of the challenged quotations.[47] Justice Kennedy, writing for a seven-justice majority, construed the issue as "whether, in the framework of a summary judgment motion, the evidence suffices to show that respondents acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity."[48] Justice Kennedy first conceded the value of a certain degree of editorial license and recognized that the very nature of certain quotations gave cause to doubt their accuracy.[49] Justice Kennedy nonetheless concluded that a reasonable reader of the Malcolm article could believe "the quotations to be nearly verbatim reports of statements made by the sub-

Newspapers, 833 F.2d 446 (3d Cir. 1987) (holding publication of term "pigs" not defamatory where no Spanish equivalent for the English word "litterbugs"); Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977) (finding bowdlerized translation not defamatory).

44. *Masson*, 895 F.2d at 1562 (Kozinski, J., dissenting).

45. *See id.* at 1566-70 (Kozinski, J., dissenting). The Ninth Circuit majority opinion precipitated a host of law review articles. *See, e.g.*, Kathleen Conkey, Comment, *Ninth Circuit Reveals Shocking Truth! No Protection for Public Figures Against Deliberate Fabrications by Media!: A Comment on* Masson v. The New Yorker Magazine, Inc., 42 RUTGERS L. REV. 1133 (1990); Richard A. Gonzales, Comment, *Pyrrhic Victories and Glorious Defeats: Why Defendants Are Winning and Plaintiffs Are Losing the Struggle Over Actual Malice and "Fictionalized" Quotations*, 22 ST. MARY'S L.J. 1037 (1991); Mary B. Koberstein, Note, Masson v. New Yorker Magazine, Inc.: *Altered States for Altered Quotes?*, 85 NW. U. L. REV. 307 (1990); John J. McGreevy, Note, *When Is a Quote Not a Quote: The Subjectivity of Truth in* Masson v. New Yorker Magazine, Inc., 64 ST. JOHN'S L. REV. 150 (1989); Patricia H. Webb, Note, Masson v. New Yorker Magazine, Inc.: *Inadequate Protection Against Altered Quotations*, 69 TEX. L. REV. 473 (1990); Sharon A. Mattingly, Recent Development, *To Quote or Not To Quote: The Status of Misquoted Material in Defamation Law*, 43 VAND. L. REV. 1637 (1990).

46. 111 S. Ct. 39 (1991).

47. The Court discussed only those passages relied on by the petitioner in his briefs to the Supreme Court.

48. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419, 2431 (1991).

49. *See id.* (citing Baker v. Los Angeles Examiner, 228 Cal. Rptr. 206 (Sup. Ct. 1986)); *see also* Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

ject,"[50] and, accordingly, that Masson could be damaged by any falsity in those statements.[51]

Justice Kennedy then articulated the standard for determining "whether the requisite falsity [for actual malice] inheres in the attribution of words to the petitioner which he did not speak":[52]

> We conclude that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for the purposes of *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc. unless* the alteration results in a material change in the meaning conveyed by the statement.[53]

The Court expressly declined to adopt a more specific standard; Justice Kennedy noted that there existed no method by which courts or juries could distinguish editorial changes from defamatory alterations "except by reference to the meaning a statement conveys to a reasonable reader."[54] He argued that any attempt to narrow this standard would be a departure from both First Amendment principles and the underlying purposes of the tort of libel.[55] Instead, Justice Kennedy sought to mirror the common law approach to libel, which he claimed "overlook[ed] minor inaccuracies and concentrate[d] upon substantial truth."[56]

With its focus on substantial truth rather than specified standards, the Court rejected both of the tests adopted by the lower courts.[57] Justice Kennedy dismissed the district court's "rational interpretation" test as unsupported by "general principles of defamation law [and] our First Amendment jurisprudence."[58] Likewise, the Court deemed that the Ninth

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50. *Masson*, 111 S. Ct. at 2431.

51. Justice Kennedy suggested that false attribution of quotations could injure reputation in two ways: (1) by presenting an "untrue factual assertion," or (2) "because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold." *Id.* at 2430.

52. *Id.* at 2431.

53. *Id.* at 2433 (emphasis added) (citations omitted).

54. *Id.* at 2432.

55. *See id.* For example, Justice Kennedy rejected any "technical distinctions between correcting grammar and syntax and some greater level of alteration" as unworkable. *Id.*

56. *Id.* at 2433.

57. *See supra* notes 35-45 and accompanying text.

58. *Masson*, 111 S. Ct. at 2433. Justice Kennedy argued that allowing a "rational interpretation" standard for quotations would ultimately dilute the policy interests underlying the First Amendment. He suggested that granting such latitude to journalists would "diminish to a great degree the trustworthiness of the printed word. . . [and] would ill serve the values of the First Amendment. *Id.* at 2432.

The Court, however, has declined to find a cause of action for defamation where the

Circuit's reliance on "incremental harm" was misplaced because: (1) it would require the court to assume that the other quoted statements actually had been made; and (2) the doctrine had no bearing on the *mens rea* of author or publisher.[59]

Using the material alteration standard, the majority concluded that a jury question of falsity existed in five of the six challenged statements.[60] The Court reversed the judgment of the court of appeals and denied summary judgment. On remand, the Court directed the court of appeals to hear Masson's arguments concerning the liability of *The New Yorker* and Alfred A. Knopf, Inc., arguments that had not been addressed in the earlier dispositions of the case.

Justice White, concurring in part and dissenting in part,[61] would have chosen a narrower basis for the holding. Relying on the *Sullivan* definition of actual malice, Justice White concluded that *any* deliberate misquotation would constitute "knowing falsehood" under that standard.[62] He chided the majority for allowing the reporter to "lie a little, but not too much."[63] In addition, Justice White suggested that the determination of what constituted a "material alteration" should be left to the jury.[64]

At first glance, the majority decision in *Masson* does not appear to differ from the legal standard the lower courts espoused—that actual malice would exist only if the published account were to "increase the defamatory impact or alter the

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author's choice of words is " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer." Bose Corp. v. Consumer's Union of United States, 466 U.S. 485, 512 (1984) (quoting Time, Inc. v. Pape, 401 U.S. 279, 290 (1971)).

59. *Masson*, 111 S. Ct. at 2436.

60. During the interview, Masson explained that he had adopted the middle name Moussiaeff to recall his Jewish heritage; his grandfather had changed the family name from Moussiaeff to Masson upon entering France. Malcolm, however, reduced the anecdote to the statement "It sounded better." The Court concluded that this statement was not a material alteration. *Id.*

61. Justice Scalia joined Justice White. Justice White believed that "[i]t sounded better," *supra* note 60, was a material alteration.

62. *Masson*, 111 S. Ct. at 2437-38 (White, J., concurring in part and dissenting in part). Under the standard espoused by Justice White, summary judgment would be justified where the defendants presented evidence such that "reasonable jurors could not conclude that attributing to Masson certain words that he did not say amounted to libel under California law." *Id.* at 2438.

63. *Id.* at 2438 (White, J., concurring in part and dissenting in part).

64. *See id. But cf.* Tavoulareas v. Piro, 817 F.2d 762, 788 (D.C. Cir. 1987) ("Nevertheless, as the Supreme Court has clearly stated, courts may not abdicate to triers of fact the responsibility for developing the contours of the actual malice rule.").

substantive content" of the original statement.[65] The opinion, however, fails to provide a standard that members of the press can use to predict the legal consequences of their actions, and thereby effectively frustrates public discourse. *Masson* actually repudiates several of the lower court standards that putative plaintiffs and defendants have used in defamation actions, and which have guided the media.

Despite *Masson*'s concern for individual reputation, the holding does recall the rationale underlying the *Sullivan* decision—the promotion of criticism of official conduct in order to enhance democratic values. The *Sullivan* Court had expressly decided the case

> against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[66]

Masson argued that prohibiting inferences of actual malice from misquotations that alter the speaker's meaning imposes too high a standard of proof on plaintiffs, and the decision enhances the ability of public figures to bring defamation suits. This decision thus appears to discourage a prolix but irresponsible media. *Masson* is consistent with the policies underlying the *Sullivan* decision; it merely encourages the media to be more responsible.

The *Masson* opinion is also consistent with recent decisions that have focused on whether reasonable readers would believe that the published statements were factually accurate. In *Hustler Magazine v. Falwell*,[67] the Court refused to award damages for emotional distress where the article in question was a parody based on a recognized ad campaign, because the ordinary reader would not find it to be a factual representation. In *Milkovich*,[68] the Court declined to create a category of immunity for statements of opinion precisely because, in certain situations, reasonable readers might misconstrue these opinions as statements of fact.[69] The *Masson* decision reflects the concerns

65. Hotchner v. Castillo-Puche, 551 F.2d 910, 914 (2d Cir. 1977).
66. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).
67. 485 U.S. 46 (1988).
68. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990).
69. "The dispositive question . . . then becomes whether or not a reasonable fact-finder could conclude that the statements in the Diadiun column imply [an assertion of

in *Milkovich* that the reader will perceive false statements of fact as truthful. The contested article in *Masson* contained no indicia of fictionalization: It was published in a reputable magazine, it used quotation marks, it carried no disclaimer, and it purported to be a nonfictional account of petitioner tenure at the Archives. Accordingly, as Justice Kennedy stated, a reasonable reader could believe "the quotations to be nearly verbatim reports of statements made by [Masson]."[70]

Although consistent with the underlying policies of *Sullivan* and recent cases, the actual decision in *Masson* effectively curtails the degree of editorial license that the press can exercise on statements made by public figures.[71] The Court acknowledged the need for editing to preserve the coherency and meaning of the speaker's words:

> The existence of both a speaker and a reporter; the translation between two media, speech and the printed word; the addition of punctuation; and the practical necessity to edit and make intelligible a speaker's perhaps rambling comments, all make it misleading to suggest that a quotation will be reconstructed with complete accuracy.[72]

Yet the majority failed to provide guidelines for the press to use in determining whether statements materially alter the speaker's original words. The words used by the Court—"materially alter"—are amorphous,. and their interpretation remains unduly dependent on the whims of a particular jury. A better approach would have resembled the five-part standard set forth by Judge Kozinski, which would have allowed an editor or author to better predict the consequences of her actions.

Furthermore, the Court continues to dispose of useful tests devised by the lower courts for analyzing libel cases. As mentioned above, the *Milkovich* holding, allowing the media to be liable for statements of opinion, blurs the distinction between fact and opinion. Similarly, the *Masson* majority rejects both the

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fact]. We think this question must be answered in the affirmative." *Id.* at 2707. *But see* Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188 (9th Cir. 1989) (finding that statements of opinion are privileged and cannot form the basis of a defamation action).

70. *Masson*, 111 S. Ct at 2431.

71. The decision might also inhibit the development of alternative schools of journalism such as New Journalism, which prefer to depict "composites" of factual situations. *See Masson*, 895 F.2d at 1560 (Kozinski, J., dissenting).

72. *Masson*, 111 S. Ct. at 2432. Indeed, the Court expressly rejected a proposal by the petitioner that any alteration beyond correction of grammar or syntax would be sufficient for a finding of actual malice. *Id.* at 2431-32.

rational interpretation test and the incremental harm test; not only has the Court removed an existing federal standard, it neglected to provide an adequate substitute through the material alteration test. This neglect will precipitate inconsistent standards within the Circuit Courts and force the Court to reexamine the actual malice doctrine at a later date.

In *Masson*, the Supreme Court confronted the issue of actual malice in altered quotations by granting certiorari to a case where the author had clearly departed from conventional standards of journalism,[73] and where the misquotations were easily proven. In setting forth a generalized standard that fails to address cases in the "gray area," however, the Court left open the opportunity for future review and the possibility of further curtailment of press freedoms granted in the 1960s and 1970s. The possibility of future retrenchment is a significant concern to some journalists, who feel that the *Masson* opinion will be used to justify restraints on the media, such as the narrowing of the class of "public figures."[74] In any event, the practical effect of the decision will be an increase in the litigation costs of media defendants. In short, *Masson v. New Yorker Magazine, Inc.* addresses and alters, but fails to resolve, the tension between defamation law and the First Amendment.

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CONFIDENTIAL MEDIA SOURCES AND THE FIRST AMENDMENT: *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).

Since its controversial decision in *Branzburg v. Hayes*,[1] the Supreme Court has attempted to articulate a framework of First Amendment[2] jurisprudence that equitably defines the rights of

73. *See, e.g.*, Jon Carroll, *All Quotes Guaranteed Clear*, S.F. CHRON., June 25, 1991, at E12.

74. *See, e.g.*, Gail Appleson, *Supreme Court Rulings Could Open U.S. Press to More Litigation*, Reuters, July 28, 1991, *available in* LEXIS, Nexis Library, Wires File; Martin Garbus, *The Big Chill on Free Speech*, NEWSDAY, July 4, 1991, at 63; Telephone Interview with Mary A. Flood, journalist (November 18, 1991) (opining that future decisions of the Court will narrow the class of public figures established in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)).

1. 408 U.S. 665 (1972) (requiring reporters to appear and testify before state or federal grand juries).

2. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

the media, confidential media sources, and the public with respect to the process of gathering and reporting truthful information. Last Term, in *Cohen v. Cowles Media Co.*,[3] the Court clarified an important issue in this area by holding that the First Amendment does not bar a state court contract action by a source whose identity has been published in violation of a reporter's promise of confidentiality.[4] The Court's decision represents a sensible extension of prior precedent. Moreover, by articulating easily comprehended principles of elementary fairness, it ensures that irresponsible media behavior will not undermine public respect for the principles of the First Amendment.

The *Cohen* case demonstrates the tension between the First Amendment and state contract rules that arises in the reporter-source relationship.[5] Dan Cohen, a political consultant associated with the 1982 Minnesota gubernatorial campaign of Independent-Republican Wheelock Whitney, approached reporters for the *Minneapolis Star and Tribune* and the *St. Paul Pioneer Press Dispatch*. Cohen claimed to have documents relating to a candidate in the upcoming election and offered to make them available to the reporters in return for an explicit promise of confidentiality. The reporters agreed to this condition in good faith. They failed, however, to inform Cohen that their promises were subject to editorial approval.

The documents that Cohen gave the reporters revealed that the Democratic-Farmer-Labor candidate for Lieutenant Governor, Marlene Johnson, had once been charged with unlawful assembly and had also been convicted for petit theft. After further investigation revealed that Johnson had been convicted of theft for shoplifting six dollars worth of sewing materials at a time when she was emotionally distraught, and that the unlawful assembly charge was similarly picayune,[6] the editorial staffs of the newspapers decided that Cohen's action was the true story. Despite the vigorous protests of the original reporters, both newspapers published Cohen's name as the source of the

3. 111 S. Ct. 2513 (1991).

4. *See id.* at 2516.

5. The statement of facts is taken from the Court's summary, *id.* at 2516.

6. The unlawful assembly charge was brought for participating in a protest over an alleged failure to hire minority workers for a municipal construction project. The charge was eventually dismissed. *See id.*

material. Cohen was fired the same day that the stories appeared.

Cohen sued the publishers of the newspapers in Minnesota state court, alleging fraudulent misrepresentation and breach of oral contract.[7] The trial court refused to apply the First Amendment as a bar to either claim, and the jury awarded Cohen $200,000 in compensatory damages and $500,000 in punitive damages.[8] The Minnesota Court of Appeals upheld the breach of contract finding and affirmed the compensatory award.[9] The Minnesota Supreme Court, however, in a new development, considered Cohen's claim under the theory of promissory estoppel.[10] Noting that promissory estoppel applies only if enforcing the underlying promise is necessary to avoid injustice,[11] the court ruled that it would subject the application of promissory estoppel to "the same considerations that are weighed for whether the First Amendment has been violated."[12] The court balanced "the constitutional rights of a free press against the common law interest in protecting a promise of anonymity,"[13] and predictably found the former to be a more compelling interest. The court held that the First Amendment barred Cohen's claim.

In a five-to-four decision, the Supreme Court reversed the decision of the Minnesota Supreme Court. Writing for the majority,[14] Justice White argued that the enforcement of generally applicable laws that incidentally burden the ability of the press to gather and disseminate information poses no First Amendment problems. Justice White acknowledged the respondent's central contention that " 'if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the high-

7. *See id.*

8. *See id.*

9. *See* Cohen v. Cowles Media Co., 445 N.W.2d 248 (Minn. Ct. App. 1989).

10. *See* Cohen v. Cowles Media Co., 457 N.W.2d 199, 203-205 (Minn. 1990).

11. "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

12. *Cohen*, 457 N.W.2d at 205.

13. *Id.*

14. Chief Justice Rehnquist and Justices Stevens, Scalia, and Kennedy joined the opinion of the Court.

est order.' "[15] For a rule of decision, however, he looked to a line of cases establishing that the press may not constitutionally object to the application of otherwise valid state laws of general scope, such as antitrust laws,[16] non-discriminatory taxes,[17] and the duty to respond to grand jury subpoenas.[18] Because promissory estoppel does not "target or single out the press,"[19] the First Amendment provides no special protection for media defendants in state court actions for breach of promise.

The Court's second line of argument distinguished earlier cases in which the First Amendment had been interpreted to void statutes that prohibited the press from publishing the names of rape victims[20] and juvenile offenders,[21] and other categories of substantive information. Justice White contrasted those cases, in which "the State itself defined the content of publications that would trigger liability,"[22] with the promissory estoppel doctrine, a common-law convention invoked by the parties for private rather than public ends. He qualified the respondent's principle, that truthful and lawfully obtained information may not be suppressed, with the condition that the use of such information is restricted by the voluntary obligations under which it was originally procured.[23] Finally, Justice White attempted to distinguish *Hustler Magazine v. Falwell*,[24] which applied the strict constitutional standards for claims of libel against public figures to state law actions for intentional infliction of emotional distress. He argued that because Cohen sought damages for breach of a promise that caused him to lose his job, rather than for injury to reputation or state of mind, Cohen's claim was not a bad-faith attempt to avoid the constitutional standards of libel and should be allowed to proceed.[25]

15. *Cohen*, 111 S. Ct. at 2518 (quoting Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979)).

16. *See* Associated Press v. United States, 326 U.S. 1 (1945).

17. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

18. *See* Branzburg v. Hayes, 408 U.S. 665 (1972).

19. *Cohen*, 111 S.Ct. at 2518.

20. *See* Florida Star v. B.J.F., 491 U.S. 524 (1989). Justice White issued a vigorous dissenting opinion.

21. *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

22. *See Cohen*, 111 S. Ct. at 2519.

23. *See id.*

24. 485 U.S. 46 (1988).

25. *See Cohen*, 111 S. Ct. at 2519.

Justice Blackmun's dissent[26] attempted to shift the focus from the media's status in relation to general laws to the particular content of the speech at issue, "namely, [exposure of] a political source involved in a political campaign."[27] Emphasizing that the core value of the First Amendment's free speech clause is the protection of political speech, whether the speaker is a newspaper or a private citizen, Justice Blackmun protested that application of the promissory estoppel doctrine would have more than an incidental effect. Rather, he asserted, "the publication of important political speech *is* the claimed violation."[28] He thus rejected the majority's position that state common-law causes of action are generally applicable laws that necessarily apply to the press, citing the state law tort of emotional distress at issue in *Hustler* as evidence that the Court has previously subjected even uniform rules to a strict level of First Amendment scrutiny.[29]

Justice Souter also dissented,[30] going beyond Justice Blackmun's opinion to address the Court's argument that a voluntary promise of confidentiality restricts a newspaper's use of information. Justice Souter criticized this position, saying it arose from an overly restrictive view of First Amendment rights as personal to the speaker "without reference to the importance of the information to public discourse."[31] In Justice Souter's view, the right of the public to receive truthful political information is a paramount value that permits the media to breach promises of confidentiality, at least where the promisee is a public figure involved in a political campaign.[32]

Cohen reached a result that is consistent with the structure of the Court's past holdings in this area of First Amendment jurisprudence and that is required by the inherent moral characteristics of the underlying promise of confidentiality. The absence of compelling empirical arguments about the effects of litigation by sources upon the process of reporting the news rein-

26. Justice Blackmun was joined by Justices Marshall and Souter.

27. *Cohen*, 111 S. Ct. at 2520 (Blackmun, J., dissenting) (quoting Cohen v. Cowles Media Co., 457 N.W.2d 199, 205 (Minn. 1990)).

28. *Id.* at 2521 (Blackmun, J., dissenting) (emphasis in original).

29. *See id.*

30. Justice Souter was joined by Justices Marshall, Blackmun, and O'Connor.

31. *Id.* at 2523 (Souter, J., dissenting).

32. *See id.* (Souter, J., dissenting) (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)). Justice Souter refused to foreclose liability where the plaintiff is not a public figure.

forces the importance of the basic intuitions of fairness that pervade the Court's opinion. By providing incentives for the media to fulfill responsibly their unique role as conduits of information in an open society, *Cohen* ensures that the type of presumptuous media behavior exhibited in the case will not bring other First Amendment claims into disrepute. Thus, the result in *Cohen* will ultimately promote, rather than harm, the constitutional values embodied in the First Amendment.

The most important policy argument the dissent advanced in *Cohen* is that allowing liability under state contract law for media defendants who breach promises of confidentiality will chill the flow and dissemination of information, protection of which constitutes a primary function of the guarantee of freedom of the press. Because a considerable portion of print and television reports are based upon information acquired from confidential sources,[33] a substantial increase in suits by aggrieved promisees might threaten the efficient functioning of the press.[34] Additionally, many reporters' strong ethical and professional incentives to maintain confidentiality arguably represent a safeguard for nervous sources.

These considerations, however, ultimately amount to little more than inconclusive speculations. It is equally likely that allowing the press legal impunity to violate promises of confidentiality will force sources into the position of weighing the importance of disseminating the information they possess against the possible harm to career and reputation if their identity is disclosed.[35] Many sources will refuse to take the risk. Indeed, it hardly seems likely that Dan Cohen would have done

33. *See* Michael Dicke, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1563 (1989) (stating that "eighty percent of national news magazine articles and fifty percent of national wire service stories rely on confidential sources").

34. Justices Blackmun and Souter neglected to mention, however, that the only effect of *Cohen* is to give the states discretion to allow or restrict such suits. There is some empirical evidence that the type of explicit agreement seen in *Cohen* may be relatively rare, thus further reducing the threat of "chilling" litigation. *See* Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 243 (1971) ("[f]requently there is not an explicit agreement about what is on and off the record"). Additionally, many states may act to protect the press from such litigation. *Cf.* Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law*, Branzburg v. Hayes, *and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 859-60 (1983) (describing the post-Branzburg upsurge in state "shield laws" protecting source confidentiality).

35. *See, e.g.*, Cohen v. Cowles Media Co., 457 N.W.2d 199, 206 (Minn. 1990) (Yetka, J., dissenting) (stating that if claims like Cohen's are refused, "the public could very well be denied far more important information about candidates for public office relevant to evaluating their qualifications than the rather trivial infractions disclosed

so given the severe consequences attendant upon the publication of his action. Ironically, media defendants advanced a similar argument in *Branzburg v. Hayes*,[36] which held that reporters may be forced to respond to grand jury subpoenas and to answer questions relating to a criminal investigation, even to the extent of revealing confidential sources. In *Branzburg*, a principal contention of the reporters was that if reporters are forced to reveal sources, informants will refuse to furnish newsworthy information.[37] If this would be the result of disclosure within the relative secrecy of grand jury proceedings, then the chilling effect of publication of source names in major newspapers very likely would be quite severe.

Nor will the professional tradition of confidentiality among reporters necessarily provide adequate protection for the legitimate interests of sources.[38] As was the case in *Cohen*, in the absence of legal disincentives, an eager editorial staff may override a reporter's promise given in good faith. Even the competitive disadvantage in access to sources which newspapers that regularly breached promises of confidentiality would presumably suffer, would not safeguard sources if the editorial staff carefully limited such episodes to the most sensational instances. It is precisely in those instances that the temptation would be most severe.

Because empirical arguments about the result in *Cohen* are largely uncertain and speculative,[39] the majority's reliance on arguments from precedent and fairness has heightened persuasive power. *Cohen* is fully consistent with the Court's earlier decisions, even those that erected constitutional barriers to media liability in actions based upon state common law. In this respect, Justice White's attempt to distinguish *Hustler*, on the dubious grounds that Cohen was seeking damages for loss of earning capacity rather than for harm to reputation,[40] was not

here"). Conversely, the certainty of legal protection once a simple promise is extracted may in fact encourage would-be confidential sources.

36. 408 U.S. 665, 679 (1972).

37. *See id. But see* Dicke, *supra* note 33, at 1585-86 (attempting to reconcile the apparent conflict between the defendants' positions in *Cohen* and *Branzburg*).

38. For a discussion of the relationship between promissory estoppel claims and ethical or traditional restraints on breaches of a promise, see David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375, 446-56 (1990).

39. *See, e.g.*, *Branzburg*, 408 U.S. at 693-95 (describing "widely divergent" estimates of chilling effect on sources of forced disclosure at grand jury proceedings).

40. *See Cohen*, 111 S. Ct. at 2519. Justice Blackmun had the better of the argument on this point, writing "I perceive no meaningful distinction between a statute that penal-

the strongest possible approach. A more powerful line of argument for the *Cohen* majority would have focused on the nature of the tort action at issue in *Hustler* in contrast to the contractual action in *Cohen*.

While the Court unanimously agreed that state judicial enforcement of both tort claims and breach of promise claims constitutes state action for Fourteenth Amendment purposes,[41] the latter type of suit poses a substantially less important threat to the values underlying the First Amendment. When state courts attempt to construct and implement substantive rules that compensate public figures for harm caused by the unilateral and independently initiated actions of the press, the suspicion that such rules represent impermissible governmental encroachment upon protected media liberties is naturally great. There is little to differentiate these common-law tort doctrines from statutes that fine the press for publicizing the names of rape victims or juvenile offenders. The Court has consistently declared such statutes to be incompatible with the First Amendment.[42] The Court's disapproval of substantive state tort rules in *Hustler* falls neatly into this category of decisions.

In contrast, the promissory estoppel doctrine at issue in *Cohen* represents a formal, content-neutral legal convention invoked by the actions of private parties in a bilateral context.[43] The central First Amendment concern of preventing public invasion of private rights does not play so great a role when reporters and sources can voluntarily determine the nature of their legal duties.[44] In such circumstances, the state merely

izes published speech in order to protect the individual's . . . reputational interest, and one that exacts the same penalty in order to compensate the loss of employment or earning potential. Certainly, our decision in *Hustler* recognized no such distinction." *Id.* at 2521 n.3. (Blackmun, J., dissenting).

41. *See Cohen*, 111 S. Ct. at 2517; *id.* at 2520 (Blackmun, J., dissenting).

42. *See supra* notes 24-26 and accompanying text; *see also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (striking down a Virginia statute that imposed criminal penalties for publishing the proceedings of a state judicial review commission).

43. *See Cohen*, 111 S. Ct. at 2519 ("Minnesota law simply requires those making promises to keep them. . . . [A]ny restrictions which may be placed on the publication of truthful information are self-imposed.").

44. *Cf.* 111 S. Ct. at 2523 (Souter, J., dissenting) (criticizing this aspect of the Court's opinion by saying that "the requirements for [waiver of constitutional rights] have not been met here," (citing Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967))). But the type of waiver at issue in *Curtis Publishing Co.* related to the procedural requirement that constitutional rights be formally asserted in a timely manner, whereas the *Cohen* situa-

provides a neutral judicial forum for the clarification of those obligations. In sum, the argument that state action is involved when contractual claims are allowed against media defendants and that First Amendment protection should apply rigorously to those situations ignores the qualitative differences in the nature of state involvement between the *Cohen* situation and the situations in *Hustler*, *Smith v. Daily Mail Publishing Co.*,[45] and *Florida Star v. B.J.F.*.[46] The result in *Cohen* can be distinguished from, and is consistent with, the Court's earlier pronouncements in this area.

Cohen has more than precedent to recommend it. The majority's principle that the enforcement of generally applicable laws against the press comports with free speech requirements, while phrased abstractly, responds to a concrete intuition of fairness. The First Amendment, like other provisions of the Bill of Rights, is phrased as a negative restriction upon government action. To interpret it to exempt the press from public rules promulgated under the residual and fully legitimate areas of governmental authority would perversely create a special positive privilege out of a protected liberty.[47] From this standpoint Justice Souter's proclamation of the "right of the public" to receive truthful information, no matter how acquired, is unconvincing.[48] It is the unique right of the public to alter, through both electoral and organizational means, the substantive state rules that penalized the publication of Cohen's identity. Until such an alteration has been accomplished, however, it is not the

tion is one in which substantive conduct by a party forecloses a later constitutional claim.

45. 443 U.S. 97 (1979).

46. 491 U.S. 524 (1989).

47. *See also* David O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579, 582-83 (1980) (arguing that the First Amendment protects individual freedom of communication, but grants no special rights to acquire information from governmental or private sources); *cf.* Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally"); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (denying media claims of special access to prison facilities); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 588 (1983) (discussing, without deciding, the possibility that the First Amendment might prevent states from according the press differential tax treatment even if the differential treatment were favorable).

48. *See* Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1506 (1974) (stating that "[t]he basic element in the [public's] right to receive is the fact that a source would voluntarily provide the information to the recipient"); *see also* William Van Alystne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761 (1977) (warning the press of the dangers of becoming the agent of the public's right to know).

place of the federal judiciary to invoke the nebulous "right" of the public so as to neglect Cohen's actual rights under the law.[49] As Justice White said, "[t]he First Amendment does not grant the press such limitless protection."[50]

By declining to expand the First Amendment beyond its proper bounds, *Cohen* will ultimately promote enhanced public respect for the role of the media and the principles of free speech. The rule of *Cohen*, that full exercise of First Amendment rights can and must comport with a respect for the equally protected rights of media sources,[51] minimizes the danger that an aggressive and self-righteous press will bring into popular disrepute a signally important provision of the Bill of Rights.

C. Adrian Vermeule

THE DEATH PENALTY AND VICTIM IMPACT EVIDENCE: *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

Over the last few years, the victims' rights movement has persuaded the criminal justice system to heighten its concern for crime victims, particularly during criminal sentencing.[1] The movement's most dramatic achievement to date occurred last Term in *Payne v. Tennessee*,[2] when a newly-configured Supreme Court overruled recent precedents and held that the Eighth Amendment erects no *per se* bar to the admission of victim im-

49. *See* O'Brien, *supra* note 47, at 585 (characterizing judicial recognition of a "right to know" as an illegitimate exercise in constitutional common law). In an analogous context, the Court has observed that recognition of a public interest in the enforcement of constitutional guarantees does not necessarily entail the existence of a corresponding constitutional right on the part of the public. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979).

50. *Cohen*, 111 S. Ct. at 2519.

51. As Justice Frankfurter once commented: "[F]reedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise . . . . [T]hat there was such legal liability [for abuse of press freedom] was so taken for granted by the framers of the First Amendment that it was not spelled out." Pennekamp v. Florida, 328 U.S. 331, 356 (1945) (Frankfurter, J., concurring).

1. *See* JOLENE C. HERNON & BRIAN FORST, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE CRIMINAL JUSTICE RESPONSE TO VICTIM HARM (May 1984); NAT'L ORG. FOR VICTIMS' ASSISTANCE, VICTIMS' RIGHTS AND SERVICE: A LEGISLATIVE DIRECTORY (1987); Frank C. Carrington & George N. Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1 (1984).

2. 111 S. Ct. 2597 (1991).

pact evidence[3] in capital sentencing proceedings.

In two previous decisions, *Booth v. Maryland*[4] and *South Carolina v. Gathers*,[5] the Supreme Court had dealt serious blows to advocates of victims' rights. In *Booth*, the Court had held five-to-four that admission of victim impact evidence in the sentencing phase of a capital trial violates the Eighth Amendment's prohibition against cruel and unusual punishment. In *Gathers*, the Court extended the rule of *Booth* to a prosecutor's references, when arguing for the death penalty, to the victim's personal characteristics.

In contrast to these decisions, the *Payne* Court correctly reasoned that the States are free to decide that the harm imposed on a victim's family is relevant to the moral blameworthiness of a defendant. The dissenters argued that because victim impact evidence encourages reliance on factors other than the defendant's culpability, such evidence always prejudices the defendant. Although some aspects of the dissenters' arguments may be quite compelling in particular cases, victim impact evidence is not inherently prejudicial, and therefore the admission of such evidence in capital sentencing proceedings does not violate the Eighth Amendment.

Payne involved an especially brutal double homicide.[6] On June 27, 1987, Pervis Tyrone Payne entered the apartment in which Charisse Christopher, her 2-year-old daughter Lacie, and her 3-year-old son Nicholas lived. Payne began making sexual advances toward Charisse. Charisse resisted, and Payne became violent. Payne repeatedly stabbed Charisse and her two children with a butcher knife. Only Nicholas survived the attack. A jury found Payne guilty of two counts of first degree murder and one count of assault with intent to commit murder in the first degree. During the sentencing phase of the trial, Charisse's mother testified that Nicholas regularly cried for his mother and sister. In arguing for the death penalty, the prosecutor commented on the continuing effects of Nicholas' experience. The jury sentenced Payne to death on each of the murder counts and to 30 years in prison for the assault.

3. "Victim impact evidence," as used herein, denotes evidence relating to a victim's personal characteristics and the impact of the crime on the victim's family.

4. 482 U.S. 496 (1987).

5. 490 U.S. 805 (1989).

6. The statement of facts is taken from the Court's summary. *See Payne*, 111 S. Ct. at 2601-02.

On appeal, the Supreme Court of Tennessee affirmed the convictions and sentences. The court found that the grandmother's testimony, although "technically irrelevant" under *Booth*, did not create a risk of arbitrary imposition of the death penalty.[7] The court further held that the prosecutor's closing argument was relevant to Payne's "personal responsibility and moral guilt."[8] The court concluded that any violation of Payne's rights under *Booth* and *Gathers* was harmless error.[9]

The Supreme Court affirmed the Tennessee Supreme Court's decision. Writing for a six-justice majority,[10] Chief Justice Rehnquist held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject [at the penalty phase of a capital trial], the Eighth Amendment erects no *per se* bar."[11] The majority further held that the Court's decisions to the contrary in *Booth* and *Gathers* were incorrectly decided and explicitly overruled them.[12]

The Court first examined the reasoning of *Booth*.[13] In *Booth*, the Court noted that although the Court "normally will defer to a state legislature's determination of what factors are relevant to a sentencing decision, the Constitution places some

7. *Id.* at 2604 (quoting State v. Payne, 791 S.W.2d 10, 18 (Tenn. 1990)).

8. State v. Payne, 791 S.W.2d at 19.

9. *See id.* The Tennessee Supreme Court's contempt for *Booth* and *Gathers* was quite apparent:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

Id.

10. Justices White, O'Connor, Scalia, Kennedy, and Souter joined Chief Justice Rehnquist's opinion. Justice O'Connor wrote a concurrence, in which Justices White and Kennedy joined. Justice Scalia wrote a separate concurrence, in which Justices O'Connor and Kennedy joined in part. Justice Souter wrote a third concurrence, in which Justice Kennedy joined. Justice Marshall wrote a dissent, in which Justice Blackmun joined. Justice Stevens wrote a separate dissent, in which Justice Blackmun also joined.

11. *Payne*, 111 S. Ct. at 2609.

12. *See id.* at 2611. The Court's decision in *Payne* overrules *Booth* and *Gathers* to the extent that these cases excluded evidence relating to the individuality of the victim and the impact of the crime on the victim's family. The Court did not disturb *Booth*'s holding that a capital sentencing authority may not receive evidence concerning the victim's family members' characterizations of or opinions about the crime, the defendant, and the appropriate sentence. *See Payne*, 111 S. Ct. at 2611, n.2; *id.* at 2612-13 (O'Connor, J., concurring); *id.* at 2614 and n.1 (Souter, J., concurring).

13. In *Gathers*, the Court merely extended the rule of *Booth* to statements made by a prosecutor to a sentencing jury regarding the personal qualities of the victim.

limits on this discretion."[14] The Court emphasized that the Constitution requires a capital defendant to be treated "as a 'uniquely individual human bein[g].' "[15] Accordingly, a determination of sentence must be based on the defendant's "personal responsibility and moral guilt."[16] The Court concluded that because victim impact evidence presents "factors about which the defendant was unaware, and that were irrelevant to the decision to kill," it has no bearing on the "blameworthiness of a particular defendant."[17] The Court also held that victim impact evidence "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner."[18]

The *Payne* Court concluded that *Booth* and *Gathers* were based on two faulty premises: (1) the harm caused by the defendant is not relevant to the defendant's blameworthiness; and (2) only evidence relating to blameworthiness is relevant to a capital sentencing decision.[19] The Court pointed out that the harm caused by a defendant historically has been relevant in determining both the particular offense and the appropriate punishment.[20] While acknowledging constitutional limits on a state's discretion in imposing the death penalty,[21] the Court found that " '[b]eyond these limitations . . . the Court has deferred to the State's choice of substantive factors relevant to the penalty determination.' "[22] The Court characterized victim impact evidence as "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities."[23]

The Court found no basis, constitutional or otherwise, for

14. *Booth*, 482 U.S. at 502 (citation omitted).

15. *Id.* at 504 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.)).

16. *Id.* at 502 (quoting Enmund v. Florida, 458 U.S. 782, 801 (1982)).

17. *Id.* at 504-05.

18. *Id.* at 505.

19. *See Payne*, 111 S. Ct. at 2605.

20. *See id.*

21. *See id.* at 2608. The Court quoted at length the constitutional limitations as set forth in McCleskey v. Kemp, 481 U.S. 279 (1987). States must establish criteria that narrow the sentencing authority's judgment as to whether particular circumstances of the case meet a required threshold; the proportionality requirement, based on a societal consensus, must be satisfied; and states may not limit the sentencer's consideration of any relevant mitigating evidence. *See id* at 305-06.

22. *Payne*, 111 S. Ct. at 2608 (quoting Blystone v. Pennsylvania, 494 U.S. 299, 309 (1990)).

23. *Id.*

the *Booth* Court's holding that *only* evidence of culpability is relevant to capital sentencing.[24] The Court argued that sentencing authorities have "always been free to consider a wide range of relevant material."[25] The Court acknowledged precedent holding that the Eighth Amendment requires a capital defendant to be treated as a " 'uniquely individual human bein[g].' "[26] But the Court found that this "language quoted from *Woodson* in the *Booth* opinion was not intended to describe a class of evidence that *could not* be received, but a class of evidence which *must* be received."[27] The Court denied that the rule of *Woodson*, which requires the admission of certain mitigating evidence, excludes evidence that offers the jury " 'a glimpse of the life' which the defendant 'chose to extinguish.' "[28] The Court concluded that *Booth's* "misreading of precedent . . . unfairly weighted the scales in a capital trial."[29]

Having found that a state may properly conclude that the harm caused by an offender's homicide goes to the offender's blameworthiness, the Court further held that such evidence does not necessarily lead to arbitrary impositions of the death penalty.[30] The Court reasoned that if the introduction of victim impact evidence renders a proceeding fundamentally unfair, then the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.[31]

The Court characterized the doctrine of stare decisis as "the preferred course," but found that "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.' "[32] The Court added that considerations in favor of stare decisis are least significant in

24. The *Booth* majority acknowledged that no prior decisions of the Court had mandated that the "defendant's record, characteristics, and the circumstances of the crime are the *only* permissible sentencing considerations . . . ." 482 U.S. at 502 (emphasis in original).

25. *Payne*, 111 S. Ct. at 2606 (citing Williams v. New York, 337 U.S. 241 (1949)).

26. *Id.* at 2606-07 (quoting Woodson v. North Carolina, 428 U.S. at 304).

27. *Id.* at 2607 (emphasis in original).

28. *Id.* (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988) (Rehnquist, C.J., dissenting)).

29. *Id.*; *see Booth*, 482 U.S. at 517 (White, J., dissenting) ("[t]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in. . . ." (citing Eddings v. Oklahoma, 455 U.S. 104 (1982))).

30. *See Payne*, 111 S. Ct. at 2608.

31. *See id.* (citing Darden v. Wainwright, 477 U.S. 168, 179-83 (1986)).

32. *Id.* at 2609 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)). Chief Justice Rehnquist pointed out that "the Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions." *Id.* at 2610 (citations omitted).

cases involving procedural and evidentiary rules.[33] The Court reasoned that *Booth* and *Gathers* "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions."[34] Based on these circumstances, and the Court's conclusion that these decisions were wrongly decided, the Court explicitly overruled *Booth* and *Gathers*.[35]

The proposition of *Booth* and *Gathers* that victim impact evidence is irrelevant to a capital sentencing decision disregards the Court's own Eighth Amendment jurisprudence and the role that accountability plays in the criminal justice system. The Court has traditionally applied a proportionality test to cases, arising under the Punishments Clause,[36] involving capital punishment. In *Coker v. Georgia*,[37] the Court indicated that

> proportionality—at least as regards capital punishment—not only requires an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim . . . .[38]

In rejecting the use of victim impact evidence, the decision in *Booth* ignored the Court's own concern with the harm inflicted on the victim in determing the magnitude of the punishment.[39]

In addition, *Booth* failed to take into account contemporary standards of legislators and jurors.[40] In *Booth*, Justice Powell,

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33. *See id.* at 2610.

34. *Id.* at 2611.

35. *See id.*; *see also supra* note 12.

36. U.S. CONST. amend. VIII ("[N]or cruel and unusual punishments inflicted"); *cf.* Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (opinion of Scalia, J.) (arguing that the Eighth Amendment contains no proportionality requirement in non-capital cases).

37. 433 U.S. 584 (1977) (plurality opinion).

38. Enmund v. Florida, 458 U.S. 782, 815 (1982) (O'Connor, J., dissenting) (explaining *Coker*). In *Coker*, a plurality of the Court held the death penalty to be an unconstitutionally disproportionate sanction for rape of an adult because "in terms of moral depravity and of injury to the person and to the public, [rape] does not compare with murder." *Coker*, 433 U.S. at 597 (plurality opinion).

39. Moreover, the Supreme Court has held that evidence not relating to the defendant's culpability may be relevant to capital sentencing decisions. For example, in *Jurek v. Texas*, the Court rejected the contention that expert testimony on the likelihood that a convicted murderer will commit future crimes must be excluded from capital sentencing proceedings. 428 U.S. 262, 274-76 (1976), *reaffirmed in* Barefoot v. Estelle, 463 U.S. 880, 896 (1983).

40. In *Gregg v. Georgia*, the Court stated that the proportionality test incorporates an "evolving standards of decency" argument, 428 U.S. 153, 173 (1976) (plurality opinion) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)), that is viewed in part as preventing the Court from becoming, " 'under the aegis of the Cruel and Unusual Punishments Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.' " Gregg v. Georgia, 428 U.S. 153, 176 (1976)

writing for the majority, correctly reasoned that the function of a capital sentencing jury is to " 'express the conscience of the community on the ultimate question of death.' "[41] If statutes are indeed "first among the objective indicia" of community attitudes,[42] then the moral judgment of most people in this country is that "the amount of harm one causes does bear upon the extent of his 'personal responsibility.' "[43] At the time *Booth* was handed down, "[a]t least thirty-one jurisdictions provide[d] for the use of victim impact evidence in one form or another during the sentencing phase."[44] As of April 1991, "forty-seven states legislatively authorize[d] input by the victim at sentencing."[45] Given the States' widespread use of victim impact evidence, one suspects that the *Booth* majority consulted its own moral judgment rather than that of the community, especially where there was no reason to believe that the jury in *Booth* failed to express the conscience of the community.[46]

The *Booth* Court's view of relevancy in a capital case is inconsistent with the role of accountability in non-capital cases. The notion that the degree of harm caused by a defendant should influence the severity of punishment pervades the criminal justice system.[47] As Justice Scalia pointed out, a driver who speeds at sixty miles per hour on a residential street may lose his license if he causes no injury, but may be convicted of manslaughter if a pedestrian happens to be in his path—although his "moral guilt," as defined by *Booth*, would be no greater.[48] The *Booth* Court offered no distinction between capital and

(plurality opinion) (quoting Powell v. Texas, 392 U.S. 514, 533 (1968) (plurality opinion)). This supports Chief Justice Rehnquist's argument that individual States, rather than the Supreme Court, should determine what evidence is relevant during sentencing.

41. Booth v. Maryland, 482 U.S. 496, 504 (1987) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)); *see also* California v. Brown, 479 U.S. 538, 545 (1987) (affirming that the capital sentencing decision should reflect the moral judgment of the community).

42. Stanford v. Kentucky, 492 U.S. 361, 370 (1989).

43. *Booth*, 482 U.S. at 519 (Scalia, J., dissenting).

44. Jackson R. Sharman, III, Recent Development, 11 HARV. J.L. & PUB. POL'Y 583, 590-91 (1988).

45. Brief for Amicus Curiae, The Washington Legal Foundation *et al.* at 25-6, *Payne v. Tennessee*, 111 S. Ct. 2597 (1991) (No. 90-5721).

46. Until *Booth*, the Court had consistently looked for objective signs of community standards. *See, e.g.*, Enmund v. California, 458 U.S. 782, 788-89 (1982) ("[T]he Court looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made . . . .").

47. *See* HERNON & FORST, *supra* note 1; U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES AND POLICY STATEMENTS (1991).

48. *See Booth*, 482 U.S. at 519 (Scalia, J., dissenting).

non-capital cases that would justify the relevance of victim impact evidence in one context and not in the other.[49] Indeed, there is no precedent, save *Booth*, that argues that victim impact evidence is irrelevant to sentencing considerations.[50]

In contrast to their position on relevancy, the dissenters' arguments based on prejudicial impact initially are quite compelling.[51] The dissents in *Payne* argued that because victim impact evidence "encourages reliance on emotion and other arbitrary factors," such evidence "necessarily prejudices the defendant."[52] The dissents echoed the *Booth* majority's fears of sentences being imposed as a result of a " 'mini-trial' on the victim's character,"[53] or "the eloquence with which family members express their grief [or] the status of the victim in the community."[54] The majority did not respond fully to the dissents, and the arguments the majority did offer were not wholly persuasive.[55]

In the absence of a systematic prejudicial effect, however, there is no legitimate constitutional argument, based on the Eighth Amendment, for a *per se* bar on victim impact evidence.[56] As a matter of constitutional law, "the Court has never

49. Of course, capital sentencing proceedings are subject to procedural protections not applicable to non-capital settings. Nonetheless, as one commentator has argued, if victim impact evidence is relevant during non-capital sentencing it must also be relevant during capital sentencing. *See* Richard S. Murphy, *The Significance of Victim Harm:* Booth v. Maryland *and the Philosophy of Punishment in the Supreme Court*, 55 U. CHI. L. REV. 1303, 1332 (1988).

50. As stated by Justice Scalia, the notion that the imposition of capital punishment is to be determined solely on the basis of "moral guilt," as defined by *Booth*, "does not exist, neither in the text of the Constitution, nor in the historic practices of our society, nor even in the opinions of this Court." *Booth*, 482 U.S. at 520 (Scalia, J., dissenting).

51. Justice Stevens conceded that a good deal of evidence concerning the victim's characteristics "is routinely and properly brought to the attention of the jury" during the guilt phase of capital trials. *See Payne*, 111 S. Ct. at 2630 (Stevens, J., dissenting).

52. *Payne*, 111 S. Ct. at 2629 (Stevens, J., dissenting); *see also id.* at 2620 (Marshall, J., dissenting).

53. *Id.* at 2630 (Stevens, J., dissenting) (quoting *Booth*, 482 U.S. at 507).

54. *Id.* at 2620 (Marshall, J., dissenting) (citing *Booth*, 482 U.S. at 505-07 & n.8).

55. The Court in large part relied on Justice White's arguments in *Booth*. There, the prospect of a "mini-trial" on the victim's character was described as "speculative" in light of the practical and strategic constraints of a murder trial. *See Booth*, 482 U.S. at 518 & n.3 (White, J., dissenting). Although conceding that victims' families will differ in their ability to articulate their sense of loss, Justice White contended that this results in no more arbitrariness than does the varying abilities of prosecutors and witnesses to express themselves. *See id.* at 518. The possibility of victim impact evidence encouraging comparative judgments about the social worth of victims was brushed aside by the *Payne* Court as extremely unlikely given that the purpose of such evidence is to show "*each* victim's 'uniqueness as an individual human being.' " *Payne*, 111 S. Ct. at 2607 (emphasis added).

56. *See* Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion of Stewart,

held 'that the excessively inflammatory character of concededly relevant evidence can form the basis for a constitutional attack . . . .' "[57] Because victim impact evidence is not inherently prejudicial,[58] the balancing of relevance and prejudice is a "state evidentiary issue, which [the Court does] not sit to review."[59] A constitutional issue only arises where evidence is so unduly prejudicial in a particular case that it renders the trial fundamentally unfair under the Due Process Clause of the Fourteenth Amendment.[60]

The *Payne* dissents also emphasized, and strenuously objected to, the majority's creation of a "radical new exception to the doctrine of *stare decisis*."[61] Justice Marshall argued that the " 'stron[g] presumption of validity' to which 'recently decided cases' are entitled 'is an essential thread in the mantle of protection that the law affords the individual . . . .' "[62] Justice Scalia responded by quoting the writings of Justice Marshall himself: " '[H]owever admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for the law itself.' "[63] Given that there is no constitutional basis for a broad prophylactic rule excluding all victim impact evidence from capital sentencing proceedings, the *Payne* Court justifiably deferred to the overwhelming public consen-

J.) (quoting Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976)). The argument that victim impact evidence creates a systematic risk of arbitrary sentences fails. Consideration of the particular harm resulting from a crime need not necessarily lead to "arbitrary" decisions any more than does consideration of the particular circumstances of the crime. *See* Murphy, *supra* note 49, at 1316.

57. William L. Menard et al., Project, *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-1990*, 79 GEO. L.J. 1089, 1142 (1991) [hereinafter, *Twentieth Annual Review*] (quoting Thompson v. Oklahoma, 487 U.S. 815, 878 (1988) (Scalia, J., dissenting)).

58. *See* FED. R. EVID. 403, advisory committee's note.

59. Thompson v. Oklahoma, 487 U.S. at 878 (Scalia, J., dissenting) (citing Lisenba v. California, 314 U.S. 219, 227-28 (1941)).

60. *See Payne*, 111 S. Ct. at 2608 (citing Darden v. Wainwright, 477 U.S. 168, 181 (1986)). This "mechanism for relief" in fact, may be very limited. In *Darden*, the Court found no denial of due process "even though the prosecutor referred to the defendant as an 'animal' and on multiple occasions expressed his belief that someone should have 'blown [the defendant's] head off.' " *Twentieth Annual Review*, *supra* note 57, at 1142 (1991) (quoting *Darden*, 477 U.S. at 182-83).

61. *Payne*, 111 S. Ct. at 2619; *see supra* notes 32-35 and accompanying text.

62. *Id.* at 2624 (quoting Florida Dep't of Health and Rehab. Servs. v. Florida Nursing Home Ass'n, 450 U.S. 147, 153 (1981) (Stevens, J., concurring)).

63. *Id.* at 2613 (Scalia, J., concurring) (quoting Flood v. Kuhn, 407 U.S. 258, 293, n.4 (1972) (Marshall, J., dissenting) (quoting Peter L. Szanton, *Stare Decisis: A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1959)) (internal quotations omitted)).

sus on the relevance of such evidence to capital sentencing.[64]

The Court's holdings in *Booth* and *Gathers* were not dictated by precedent, logic, or history; they were the result of a policy choice. In *Payne*, the Court recognized that the determination of who has the better argument on policy with respect to victim impact evidence rightfully belongs to the state legislatures. The conservative six-justice majority's activist stance in overruling recent precedent represents a renewed deference to state legislatures on capital sentencing issues. As a result, many states will likely extend the use of victim impact evidence, which is already prevalent in non-capital trials,[65] to capital sentencing proceedings.

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PROPORTIONALITY AND THE EIGHTH AMENDMENT: *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991).

In *Harmelin v. Michigan*,[1] the Supreme Court upheld a controversial life sentence without parole for Ronald Harmelin, a 45-year-old Michigan man convicted of possessing 672 grams of cocaine.[2] The five justices who rejected Harmelin's appeal that this sentence represented "cruel and unusual punishment"[3] presented widely divergent reasons for doing so. Justice Scalia, joined by Chief Justice Rehnquist, stated that the Eighth Amendment prohibition against cruel and unusual punishment is devoid of a proportionality guarantee, which Justice Scalia argued is simply a judicially-created device for ensuring that

64. Justice Marshall raises a different concern with his prediction that "[b]y signaling its willingness to give fresh consideration to any constitutional liberty recognized by a 5-4 vote 'over spirited dissen[t],' the majority invites state actors to renew the very policies deemed unconstitutional in the hope that this Court may now reverse course . . . ." *Payne*, 111 S. Ct. at 2624-25 (Marshall, J., dissenting). In *Payne*, the Court requested the parties to address whether *Booth* and *Gathers* should be overruled, though the issue was not raised in either the petition for certiorari or the response. *See* 111 S. Ct. 1407 (1991).

65. *See supra* notes 44-46 and accompanying text. The *Booth* Court had expressly limited its holding to capital cases. *Booth*, 482 U.S. at 507-08, n.10.

1. 111 S. Ct. 2680 (1991).

2. MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West Supp. 1990-1991) provides a mandatory sentence of life in prison for possession of "650 grams or more of any mixture containing" a Schedule 2 controlled substance; § 333.7214(a)(iv) defines cocaine as a Schedule 2 controlled substance.

3. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

courts equitably balance the severity of a non-capital sentence with the severity of the crime committed.[4] Instead, Justice Scalia stated that the Constitution only proscribes certain *modes* of punishment.[5]

In a separate concurring opinion, Justice Kennedy, joined by Justices O'Connor and Souter, refused to reject absolutely the proportionality guarantee, contending that the Eighth Amendment does, in fact, embody a narrowly-defined principle of proportionality.[6] The three justices concluded, however, that because of the gravity of Harmelin's offense, his sentence failed to comport with a requisite threshold test of "gross disproportionality."[7]

Justice Scalia's textual analysis coupled with Justice Kennedy's more topical concurrence forced the dissenting Justice White to construct a two-tiered argument. On the one hand, Justice White had to show that judicial interpretation of the Constitution historically recognized a proportionality guarantee. On the other hand, he also had to argue that Harmelin's sentence, upheld by the Michigan Supreme Court, was in fact disproportionate. By focusing on Twentieth-Century precedent, Justice White partially succeeded in constructing the first tier. Ultimately, however, he failed to build the second tier.

The division in the Court's conservative vanguard, reflected in Justice Scalia's inability to persuade a plurality of the justices to endorse his rejection of the proportionality principle, has fueled criticism by liberal commentators who view Harmelin's sentence as more characteristic of a police state than a humane democracy.[8] Moreover, Justice Scalia's reluctance to consider the gravity of the sentence in light of contemporary trends in penology and drug enforcement and his reliance on a textual

4. Justice Scalia attempted to overrule directly Solem v. Helm, 463 U.S. 277 (1983), in which the Court held in a 5-4 decision that the proportionality of a given sentence should be subject to a three-part comparative analysis. Justice Scalia maintained that the *Solem* decision was "simply wrong." *Harmelin*, 111 S. Ct. at 2686.

5. Part V of Justice Scalia's opinion, in which four justices joined, also rejected the argument that a punishment, not otherwise "cruel and unusual," becomes so by virtue of the fact that it is mandatory and includes no process for considering mitigating factors. The majority held that there is no authority supporting this claim. *Id.* at 2701. Justice Marshall addressed this claim in a separate dissent. 111 S. Ct. at 2719 (Marshall, J., dissenting).

6. *See id.* at 2702 (Kennedy, J., concurring in part and concurring in the judgment).

7. *Id.* at 2707 (Kennedy, J., concurring in part and concurring in the judgment).

8. *See Death Penalty Speaks Society's Moral Outrage* N.Y. TIMES, July 19, 1991 at A26; Jon Margolis, *Crime, Punishment and Americans' Anti-Drug Hysteria*, CHI. TRIB., July 2, 1991 at 15; *Power, Reason, and the Constitution* WASH. TIMES, July 1, 1991 at D2.

analysis that focuses upon early American jurisprudence, undercut what would otherwise be a bold showing of activism in narcotics' prevention. Finally, and perhaps most importantly, Justice Scalia's failure both to accord due respect to Twentieth-Century precedents and to provide a mechanism for addressing extreme cases of disproportionality[9] undermines the strength of his complete repudiation of the proportionality principle. The concurring justices, in contrast, while recognizing a narrowly-defined proportionality principle, directly and affirmatively addressed the severity of Harmelin's offense. Consequently, the concurrence does not give the impression that it was rendered within a historical vacuum.

Justice Scalia, and Justice White in dissent, engaged in lengthy expositions on the derivation of the Eighth Amendment's "cruel and unusual punishments" provision. Justice Scalia contended that the original meaning of the prohibition, which derived from a parallel provision in the English Declaration of Rights of 1689,[10] as well as the circumstances of the Eighth Amendment's enactment, demonstrate that its focus was on modes of punishment, not proportionality.[11] While Justice Scalia's historical analysis is correct, it fails to recognize how the Eighth Amendment has evolved since the beginning of this century.

Justice Scalia began his opinion by examining the meaning of the original English prohibition; he maintained that English courts never recognized a proportionality guarantee.[12] He buttressed this conclusion with several historical observations. First, because the drafters of the Declaration of Rights "did not explicitly prohibit 'disproportionate' or 'excessive' punishments," even though English law of the period recognized proportionality in some areas, it is clear that no such principle was intended.[13]

Second, Justice Scalia pointed to the consensus among his-

9. Justice Scalia explained that there are certain instances in which the Court might strike down severely disproportionate sentences; for example, if one were given life imprisonment for overtime parking. Justice Scalia provided no standard for doing so, however, stating that "for the same reason these [extreme] examples are easy to decide, they are certain never to occur." *Harmelin*, 111 S. Ct. at 2696-97 (Opinion of Scalia, J.).

10. *See id.* at 2686 (Opinion of Scalia, J.).

11. *See id.* at 2690-91 (Opinion of Scalia, J.).

12. *See id.* (Opinion of Scalia, J.).

13. *Id.* at 2687 (Opinion of Scalia, J.).

torians that the English "Cruell and Unusuall Punishments" provision was a reaction to the abuses of Chief Justice Jeffreys, who, during the reign of James II, devised "special penalties," such as being scourged to death, to punish suspected insurgents.[14] Jeffreys's contemporaries objected to these sentences not because they were disproportionate, but because they were "out of [the Judge's] Power" and "contrary to Law and ancient practice."[15] Justice Scalia concluded that for the Seventeenth Century Englishman "cruell and unusuall" meant "cruel and illegal."

Justice Scalia next proceeded to what he considered "the ultimate question" in Harmelin's appeal: What did the "cruell and unusuall Punishments" provision in the English Declaration of Rights mean to the colonial Americans who made it their own?[16] According to Justice Scalia, the answer lies in the circumstances surrounding the drafting of the Eighth Amendment and the language of the provision itself, both of which belie the existence of any proportionality guarantee.

Justice Scalia first explained that because there were no federal common law punishments in the United States during the Eighteenth Century,[17] the prohibition against cruel and unusual punishment was intended as a check upon the legislature, not the judiciary, which otherwise would have had the power to hold a legislatively-mandated sentence unconstitutional. Second, in the parlance of the period, the word "unusual" meant "[not] in common use,"[18] thus implying an abhorrence of unusual modes of punishment, not disproportionate amounts of a particular punishment, such as lengthy periods of imprisonment.[19]

Justice Scalia eventually was forced to confront the fact that the actual language of the Eighth Amendment "bears the construction" of a proportionality analysis.[20] Nevertheless, he attempted to defuse such a reading with several observations.

14. *See id.* at 2687-89 (Opinion of Scalia, J.).
15. *Id.* at 2690 (Opinion of Scalia, J.) (brackets in original).
16. *See id.* at 2691 (Opinion of Scalia, J.).
17. *See id.* (Opinion of Scalia, J.).
18. *Id.* (Opinion of Scalia, J.) (brackets in original).
19. Justice Scalia espoused a theory of legislative positivism here that took on greater significance later in his opinion when he emphasized the importance of deferring to state legislatures on questions of criminal sentencing. *See id.* at 2697-99 (Opinion of Scalia, J.).
20. *Id.* at 2692 (Opinion of Scalia, J.).

First, like their English counterparts, the Framers were clearly aware of the concept of proportionality in criminal sentencing; the term "proportionality" appears in several original state constitutions.[21] No representative, however, chose to include the word "disproportionate" in the "cruel and unusual" provision of the Constitution. Second, Justice Scalia explained that the term "unusual" could not have meant excessive with regard to crimes committed because, at the time the Constitution was written, legislators had not yet defined any crimes with which to compare respective sentences.[22] Finally, Justice Scalia found support for his position in accounts contemporaneous to the drafting of the Constitution. For example, debates at state ratifying conventions centered around modes of punishment, not the severity of sentencing;[23] criticism of the national Penal Code promulgated by the First Congress did not include any notion of disproportionality;[24] early academic commentary on the clause only suggested the outlawing of particular types of punishment;[25] finally, and according to Justice Scalia, most persuasively, early judicial constructions of the Eighth Amendment focused on illegality, not disproportionality, in criminal sentencing.[26]

When Justice Scalia departed from his analysis of the Framers' intent and purported to examine Twentieth-Century authorities, his arguments lost persuasive force. He argued that courts have shunned proportionality scrutiny in Eighth Amendment jurisprudence because proportionality is not conducive to objective analysis. Justice Scalia demonstrated this by dissecting the three-element proportionality test outlined in *Solem v.*

21. *See id.* (Opinion of Scalia, J.).

22. *See id.* (Opinion of Scalia, J.).

23. *See id.* at 2693 (Opinion of Scalia, J.).

24. *See id.* at 2694 (Opinion of Scalia, J.).

25. *See* J. BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 140 (1833) ("The prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture devised by human ingenuity for the gratification of fiendish passion.").

26. *See, e.g.*, Barker v. People, 20 Johns 457, 458 (N.Y. Sup. Ct. 1823), *aff'd*, 3 Cow. 686 (N.Y. 1824) ("The disfranchisement of a citizen is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offenses."); Aldridge v. Commonwealth, 4 Va. 447 (1824) ("That [cruel and unusual punishments] provision was never designed to control the Legislative right to determine *ad libitum* upon the adequacy of punishment, but it is merely applicable to the modes of punishment . . . .").

Helm.[27] First, he argued that there are no objective criteria available for discerning the inherent gravity of individual criminal offenses as proposed in *Solem*'s first prong; sentences necessarily vary over both time and regions.[28] With respect to the second element in the *Solem* test, Justice Scalia argued that requiring judges to make comparisons between "similarly grave" offenses is tantamount to endorsing individual judges' subjective notions about where various offenses lie on the severity spectrum.[29] Justice Scalia attacked the third prong of the *Solem* test by arguing that interstate comparisons of sentences issued for the same crime represent an affront to the American institution of federalism.[30] While Justice Scalia successfully pointed out the limitations in the *Solem* test, his inability to explain the presence of proportionality in other Twentieth-Century cases ultimately undercut the effectiveness of his earlier historical analysis.

In contrast to Justice Scalia's opinion, Justice Kennedy's concurrence is a forceful appeal to logical and conservative sensibilities. While upholding Harmelin's sentence, Justice Kennedy accounted for the gaps left in the wake of Justice Scalia's and Justice White's historical polemic. He eschewed his colleagues' emphasis on colonial America and held true to the doctrine of stare decisis, recognizing that modern precedents have added some guarantee of sentencing proportionality to American penology.[31]

Justice Kennedy explained, however, that although stare de-

27. 463 U.S. 277 (1983). In *Solem*, the Court held that the proportionality of a given sentence should be determined by comparing the sentence to: (1) the gravity of the offense; (2) sentences imposed on other criminals in the same jurisdiction, "that is, whether more serious crimes are subject to the same penalty or to less serious penalties"; and (3) sentences imposed for perpetration of the same crime in other jurisdictions. *See id.* at 278.

Justice Scalia also pointed out that *Solem*'s three-element test is not firmly entrenched in our constitutional jurisprudence. The credibility of the test is undermined by the fact that the exact same test was explicitly rejected by the Court when the dissent proposed it in Rummel v. Estelle, 445 U.S. 263, 281-82 & n.27 (1980). *See Harmelin*, 111 S. Ct. at 2686.

28. *See Harmelin*, 111 S. Ct. at 2697-98 (Opinion of Scalia, J.).

29. *Id.* at 2698 (Opinion of Scalia, J.).

30. *See id.* at 2699 (Opinion of Scalia, J.). "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U.S. at 282.

31. *See Harmelin*, 111 S. Ct. at 2702-03 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy cited a number of Supreme Court cases that acknowledge a proportionality principle. For example, he cited Coker v. Georgia, 433 U.S. 584 (1977) for the proposition that "a sentence of death is grossly disproportion-

cisis commands the acceptance of proportionality, the pertinent cases have left the contours of the doctrine unclear. He nevertheless posited five "common principles" that affect judicial discretion and precedent in criminal sentencing review. First, Justice Kennedy argued that the fixing of prison terms involves substantial penological judgments " 'properly within the province of legislatures, not courts.' "[32] This observation emphasizes the development of penology as a system, best engineered by legislatures. Second, " 'principles which have guided criminal sentencing . . . have varied with the times.' "[33] American courts therefore must look beyond textual analyses to determine whether criminal sentences accord with socially accepted principles of the period. Third, marked divergences in criminal sentences between states are the "inevitable, often beneficial, result of [the American] federal structure."[34] Fourth, proportionality review should ideally "be informed by 'objective factors to the maximum possible extent'."[35] As both Justices Scalia and Kennedy demonstrated by attacking *Solem*, however, true objectivity in this respect is an illusory goal; determining the proportionality of a given sentence is a largely subjective endeavor. Justice Kennedy's fifth principle thus followed as the logical conclusion of the first four: The Eighth Amendment does not require strict proportionality between a crime and a sentence. It "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[36]

Balancing these five principles, Justice Kennedy offered American courts a two-step proportionality analysis. First, a judge must compare an offense and the resulting sentence to determine whether "an inference of gross disproportionality" can be made.[37] Second, and only if this threshold has been crossed, a judge should consider whether the case merits some

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ate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* at 592.

32. *Harmelin*, 111 S. Ct. at 2703 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Rummel*, 445 U.S. at 275-276).

33. *Id.* at 2704 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Payne v. Tennessee, 111 S. Ct. 2597, 2605 (1991)).

34. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

35. *Id.* (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Rummel*, 445 U.S. at 274-275).

36. *Id.* at 2705 (Kennedy, J., concurring in part and concurring in the judgment) (citations omitted).

37. *Id.* at 2707 (Kennedy, J., concurring in part and concurring in the judgment).

intra- and inter-jurisdictional comparison.[38]

The end result of Justice Kennedy's concurrence is a judicial prescription that looks beyond textual analysis and provides recourse for extreme cases of sentencing disproportionality. By requiring judges to undertake this minimum threshold examination, Justice Kennedy recognized that popular perceptions of appropriate sentencing have changed over time and will continue to do so in ways that the Framers could not have foreseen. His prescription, however, is also judiciously qualified. It is narrowly tailored out of respect for a system of federalism averse to imposing interstate comparisons and out of recognition of the inherent subjectivity of proportionality review.

Naturally, what works in theory may fail in practice. Thus, if it is to serve a practical function, Justice Kennedy's narrow proportionality principle must yield a justifiable result when applied to Harmelin's sentence. Indeed, Justice Kennedy argued that the sentence given by the Michigan state court had not crossed the threshold level of gross disproportionality and therefore did not warrant further comparative analysis. Backed by studies and statistics demonstrating the "direct nexus between illegal drugs and violence,"[39] Justice Kennedy maintained that it was well within the authority of the Michigan legislature to mandate a life sentence for those convicted of possessing 650 grams of cocaine, an amount roughly equal to between 32,500 and 65,000 "hits."[40] Justice Kennedy stated with force that "the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole."[41] Moreover, and again guided by the principle of stare decisis, Justice Kennedy showed that the seriousness of Harmelin's crime "brings his sentence within the constitutional boundaries established by [the Court's] prior decisions."[42]

In his dissent, Justice White attempted to attack both Justice

38. *See id.* (Kennedy, J., concurring in part and concurring in the judgment).

39. *Id.* at 2706 (Kennedy, J., concurring in part and concurring in the judgment).

40. *Id.* at 2705 (Kennedy, J., concurring in part and concurring in the judgment) (citing ARNOLD M. WASHTON, COCAINE ADDICTION: TREATMENT, RECOVERY, AND RELAPSE PREVENTION 18 (1989)).

41. *Id.* at 2706 (Kennedy, J., concurring in part and concurring in the judgment).

42. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

Scalia's historical analysis and Justice Kennedy's more practical approach. Justice White began by acknowledging that, although the Constitution "does not refer to proportionality in so many words . . . it does forbid 'excessive' fines."[43] This, he believes, demonstrates the Framers' early appreciation of proportionality. The remainder of Justice White's Eighteenth and Nineteenth-Century analysis, however, was noticeably deficient in authorities, and he was largely relegated to attacking structural flaws in Justice Scalia's derivational account.[44] Justice White, however, neglected to point out that many of his arguments, which frequently consisted of irreconcilable historical interpretations, only addressed a minor segment of Justice Scalia's textual analysis.

As Justice White's opinion moved forward in time, it began to acquire greater persuasive force. He offered a picture of American jurisprudence since 1910 replete with decisions in which the Court had discerned some notion of proportionality in the "cruel and unusual" clause.[45] Justice White's exposition of these cases undercut Justice Scalia's proposition that the Supreme Court has never recognized the concept of proportionality.

Justice White also attacked Justice Scalia's contention that the Court should make a special exception for proportionality analysis in capital punishment cases because "death is different."[46] Not so, Justice White argued. "Death is different" was merely Justice Scalia's pretext for disregarding precedential support for a proportionality guarantee. It is clear, Justice White added, that the justification for overruling death sentences is derived straight from the Eighth Amendment pro-

43. *Id.* at 2709 (White, J., dissenting).

44. For example, Justice White explained that the general murkiness of other constitutional provisions, such as the Due Process Clause of the Fifth Amendment, eviscerates the argument that proportionality is not clearly spelled out in the Eighth Amendment. *See id.* at 2710 (White, J., dissenting). He also claimed that Justice Scalia's proposition that there were no federal common law crimes in colonial America, and therefore that the "cruel and unusual" provision was directed at the legislature, is unpersuasive in light of the criminal law regimes that had already been established by individual states. *See id.* (White, J., dissenting).

45. *See id.* at 2710-11 (White, J., dissenting). For example, Justice White cited Robinson v. California, 370 U.S. 660, 667 (1962), which held that it was "cruel and unusual to impose a [single day] of imprisonment for the status of drug addiction."

46. Justice Scalia argued: "Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides. We would leave it there, but will not extend it further." *Harmelin*, 111 S. Ct. at 2701 (Opinion of Scalia, J.) (citations omitted).

hibition against cruel and unusual punishment.[47]

Finally, and in an appeal to "non-legal" intuition, Justice White set as a cornerstone to his argument the proposition that "time works changes, [and] brings into existence new conditions and purposes . . . . [and that] this is peculiarly true of constitutions."[48] Our ideas about judicial prerogative and decency in criminal sentencing undergo an inevitable evolution as our overall social outlook evolves. Justice Scalia's exclusively textual analysis missed this observation.

Turning away from historical analysis and responding to Kennedy's proposed two-step test,[49] Justice White relied on *Solem* to illustrate the disproportionality of the specific sentence in *Harmelin*. In particular, he argued that the severity of this sentence is clearly unmatched by sentences imposed by any other state.[50]

Yet, while laudably striving for objectivity in his analysis, Justice White inevitably lapsed into subjectivity: "Mere possession of drugs—even in such a large quantity—is not so serious an offense that it will always warrant, much less mandate, life imprisonment. . . ."[51] Perhaps not to Justice White, but in the eyes of the Michigan legislators, when the possession in question amounts to at least 35,000 doses of cocaine, stiff sentences are not only acceptable, but necessary to help stem illicit drug traffic. Justice White's inability to avoid plunging into a normative analysis demonstrates exactly why Justice Kennedy argued that sentences must cross a threshold level of "gross disproportionality" before courts can overturn state legislation. Justice White ultimately detracted from his own argument when he understated the collateral consequences of cocaine possession. For example, in his analogy to drunk driving,[52] he overlooked the potential for crime and violence inherent in the many transactions that result from a single drug shipment,

47. *See id.* at 2712 (White, J., dissenting).

48. *Id.* (White, J., dissenting) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)). Justice White also stated that "the Court's jurisprudence concerning the scope of the prohibition against cruel and unusual punishments has long understood the limitations of a purely historical analysis." *Id.* (White, J., dissenting) (citations omitted).

49. Justice White argued that Justice Kennedy's narrow construction effectively eviscerates the proportionality guarantee. *See id.* at 2714 (White, J., concurring).

50. *See id.* at 2718 (White, J., concurring).

51. *Id.* at 2716 (White, J., concurring).

52. *See id.* at 2717 (White, J., concurring).

something for which there is no counterpart in drunk driving.[53]

Chief Justice Rehnquist presumably chose Justice Scalia to write for the Court out of respect for his jurisprudence and his ability to express majority views. But as Justice White, and to a greater extent, Justice Kennedy demonstrated, there are definite limits to Justice Scalia's historical analysis. On balance, Justice Scalia's textual emphasis gives the impression that he rests so much confidence in this country's tripartite system of governance that he can simply disregard precedent and the accretive nature of criminal law, all under the cover of historical mandate.[54] Yet, by foregoing any attempt at line-drawing and relying solely on an institutional competence argument, Justice Scalia fell into a dilemma whereby his extreme deference creates real impediments for our system of checks and balances. Indeed, unlike the concurring justices, he left future jurists with no guidelines for remedying instances of extreme disproportionality in state sentencing requirements.[55] Moreover, although the overall impact of Justice Scalia's opinion suggests a conservative hard-line on drug trafficking, his message, again in contrast to that of the concurrence, leads one to believe that Harmelin's severe sentence really is not a response to the gravity of his offense. Rather, it appears that penological goals, like deterrence and rehabilitation, were never an issue. Justice Scalia believes the Court should not interfere with state legislatures, irrespective of the consequences for future criminal defendants, simply because of the Framers' intent and his own belief that representative bodies are better suited to make sentencing decisions.

53. Conversely, the fear Justice White expressed over the unfair advantage given to prosecutors who are able to bypass the "possession with intent to distribute" charge and allege simple possession with the expectation that the sentences given will be the same, is compelling. *See id.* at 2718 (White, J., dissenting). Nonetheless, in light of the violence characteristic of America's ever-increasing drug epidemic and the legislative prerogative of Michigan, this observation is best taken as an admonition to Michigan legislators that if they believe these draconian sentences are warranted, calibration with respect to the intent to distribute would confer a greater degree of legitimacy upon the statutes.

54. At one point it even seems as though Justice Scalia was trying to ease his conscience over the severity of Harmelin's sentence. Downplaying the fact that to many observers the difference between life imprisonment without parole and a death sentence is quite narrow, Justice Scalia explained that Harmelin may yet see freedom by means of "executive clemency" or retroactive legislation. *Id.* at 2702.

55. This is not to say, however, that Justice Scalia completely defers to state legislatures; the Court will presumably still prohibit cruel and unusual *modes* of punishment and will not tolerate sentencing directed at a specific population in violation of the Fourteenth Amendment.

Finally, Justice Scalia's reluctance to address fully the severity of Harmelin's offense in light of current sentiment toward narcotics prevention is likely to erode popular support for a Supreme Court already under scrutiny for its firm conservative commitment. This most recent manifestation of the "conservative counterrevolution" may also offend the sensibilities of more "traditional" judicial conservatives who believe that the Court should give some deference to precedents that have recognized a narrow proportionality guarantee.

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